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# CASES

DECIDED IN

# THE COURT OF SESSION, COURT OF JUSTICIARY,

AND

# HOUSE OF LORDS,

FROM JULY 20, 1904, TO AUGUST 4, 1905.


REPORTED BY

H. J. E. FRASER, EDWARD W. NEISH, JOHN HARVEY, W. M. GLOAG, J. M. IRVINE, AND J. S. LEADBETTER, ESQUIRES, ADVOCATES.

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# JUDGES

OF THE

# COURT OF SESSION

DURING THE PERIOD OF THESE REPORTS.

## FIRST DIVISION.

Lord President, { The Lord KINROSS, succeeded by The Lord DUNEDIN.*

Lord ADAM.
Lord M'LAREN.
The Lord KINNEAR.

## SECOND DIVISION.

Lord Justice-Clerk, { The Right Hon. Sir J. H. A. MACDONALD, K.C.B.

Lord YOUNG.†
Lord TRAYNER.†
The Lord MONCREIFF.†
Lord KYLLACHY.
Lord KINCAIRNEY.
Lord STORMONTH-DARLING.

### PERMANENT LORDS ORDINARY.

| | |
|---|---|
| Lord KYLLACHY. | Lord PEARSON. |
| Lord KINCAIRNEY. | Lord ARDWALL.‡ |
| Lord STORMONTH-DARLING. | Lord DUNDAS.‡ |
| Lord LOW. | Lord JOHNSTON.‡ |

* Lord Kinross died on 22d January 1905. His Lordship was succeeded on 21st February by the Right Hon. Andrew Graham Murray, afterwards created Lord Dunedin.

† Lord Young resigned on 5th May 1905; Lord Trayner on 31st December 1904; Lord Moncreiff on 21st January 1905.

‡ Lord Ardwall took his seat on 11th January 1905; Lord Dundas on 17th February 1905; Lord Johnston on 19th May 1905.

## HIGH COURT OF JUSTICIARY.

Lord Justice-General, { The Lord KINROSS, succeeded by The Lord DUNEDIN.

Lord Justice-Clerk, { The Right Hon. Sir J. H. A. MACDONALD, K.C.B.

LORDS COMMISSIONERS OF JUSTICIARY.

The other Judges of the Court of Session.

---

Lord Advocate, { The Right Hon. CHARLES SCOTT DICKSON.

Dean of Faculty, ALEXANDER ASHER, Esq.

Solicitor-General, { DAVID DUNDAS, Esq., succeeded by EDWARD T. SALVESEN, Esq.

---

## HOUSE OF LORDS.

### PEERS

WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE PERIOD OF THESE REPORTS.

Lord Chancellor, EARL OF HALSBURY.

Lords ASHBOURNE, MACNAGHTEN, DAVEY, JAMES OF HEREFORD, ROBERTSON, LINDLEY, ALVERSTONE, and DUNEDIN.

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# ERRATA.

P. 281, third line from foot of page, *for* "1894" *read* "1893."

P. 452, first and also second line of rubric, *for* "Truster" *read* "Trustee."

P. 485, *for* "Section 2" in third line from end of rubric, *read* "Section 1."

# CASES

DECIDED IN

# THE HOUSE OF LORDS,

## 1904–1905.

No. 1.

Aug. 1, 1904
Free Church of Scotland v Lord Overtoun.

Macalister v. Young.

GENERAL ASSEMBLY OF FREE CHURCH OF SCOTLAND AND OTHERS (Pursuers), Appellants.—*Johnston, K.C.—Salvesen, K.C.—Roberton Christie.*

LORD OVERTOUN AND OTHERS (Defenders), Respondents.—*D.-F. Asher—Haldane, K.C.—Guthrie, K.C.—Orr.*

REV. D. M. MACALISTER AND OTHERS (Defenders), Appellants.—*Johnston, K.C.—Salvesen, K.C.—Roberton Christie.*

YOUNG AND ANOTHER (Trustees of Buccleuch-Greyfriars Free Church), and GENERAL ASSEMBLY OF UNITED FREE CHURCH OF SCOTLAND (Pursuers), Respondents.—*D.-F. Asher—Haldane, K.C.—Guthrie, K.C.—Orr.*

*Church—Dissenting Church—Union of two dissenting Churches—Abandonment of fundamental principle—Property claimed by minority.*—In 1843 a majority of the General Assembly of the Church of Scotland (consisting of ministers and elders elected by the Presbyteries) in consequence of certain decisions of the Civil Courts which they considered to interfere with the constitution and spiritual independence of the Church, protested and withdrew from the Establishment, maintaining in other respects the doctrines, polity, and discipline of the Established Church, and claiming to be the Church of Scotland free from State control. They along with others adhering to them formed the Free Church. Large sums were, at the Disruption and subsequently, contributed for the purposes of the Free Church.

On 30th October 1900 the General Assembly of the Free Church, with consent of a majority of the Presbyteries, passed an Act agreeing to a union with the United Presbyterian Church, and relative Acts followed transferring the property of the Free Church to trustees for the new United Church.

A small minority of the Assembly of the Free Church, regarding the Acts as incompetent, protested against and dissented from them, and professed to act as the Assembly of the Free Church. On 14th December 1900 they raised an action in name of the General Assembly of the Free Church against the General Trustees of the Free Church and the General Trustees of the United Free Church and its Assembly, concluding for declarator that the United Free Church had no right to the lands, property, or funds of the Free Church, and that the pursuers were and lawfully represented the Free Church, and were entitled to its property and funds.

The ground of action was that the funds had been contributed in trust for the purposes of the Free Church as a Church distinguished from the other Churches in Scotland by a certain constitution and as holding certain principles.

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The pursuers contended—

I. That the Free Church was distinguished from the United Free Church—(1) In holding that under the doctrine of the Headship of the Lord Jesus Christ over the nation it was the duty of the State to see that its subjects were provided with religious ordinances in accordance with God's Word: (2) In holding as a creed the Westminster Confession of Faith in its entirety, and in requiring from each minister and elder at ordination a declaration of his belief that the whole doctrine of the Confession of Faith was the truth of God, and that he would constantly adhere thereto.

II. That the General Assembly of the Free Church had no legislative power to depart from the doctrines of the Confession or the constitution of the Church, in respect that the General Assembly of the Church of Scotland at the Disruption had no such power; that the members of the Free Church Assembly were bound as office-bearers to adhere to the Confession of Faith; and that the written commission which they held to sit in the Assembly only authorised them to consult and vote in accordance with the Word of God, the Constitution of the Church, and the Confession of Faith.

III. That, on the other hand, the United Presbyterian Church had from its foundation in 1847 constantly maintained that it is not within the province of Civil Government to provide for the religious instruction of the subject, and that that department of the education of the young belongs exclusively to the parents and to the Churches—and had not departed from these views in entering into the United Church, and that the United Church in leaving the question open could not be regarded as holding the doctrine of the Free Church in this respect.

IV. That the United Free Church did not hold the Confession of Faith in its entirety, but as qualified by certain declaratory Acts.

V. That its ministers and elders were no longer required to adhere to the whole doctrine of the Confession of Faith, but to the doctrine of the United Free Church as contained in the Confession of Faith, thus leaving it open to the Church Courts to alter or curtail its doctrine.

The position taken by the United Free Church in defence was—

(1) That the doctrines of the original Free Church did not include the doctrine that it was the duty of the State to maintain a Church:

(2) That even if they did, it was not a fundamental doctrine of the Church:

(3) That the United Free Church had not departed from the doctrines of the Confession:

(4) That the original Free Church held as its fundamental principle the Headship of Christ and the supreme authority of His Word over the Church, and that the Assembly had power, and was bound from time to time as might be necessary, to deal with the doctrines of the Church by legislation.

Both parties produced documentary evidence, and *quoad ultra* renounced probation.

Evidence upon which *held* (*rev.* judgment of the Second Division), *diss.* Lords Macnaghten and Lindley, (1) that the Free Church of 1843 held as one of its fundamental and distinctive doctrines the duty of the State to maintain and support an establishment of religion in accordance with God's Word; (2) that the Free Church Assembly, with consent of a majority of the Presbyteries, was not entitled to depart from this doctrine and to make it an open question, and to share the funds of the Free Church with another Church which did not hold this doctrine, and, further, was not entitled to deprive the minority of their rights in the funds because they refused to hold the doctrine an open question and to enter into the United Church; and therefore (3) that neither the United Free Church nor any of its members had right to any part of the property belonging to the Free Church.

*Per* the Lord Chancellor—"Among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community."

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Ld. Chancellor (Halsbury.)
Lord Macnaghten.
Lord Davey.
Lord James.
Ld. Robertson.
Lord Lindley.
Lord Alverstone.

*Per* Lord Robertson—"To those who realise the high theocratic views of the sixteenth and seventeenth centuries in Scotland it is easy to understand that the autonomy of God's Church, and the duty of the State to support it, were but two essential parts of the one great conception of a Christian nation. And this is in truth the clue to the Disruption documents."

FIRST APPEAL.

(IN the Court of Session, *Bannatyne* v. *The United Free Church of Scotland*, July 19, 1902, 4 F. 1083.)

On 14th December 1900 the General Assembly of the Free Church of Scotland and the Rev. Colin A. Bannatyne, Moderator, and Others, raised an action against Lord Overtoun and Others, the General Trustees of the Free Church, the General Trustees of the United Free Church, and the General Assembly of the United Free Church, concluding, *inter alia*, for declarator—"(3) That the said United Free Church of Scotland has no right, title, or interest in any part of the lands, property, or funds" held for the Free Church prior to the Union. "(6) That the pursuers and those adhering to and lawfully associated with them conform to the constitution of the Free Church of Scotland are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them, and their successors, as constituting the true and lawful Free Church of Scotland, and that the defenders . . . the General Trustees foresaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland . . . and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900."

On 9th August 1901 the Lord Ordinary (Lord Low) dismissed the action.

The pursuers reclaimed.

Both parties produced documentary evidence, and *quoad ultra* renounced probation.

On 4th July 1902 the Second Division recalled Lord Low's interlocutor, and assoilzied the defenders.

The pursuers presented the present appeal.

SECOND APPEAL.

(IN the Court of Session, see *United Free Church of Scotland* v. *M'Iver* (*Aultbea* case), July 19, 1902, 4 F. 1117.)

This action was brought by Robert Young and Another, as trustees for the congregation of the United Free Church formerly occupying Free Buccleuch and Greyfriars Church, and by the Rev. Robert Rainy, Moderator of the General Assembly of the United Free Church, against

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the Rev. D. M. Macalister and the Rev. Robert Gordon, the ministers of the Free Church occupying the church, and certain office-bearers, for declarator that the church belonged to the pursuers, and for interdict against Mr Macalister and Mr Gordon preaching in the church.

The church was held by the trustees under the Model Trust Deed, and this action, with three other similar actions, was brought by the United Free Church to determine their right to four churches.

The Second Division, in accordance with their judgment in the action by the Free Church above mentioned, granted decree in favour of the United Free Church, the pursuers in these four actions. One of the actions (the *Aultbea* case) is reported 4 F. 1117.

The present appeal was brought in another, the *Buccleuch and Greyfriars Church* case, by the Rev. D. M. Macalister and others, the defenders.

The two appeals were heard together. The documentary evidence for the purposes of this report is sufficiently given in the judgments. It is fully quoted in an appendix to the report in L. R. [1904], A. C. 515. A verbatim report of the argument is given in a separate report of the case entitled "The Free Church of Scotland Appeals, 1903-4," edited by Mr R. L. Orr, K.C.

LORD CHANCELLOR.—In this case the pursuers complain of a breach of trust, the trust being for the behoof of the Free Church of Scotland, and the breach of trust alleged is that certain property is no longer used for the behoof of the Free Church of Scotland, but for the maintenance and support of another and a different body, namely, the United Free Church. That body was formed in 1900, and consisted of a certain number of those who professed to belong to the Free Church of Scotland and others who, up to the time of the union, had belonged to the United Presbyterian body. They purported to unite and to exclude from their Communion, or at all events from all participation in their organisation, those who refused to unite in the new body, and have of course used the funds of which they claim to be the beneficial owners for the use of the new united body.

This is the breach of trust complained of, and the question is whether that complaint is well founded.

Now, in one sense there can be no doubt what was the original purpose of the trust. It was for the maintenance and support of the Free Church of Scotland.

What was the Free Church of Scotland in 1843 can hardly admit of doubt. The reasons which those who then separated themselves from the Established Church of Scotland then gave for their separation are recorded with distinctness and precision, and I do not think there can be any doubt of the principles and faith of those who came out from the Church of Scotland and described themselves as the Free Church of Scotland. Their name was significant; they claimed to be still the Church of Scotland, but freed from interference by the State in matters spiritual.

It was to the persons thus describing themselves that the funds in dispute were given, and until the union of 1900 with the other body we do not hear of any difficulty having arisen in the administration of the trust.

Now, however, the new body has established a new organisation; it is

alleged to profess new doctrines; and its identity with the Free Church, for whose behoof the property was settled, is disputed; and it accordingly becomes necessary to consider in what consists the identity of the body designated by the donors of the fund as the Free Church of Scotland.

Speaking generally, one would say that the identity of a religious community described as a Church must consist in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth, are apparently intended to ensure the unity of the faith which its adherents profess, and certainly among all Christian Churches the essential idea of a creed or confession of faith appears to be the public acknowledgment of such and such religious views as the bond of union which binds them together as one Christian community.

If this be so, there is no lack of material from which to deduce the identity of the Free Church of Scotland. Its founders left their Claim, Declaration, and Protest to stand for all time as a clear exposition both of their reasons for leaving the Church of Scotland when they did leave it and as a profession of their faith as the true Church of Scotland though separated from the Establishment, which in their view was itself heretical from its submission to the temporal power in what they regarded as exclusively spiritual.

Now, in the controversy which has arisen it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held—a question which, of course, does not arise here—a Court has simply to ascertain what was the original purpose of the trust.

I do not think we have any right to speculate as to what is or is not important in the views held. The question is what were in fact the views held and what the founders of the trust thought important.

Fortunately your Lordships have the authority of most learned Judges—their decisions now reaching back for something like a century—which I shall quote somewhat copiously, as laying down the principle upon which such questions as are now in debate should be determined.

Commenting on what Lord Eldon said, Lord Moncreiff in Scotland, and Sir William Cusack Smith in Ireland, have expressed themselves in a manner which I think may be well applied to the matter now in debate.

Lord Eldon said (*Craigdallie* v. *Aikman*[1]):—"With respect to the doctrine of the English law on this subject, if property was given in trust for A, B, C, &c., forming a congregation for religious worship; if the instrument provided for the case of a schism, then the Court would act upon it; but if there was no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestuis que trust*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say that the Court would enforce such a trust not for those who adhered to the original principles of the society but merely with a reference to the majority; and much less if those who changed their opinions, instead of being a majority,

[1] (1813) 1 Dow, 1.

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did not form one in ten of those who had originally contributed, which was the principle here. He had met with no case that would enable him to say that the adherents to the original opinions should under such circumstances for that adherence forfeit their rights.

"If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none. He proposed, therefore, that the cause should be sent back with two findings of this nature—1st. That the ground appeared to have been purchased and the house built for a society united and proposing to continue united in religious opinion. 2d. That it did not in point of fact appear how this property was to be applied in case the society should happen to differ and separate."

Lord Moncreiff said in *Craigie* v. *Marshall* (*Kirkintilloch* case),[1] quoting Lord Eldon in *Craigdallie* v. *Aikman*[2]:—"'If it were distinctly intended that the Synod should direct the use of the property, that ought to have been matter of contract, and then the Court might act upon it; but there must be evidence of such a contract, and here he could find none.' He therefore proposed to remit the cause with two findings. Accordingly it was remitted with very precise findings, importing that it appeared sufficiently as matter of fact that the ground was purchased and was to be used for religious worship 'by a number of persons agreeing at the time in their religious opinions and persuasions, and therefore intending to continue in communion with each other'; and that the society had acceded to a body called the Associate Synod; but that it did not appear as matter of fact 'for what purpose it was intended at the time such purchase and erections were made, or at the time such accession took place, that the ground and buildings should be used and enjoyed, in case the whole body of persons using and enjoying the same should change their religious principles and persuasions, or if in consequence of the adherence of some such persons to their original religious principles and persuasions, and the non-adherence of others thereto, such persons should cease to agree in their original principles and persuasions, and should cease to continue in communion with each other, and should cease, either as to the whole body, or as to any part of the members, &c., to adhere to the Associate Synod.' With these findings the cause was remitted for further consideration.

"There is no ambiguity in the principles on which Lord Eldon made this remit. Under the remit the Court ordered a condescendence with a view to the ascertainment of the matters of fact—whether there was a real difference in the religious principles or not; and afterwards pronounced an interlocutor, the result of which was that the Court found that the pursuers 'have failed to condescend upon any acts done or opinions professed by the Associate Synod, or by the defenders, from which this Court, as far as they are capable of understanding the subject, can infer, much less find, that the defenders have deviated from the original principles and standards of the Associate Presbytery and Synod; farther find that the pursuers have failed to render intelligible to the Court on what ground it is that they aver

[1] 1850, 12 D. 523, at p. 560.

[2] 1 Dow, 1.

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that there does exist at this moment any real difference between their principles and those of the defenders,' &c.; and therefore found it unnecessary to enter into the inquiries which had been directed by the House of Lords, under the supposition that the defenders had departed from the original standards and principles of the Association."

In *Dill* v. *Watson*[1] Smith, B., in Ireland, on the same subject, said—"Again, I do not conceive that I appeal from the Word of God to that of man by proclaiming or attesting by my signature that I concur in the interpretation given by a numerous body of my fellow Christians to certain passages of Scripture. They agree with me, I agree with them in construction and consequent creed: but neither take their belief upon the authority of those others. Both draw their faith from the Bible as its common source; both consider the Bible as containing the only rule of and furnishing the only unerring guide to a true faith; each, with God's assistance and the subordinate and pious aid of human instruction, interprets as well as man's infirmity will permit; both coincide in the same interpretation; that interpretation regulates their faith; and all who thus coincide become members of the same religion. And thirdly, we do not coerce our neighbour by calling for his signature to our profession or articles of faith. We leave him free to adopt or to repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, if you agree with us affix your signature to certain articles, or in some way notify your recognition of their truth; or if you disagree withhold such signature or declaration. And we say of him, in the former case that he is, and in the latter case that he is not of our religion. We do not compel him to hold our faith; we but ask him to inform us by certain acts whether he does hold it or does not; and we ask this only if he claim to be enrolled as one of our body and to be in religious communion with us. In the absence of such a test our Establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion; it would be a mere incongruous heap of, as it were, grains of sand thrown together without being united; each of these intellectual and isolated grains differing from every other; and the whole forming a but nominally united while really unconnected mass; fraught with nothing but internal dissimilitude and mutual and reciprocal contradiction and dissension. *Hic dextrorsum abit; ille sinistrorsum.* This indeed I should hold to be, in the language of a late prelate, 'a Church without a religion.'"

The principles for decision thus propounded have been recognised and acted upon ever since, and it would seem that it may be laid down that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide.

Under these circumstances, it would seem to reduce the question in dispute to an examination of the evidence as to what is the difference between them, if any, and if that difference does or does not accord with the original purpose of the trust; but in examining this question one has to bear in mind not what we or any other Court might think of the importance of the difference, but what the donors of the trust fund thought about it, or what

[1] (1836) 2 Jones Rep. (Ir. Ex.) 48, 91.

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we are constrained to infer would be their view of it if it were possible to consult them.

The first point in dispute is very plainly set forth by the pursuers in the 13th Condescendence.

After pointing out in the 10th Condescendence that the Free Church of Scotland was a voluntary association or body of Christians associated together under a definite contract involving the maintenance of definite principles, the 13th Condescendence proceeds thus:—"As already stated, one of the essential principles recognised by those who associated themselves to form the Free Church of Scotland, emphasised by their leaders in their utterances at the time of the Disruption, and embodied in the contract of association or constitution of said Church as hereinbefore defined, is that it is the duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word; and the said Church as originally associated recognised and maintained the propriety and advantage of the endowment of pastoral charges and the promotion of religious education by the State. The principle of the duty of the recognition of religion by the State by means of the establishment, and, where possible, endowment of a national Church, was moreover implicitly involved in the position claimed by the Free Church as being the Church of Scotland freed merely from the control of the Civil Courts in matters spiritual. The said principle formed an essential principle of the Free Church of Scotland, and its maintenance was one of the main reasons for the formation of that Church as a separate association or body of Christians, distinct and apart from those who professed themselves to be 'voluntaries.' There were several such associations of seceders from the Established Church of Scotland in existence at the time of the Disruption of 1843, holding views practically identical with those of the founders of the Free Church in matters of doctrine and as to the encroachments of the Civil Courts, but differing from them as regarded the duty above referred to. In regard to this, these bodies were 'voluntaries' in the sense of holding such action of the State to be unlawful. The foundation of the Free Church was a protest against the position of such churches on the one hand, just as it was against the encroachments of the civil power on the other."

In reply to this the defenders say:—"The Confession of Faith does not contain or set forth the said alleged principle in respect to the rights and duty of the civil magistrate in regard to establishments of religion as an article of faith or doctrine or belief. It teaches that nations and their rulers are bound to own the authority of Christian truth, but the Free Church has always held that the teaching of the Confession in this matter is to be read and understood in harmony with the principle (which the Confession also teaches) that the Christian Church has an independent government and jurisdiction in matters spiritual, distinct from the civil magistrate, and also in harmony with the view that the Confession is not to be accepted as favouring intolerance or persecution or interfering with liberty of conscience. The alleged principle as to the right and duty of the civil magistrate to maintain and support an establishment of religion has always been in the Free Church an open question in regard to which liberty of opinion has been permitted and exercised, and as to which wide differences of opinion

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have all along prevailed." These, then, are the two contentions upon which the first part of the controversy depends.

I cannot doubt that upon this head there is an overwhelming body of evidence in favour of the pursuers. Indeed, two of the learned Judges have stated in express terms that originally the Free Church did profess what has been conveniently called the Establishment principle, though, for reasons which will be dealt with hereafter, they do not think that those who now represent the Free Church are bound by that original opinion.

I am unable to understand by what test I am to ascertain what the donor of a fund has made essential to his gift unless it is by what he has said or written, and when I find that the Free Church invited support by the circulation of Dr Chalmers' Address, what can I say but that he expresses the views of the Church that he represents?—"By giving up your connection with the State, and thus separating yourselves from the worldly advantages of such a connection, you may be said to have withstood a great temptation to sin in one form; but such is the deceitfulness of the human heart that, without the heedfulness and the humility which apostles of old so pressed upon the early converts, there is danger of being carried away by temptation in another form—and temptation, too, to the very same sin. Rather than be seduced from one of your greatest principles, you have given up one earthly dependence; but let principle have its perfect work, and have a care lest you be tempted from even the best (ought to be 'least') of your principles by the promises and the allurements of another earthly dependence. Rather than compromise the authority of Christ over the affairs of His own Church, you have forfeited the countenance of men in power, that is, who have the power of this world's authority on their side. Beware of compromising another of your doctrines or articles of faith; and in the defence of which the Church of Scotland did lately signalise herself under the authority of Christ, over the kings and governments of earth, and the counterpart of this government, to uphold religion in the world—beware, we say, of making any compromise or surrender of this your other principle, and this too, to gain the countenance of those who may still be called men in power, that is, who have the power, if not of authority and office, have at least the power of numbers on their side. This may be termed a less principle than the other, of inferior consideration in itself, and inferior consequence to the vital or spiritual wellbeing of Christ's Church upon earth. But let us not forget what the Bible says of those who break even the least of the commandments, that they shall be called least in the Kingdom of Heaven. The men who stand opposed to us on this second, or, as many choose to term it, this secondary question, might, with all the hay and stubble and wood of this, and it may be of other errors, be reposing on the like precious foundation with ourselves. They might be men with whom we differ and yet with whom we can agree to differ. They might be coadjutors in the great work of evangelising the people of our land—brethren with whom we can hold sweet and profitable counsel on the *capita fidei* or weightier matters of the law, having one faith, and one Lord, and one baptism. But we shall not, even for their friendship, violate the entireness of our principles, or make surrender of the very least of them. It is not for those ministers of Christ

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whom I am now addressing, and who, on the altar of principle have just laid down their all—thus quitting, and for the sake of one principle, the friendship of men who have the power of office—it is not for them to give up another principle for the sake of courting the friendship of men who have the power of numbers. We must not thus transfer ourselves from one earthly dependence to another. We have no other dependence than God. We acknowledge the authority and will submit to the influence of no other guide than His eternal and unalterable truth as seen in the light of our own consciences. To be more plain, let me be more particular. The Voluntaries mistake us if they conceive us to be Voluntaries. We hold by the duty of Government to give of their resources and their means for the maintenance of a gospel ministry in the land; and we pray that their eyes may be opened so as that they may learn how to acquit themselves as the protectors of the Church, and not as its corruptors or its tyrants. We pray that the sin of Uzziah, into which they have fallen, may be forgiven them; and that those days of light and blessedness may speedily arrive when kings shall be the nursing fathers and queens the nursing mothers of our Zion. In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity; and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that lies in them to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle—we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support of religion, and we are not voluntaries."

It would probably be admitted by all that the authority of Dr Chalmers as an exponent of the views of the Free Church could hardly be overrated, but it was not his personal view merely. The words were addressed by him as Moderator, and were adopted unanimously, and directed to be circulated by the Assembly.

I am reluctant to render longer what I have to say by literal quotations from authoritative declarations of the Free Church, but though I summarise I am actually using the language which originally, and for a long period afterwards, those who spoke on behalf of the Free Church have said and written:—

"The Free Church has ever highly valued her connection with the State." "Firmly asserts the right and duty of the Civil Magistrate to maintain and support an establishment of religion in accordance with God's word." "They" (the Free Church) "reserve to themselves and their successors to strive by all lawful means to secure the performance of this duty." "The State was bound to establish and endow the Church." "The Free Church has not in the least degree altered its views respecting the lawfulness and the desirableness of a right connection between Church and State." "History and experience have convinced us" (the Free Church) "that there is a form of alliance which is at once practicable and agreeable to Scripture, and highly beneficial."

I cannot doubt that each of the utterances I have quoted is important, and to my mind conclusive, evidence that originally at all events the views of the founders of the trust were in favour of the Establishment principle.

The question whether they were fundamental or susceptible of being changed demands a separate treatment, which as it is applicable to both questions in debate must be reserved for the present.

Now, the views of the United Presbyterian Church cannot be more definitely or more shortly stated than in their own language authoritatively stated by themselves and before their union with the Free Church:—"It is not competent," they say, "to the civil magistrate to give legislative sanction to any creed in the way of setting up a Civil Establishment of religion, nor is it either his province to provide for the expense of the ministration of religion out of the national resources. It is Jesus Christ as sole King and Head of His Church who has enjoined upon His people to provide for maintaining and extending it by freewill offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence."

In my view what follows does not at all qualify this passage, but in fairness it ought to be added:—"Moreover, though uniformity of opinion with respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions."

Here, we have the two bodies which are supposed to establish identity of religious belief, the one asserting the right and duty to maintain and support an establishment of religion, the other asserting that Christ's ordinance excludes State aid; each of them therefore treats the question as one of religious belief and obligation, and not one from which religious duties are excluded.

The second question in debate is the difference between the two bodies as to the two doctrines known as the Calvinistic and the Arminian doctrine of Predestination. I use these two phrases, subject to more ample exposition hereafter, in order to summarise what I have to say, as preliminary to the discussion of the subject itself.

I regret very much that we have not any opinion from the learned Judges whose judgments we are called upon to review. I am afraid, speaking for myself, I do not think it is competent to me to avoid dealing with it. It is included in the allegation of a departure from the doctrines which is complained of in the summons, and it has been argued before your Lordships with great learning and ability. One observation made by the learned counsel I entirely agree to, namely, that in discussing this subject one cannot ignore the contemporaneous theological discussions at the time the Confession of Faith was compiled.

Now, the doctrine in dispute was the subject of a copious amount of literature all through the seventeenth century.

Looking, then, at the history of the particular dispute which is brought into debate, it cannot be said that the language of the Confession of Faith was lightly drawn or arrived at without long debate and deliberation.

Indeed, it may be said of the Westminster Confession as a whole that it was composed with a deliberate and careful scrutiny which may be regarded as hardly equalled in any theological discussion, and though councils of the Church have lasted longer, yet if one regards the composition of the Assembly itself, the original parties to the discussion, the presentation of

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its different portions to Parliament, the adoption of it by Parliament, and afterwards by the Church of Scotland, these things give an overwhelming sanction to it, and, at all events, to its original meaning by those who were content to accept it as a test of the unity of their religious belief.

If this observation is true and applicable to the Confession of Faith as a whole (the minute report of its deliberations has been deciphered by the distinguished Director and Principal Librarian of the British Museum), the particular doctrine debated as part of the code of belief which the Free Church adopted in 1843, and which it is alleged that the United Free Church has abandoned, can hardly be said to be one which any Christian Church could regard as a matter of indifference. It divided the Dutch Reformed Church at the beginning of the seventeenth century. It proved the subject of debate at the Hague in 1611, and at Delft in 1613.

An edict of the States of Holland sought to put an end to the controversy, but in vain; and finally, in 1619, ten years after the death of Arminius, or Harmensen, as was his real name, the Arminian heresy, as it was described, was publicly condemned. Its professors were denounced as liars and deceivers, and those who participated in it were deprived of their civil rights unless they retracted.

James the First is said to have procured the exile of Conrad Vorstius, one of the protagonists of the Arminian doctrines, and afterwards he wrote a pamphlet against him, and argued that he ought to be put to death for his unchristian doctrines, while, on the other hand, the Councils of Constantinople in 1642 and the Council of Jerusalem in 1672 pronounced the following opinions:—

Treating of what they describe as the Calvinistic doctrine—Councils of Constantinople, 1642—Cap. 3:—

"τὸν Θεὸν ὑποτίθησιν ἀδικώτατον, τυραννικῇ χρώμενον ἐξουσίᾳ, μόνῃ λέγων τῇ θελήσει αὐτοῦ τοὺς μὲν εἰς δόξαν προορίσαι, τοὺς δὲ ἀποβάλλειν εἰς κόλασιν, μηδαμῶς τὰ ἔργα αὐτῶν σκοπούμενον, οὗ τί ἂν γένοιτο ἀσεβέστερον;"

"Deum facit iniquissimum, tyrannica potestate utentem, aiens eum sola sua voluntate alios prædestinare ad gloriam, alios in pœnam mittere, nulla operum habita ratione. Quo quid magis impium proferri possit?"

The Synod of Jerusalem in 1672 said (extract from cap. 3):—

"ἀλλὰ καὶ τὸ τὴν θείαν θέλησιν αἰτίαν εἶναι τῶν καταπρινομένων οὕτως ἁπλῶς καὶ ἀναιτίως ποίαν οὐκ ἔχει μανίαν; ποίαν οὐκ ἐπιφέρει κατὰ τοῦ Θεοῦ συκοφαντίαν, καὶ ποίαν εἰς τὸ ὕψος οὐ λαλεῖ ἀδικίαν, καὶ βλασφημίαν; ἀπείρατον μὲν γὰρ κακῶν τὸ Θεῖον, καὶ πάντων ἐξ ἴσου ἔθελον τὴν σωτηρίαν, ὡς μὴ ἰσχύσης χώραν τῆς προσωποληψίας παρ' αὐτῷ οἴδαμεν: τοῖς βιβήλοις γενομένοις σκεύεσι διὰ μοχθηρὰν αὐτῶν προαίρεσιν, καὶ ἀμετανόητον καρδίαν, ὡς δίκαιον παραχωρεῖν τὴν κατάκρισιν ὁμολογοῦμεν. κολάσεως δ' αἰωνίου, ὠμότητός τε καὶ ἀσπλαγχνίας, καὶ μισανθρωπίας αἴτιον, οὔποτε, οὔποτε φαμὲν τὸν Θεὸν, τὸν χαρὰν γίνεσθαι ἐν οὐρανῷ ἐπὶ ἑνὶ μετανοοῦντι ἁμαρτωλῷ ἀποφηνάμενον. μὴ γένοιτο ἡμᾶς οὕτως ἢ πιστεῦσαι, ἢ ἐννοῆσαι ἕως ἂν ἑαυτῶν ἐσμὲν ἀναθέματι δὲ αἰωνίῳ καθυποβάλλομεν τοὺς τὰ τοιαῦτα καὶ λέγοντας, καὶ φρονοῦντας, καὶ χείρους πάντων ἀπίστων γινώσκομεν."

"Sed et hominum ita simpliciter ac sine caussa damnatorum auctorem statuere divinam voluntatem, insania quanta? Quæ major Deo calumnia inferatur? Quanta in supremum Numen injuria, quanta blasphemia? Quippe intentatorem malorum non esse Deum, et omnium ex æquo salutem velle

ceu apud quem personarum acceptio nulla est, cognoscimus: et his qui pravis voluntatis suæ moribus ac secundum impœnitens cor se vasa in contumeliam effecere damnationem juste decerni confitemur. Æternæ autem punitionis, immanitatis, duritiæ et inhumanitatis nusquam, nusquam dicimus auctorem esse Deum, super uno peccatore pœnitentiam agente esse in cœlo gaudium, afferentem. Absit a nobis ita cogitare, nedum credere, quamdiu nostri compotes sumus: immo vero talia dicentes ac sentientes anathemati sempiterno subjicimus, et cunctis infidelibus pejores agnoscimus."

I quote from the edition of the Councils of the Church published in Venice by two Jesuit Fathers in 1728, who have appended to the originals their own Latin translation.

It was in this state of the controversy agitating the Christian Church throughout the world that the Confession of Faith was adopted by the Church of Scotland on the 27th of August 1647, and the approval and adoption of it was made in a form which was intended to prevent cavil as to its being agreed upon without objection or doubt. It recites that the Confession was twice publicly read over, examined, and considered, that copies were printed that it might be sedulously perused by all members of the Assembly, unto whom frequent intimation was publicly made to put in their objections and doubts, if they had any; and the said Confession being, upon due examination thereof, found by the Assembly to be most agreeable to the Word of God, and in nothing contrary to the received doctrines, worship, discipline, and government of this Kirk, it proceeds to adopt it as a Confession of Faith for the three Kirks of God in the three kingdoms.

I think it is only necessary to put in juxtaposition the language of the Confession of Faith itself and the statement of doctrine set forth by one component part of the supposed united body united in one faith and doctrine.

The Confession of Faith—"(CHAP. III.—*Of God's Eternal Decree*):—Sec. III. By the decree of God, for the manifestation of His glory, some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death. Sec. IV. These angels and men, thus predestinated and foreordained, are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished."

Now, then, for the Act.—Act (Declaratory Act) anent Confession of Faith made 26th May 1892:—"That this Church also holds that all who hear the Gospel are warranted and required to believe to the saving of their souls; and that in the case of such as do not believe, but perish in their sins, the issue is due to their own rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the foreordination of men to death irrespective of their own sin."

It has been argued with great ingenuity that inasmuch as the doctrine of Predestination, as treated of in the Scriptures, is a mystery, and that various opinions have been held in respect of it, it cannot be made a test doctrine, since another doctrine may be held with it not to human intelligence reconcilable with it, but equally derived from and established by Scriptural authority. If the Scottish Church, or the Westminster Confession as one of its declarations of doctrine, had simply declared that predestination was one of its doctrines, there might be something in the argument, but the

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argument ignores the fact that the Westminster Confession purports to explain, and does explain, in language which does not admit of doubt, what is meant. Each party well knew what they meant. It is not a question of metaphysical subtleties or ambiguous language. Each meant to exclude and denounce the doctrine of the other.

I am therefore led to the conclusion that upon this second question the appellants are entitled to succeed.

But another question is raised which in one sense, as affecting the law of trusts and their administration, is most important.

The Dean of Faculty boldly argued for the inherent power of every Christian Church to change its doctrines, and Lord Young has based his judgment upon this proposition.

Apart from some mysterious and subtle meaning to be attached to the word "Church," and understanding it to mean an associated body of Christian believers, I do not suppose that anybody will dispute the right of any man, or any collection of men, to change their religious beliefs according to their own consciences, but when men subscribe money for a particular object and leave it behind them for the promotion of that object, their successors have no right to change the object endowed.

In this case it is suggested that the terms of what is called the Barrier Act suggest such licence to change.

I am not able to concur in such an inference.

It is obvious that dealing with such a subject as formularies, books of religious instruction, and the like, many things might be done, written, and taught, which might touch doctrine, and for the purpose of preventing any alteration in doctrine, the precautions insisted upon by the Barrier Act were thought necessary to prevent and render impossible any departure from the orthodox standards. It provides that "before any General Assembly of the Church shall pass any Acts which are to be binding Rules and Constitutions to the Church" (observe "binding Rules and Constitutions") "the same Acts be first proposed as overtures to the Assembly."

Many things might be proposed which, as "binding Rules and Constitutions," might touch doctrine, or worship, or discipline, or government, but that the Church of Scotland in 1697 might change its faith or permit it to be changed is a suggestion which to one acquainted with its history either then or even a very long time after is not very plausible. It is only just to Lord Young to say that he adds:—"I desire to say that there is, in my opinion, no rule of law to prevent a dissenting Church from abandoning a religious doctrine or principle, however essential and fundamental, or from returning to it again with or without qualification or modification. Whether or not a property title is such that a forfeiture of property will follow such abandonment or return is another matter."

But that is the whole question now before your Lordships, and as it appears to me there is nothing in calling an associated body a Church that exempts it from the legal obligations of insisting that money given for one purpose shall not be devoted to another. Any other view, it appears to me, would be fatal to the existence of every Nonconformist body throughout the country.

But there is another and a further ground upon which I think the appel-

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lants are entitled to succeed, and that is, that the so-called Union is not really an union of religious belief at all. The united body has united in its organisations. It has established its various administrative arrangements, has declared its authority as the United Free Church, and in that name has absorbed the various bodies of the United Presbyterians and the Free Church as originally constituted, but has it agreed in the doctrines of either of them, and if so, which is it that has given way?

I am bound to say that after the most careful examination of the various documents submitted to us, I cannot trace the least evidence of either of them having abandoned their original views. It is not the case of two associated bodies of Christians in complete harmony as to their doctrine agreeing to share their funds, but two bodies each agreeing to keep their separate religious views where they differ, agreeing to make their formularies so elastic as to admit those who accept them according as their respective consciences will permit.

Assuming as I do that there are differences of belief between them, these differences are not got rid of by their agreeing to say nothing about them, nor are these essentially diverse views avoided by selecting so elastic a formulary as can be accepted by people who differ and say that they claim their liberty to retain their differences while purporting to join in one Christian Church.

It becomes but a colourable union, and no trust fund devoted to one form of faith can be shared by another communion simply because they say in effect there are some parts of this or that confession which we will agree not to discuss, and we will make our formularies such that either of us can accept it.

Such an agreement would not in my view constitute a Church at all, or, it would be, to use Sir William Smith's phrase, a Church without a religion. Its formularies would be designed not to be a confession of faith but a concealment of such part of the faith as constituted an impediment to the union.

I am disposed to quote one passage from what was said by Dr William Wilson from the Moderator's Chair in 1866, and which I find in Mr A. Taylor Innes' most excellent Treatise on the Law of Creeds in Scotland.[1] Speaking of the freedom of the Church as to confessions of faith, he says:—"We are not at liberty to hold forth a confession in which we do not believe. For in such a case the Church is absolutely without a confession. . . . It ceases to be either a bond of union or a public testimony. It is lawful for the Church to revise her confession and adjust it to her present attainments and exigencies; it is lawful for her altogether to dispense with a confession, if indeed without one any organisation were possible, but to retain a confession which has ceased to be believed can never be lawful."

He is speaking of course of the Christian conscience, and as he says at an earlier period of his discourse, when the Church has arrived at the conclusion that its confession must be altered, "the time has come for us then to frame a new bond of union with each other, a new testimony to the world."

[1] 1902 ed. p. 245, note.

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This would certainly not be done by making formularies ambiguous or elastic, or authorising its votaries to put different meanings upon a set of words the function of which was intended to be a test of the unity of their faith.

That this is the principle upon which the so-called Union has been arrived at is proved by the declaration of the United Church, in which they claim in effect to retain their own separate views held either in the United Presbyterian or in the Free Church, or in either of the bodies which originally composed the united body which afterwards became the United Presbyterian Church. They say this:—"(1) The various matters of agreement between the Churches with a view to union are accepted and enacted without prejudice to the inherent liberty of the United Church as a Church of Christ to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God and under the guidance of His word. . . . (3) As this Union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right, as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

For these reasons I think the judgment ought to be reversed, and I so move your Lordships; but I cannot conclude without expressing how much we are indebted to the learned counsel on both sides for their most able and learned argument.

LORD MACNAGHTEN.—I am unable to agree in the conclusion at which your Lordships have arrived. I do not differ from any of your Lordships as to the law; at least I think not. I accept the principles laid down in this House in *Craigdallie* v. *Aikman*,[1] and the other cases referred to during the argument. I accept those principles loyally and entirely, however much I may err in their application.

Everyone, I think, must feel that the consequences of your Lordships' decision to-day for good or evil will be far-reaching and of momentous importance,—graver, I think, and more serious than the consequences of any decision in which it has been my lot to take part. And the argument addressed to your Lordships has been worthy of the occasion. But after all, the question at issue is one of a very ordinary description. It is alleged on the one hand, and denied on the other, that there has been a breach of trust in the disposition of property. The complaint is that funds contributed and set apart for one purpose have been diverted to another and a different purpose. Such questions are of everyday occurrence, and the problem in each case must be solved by the ordinary commonplace inquiry,—What was the purpose for which the funds in dispute were collected? What was the original trust?

The funds in question in the present case represent moneys contributed for the support of the Free Church of Scotland. They represent property

[1] 1 Dow, 1, 2 Bli. 529, 21 R. R. 107.

dedicated to the use of the Church body or voluntary association of professing Christians founded by those Ministers of the Established Church of Scotland who in 1843, on the memorable occasion known as the Disruption, withdrew from the Establishment; or, according to their own view of the transaction, separated from the State, carrying with them the greater part of the office-bearers of the Established Church and at least one-half of her members in full communion, asserting all the while for themselves and their followers in time to come the character of the ancient and true Church of Scotland. Setting forth with these lofty pretensions, they declared their adherence to the principles and practice of the Church of Scotland as regards doctrine, worship, discipline, and government untrammelled and unfettered by connection with the State and purged of every taint of Erastianism.

The question therefore seems to me to be this:—Was the Church thus purified—the Free Church—so bound and tied by the tenets of the Church of Scotland prevailing at the time of Disruption that departure from those tenets in any matter of substance would be a violation of that profession or testimony which may be called the unwritten charter of her foundation, and so necessarily involve a breach of trust in the administration of funds contributed for no other purpose but the support of the Free Church—the Church of the Disruption? Was the Free Church by the very condition of her existence forced to cling to her subordinate standards with so desperate a grip that she has lost hold and touch of the supreme standard of her faith? Was she from birth incapable of all growth and development? Was she (in a word) a dead branch and not a living Church?

This, I think, is the real and only question. But, if I may venture to say so without offence, it has been rather pushed aside and obscured by a very interesting preliminary search after a principle, if it be a principle, called for the sake of convenience, and not, I think, for the sake of clearness, "the Establishment principle," which, in my humble judgment, partakes rather of the elusive attraction of an *ignis fatuus*, which means much or little, just as you may choose to interpret one of the most obscure passages in the Westminster Confession, which in one aspect no Christian man, I think, would hesitate to accept, but which in the mouth of an adherent of a Church that has abandoned Establishment and separated from the State, can only mean a counsel of perfection unattainable in this world, at least until the advent of the Millennium.

Your Lordships have been furnished with a print of many Scottish statutes and a bulky volume containing the Acts of the General Assembly of the Church of Scotland. I have read those documents and many others to which the attention of the House was directed with much interest and some care. I can only say that they have confirmed me in the opinion I entertained at the conclusion of the first argument—no doubt erroneously—that the judgment under appeal was right and ought to be affirmed.

I do not propose to trouble your Lordships by tracing the history of the Church of Scotland in its connection with the State from the date of the first Reformation to the time of the Disruption; that was done very ably and very fully by the learned counsel at the Bar. It is enough for me to say that during the whole period of the existence of the Church of Scotland there was a constant assertion of spiritual independence—of the right as it

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was termed of the Lord Jesus to reign in His own house. I will only give one instance—I might give many—and I will give an instance that occurred almost on the eve of Disruption. On the 23d of May 1838 the General Assembly of the Church of Scotland passed this resolution, which is called "Resolution anent the Independent Jurisdiction of the Church of Scotland:—The General Assembly having heard and considered the overtures on the Independent Jurisdiction of the Church of Scotland, agreed, by a majority, to the following resolution—'That the General Assembly of the Church of Scotland, while they unqualifiedly acknowledge the exclusive jurisdiction of the Civil Courts in regard to the civil rights and emoluments secured by law to the Church and ministers thereof, and will ever give and inculcate implicit obedience to their decisions thereanent, do resolve that, as is declared in the Confession of Faith of this National Established Church, "The Lord Jesus as King and Head of His Church hath therein appointed a government in the hand of church officers distinct from the civil magistrate"; and that in all matters touching the doctrine, government, and discipline of this Church her judicatories possess an exclusive jurisdiction, founded on the Word of God, "which power ecclesiastical" (in the words of the Second Book of Discipline) "flows immediately from God and the Mediator Jesus Christ, and is spiritual, not having a temporal head on earth, but only Christ, the only spiritual King and Governor of His Kirk"; and they do further resolve, that this spiritual jurisdiction, and the supremacy and sole Headship of the Lord Jesus Christ on which it depends, they will assert and at all hazards defend by the help and blessing of that Great God who in the days of old enabled their fathers, amid manifold persecutions, to maintain a testimony, even to the death, for Christ's kingdom and crown; and, finally, that they will firmly enforce submission to the same upon the office-bearers and members of this Church by the execution of her laws, in the exercise of the ecclesiastical authority wherewith they are invested.'"

Thus while the Church was in connection with the State she took upon herself to declare emphatically that what she claimed was nothing less than an exclusive jurisdiction, founded on the Word of God, in all matters touching the doctrine as well as the government and discipline of the Church. The fact that this resolution was passed by a majority shews that it was carried by the vote of the party which five years later went out as the Free Church. Some may have hesitated—some dissented. The majority—the Free Church in embryo—recognised this claim of "Church power" as the governing principle of the Church.

During the period when the Church which had passed through the furnace of two Reformations was approaching her last and greatest trial, there grew up in the Church two parties—the Moderates and the Evangelicals. It was to the Evangelicals in later days that the Free Church of Scotland owed her separate existence. For a long time the Evangelical party was in a minority, and matters then went tolerably smoothly between Church and State. Ultimately in 1834 the Evangelicals gained the ascendancy. They were the party of progress, reform, and Church extension. They planted religion in remote and half-civilised districts in the Highlands of Scotland. They founded missions in all parts of the world. Their zeal and fervour were, as their adherents boasted, in striking contrast to the apathy and luke-

warmness of the Moderates. When they became the dominant party they carried matters with a high hand. They passed Acts—the Veto Act and the Chapel Act—which were altogether beyond the competence of the Church as established by law; they censured and deposed ministers who obeyed the decrees of the Court of Session, they held those decrees to be encroachments on the true liberties of the Church, and actually pronounced them illegal. The State refused to admit their claims. The strong arm of the law restrained their extravagances. They still maintained that their proceedings were justified and required by the doctrine of the Headship of Christ, which was common to all the Reformed Churches, but to which they attached peculiar and extraordinary significance. Then came the protest of 1842, "the unanswered and unanswerable protest," as they called it.

It was followed by a cold and chilling reply from the Government in power, and it became evident to all thinking men that as the State would not give way, the leaders of the Assembly and those who adhered to them would have to retract their pretensions and own themselves defeated or quit the Establishment altogether. No one who knew the courage and temper of the leaders of the Assembly, no one who had caught the note of defiance and triumph sounded by Dr Chalmers at the close of the Edinburgh Convocation, could doubt what the issue would be. And now, in passing, I would call your Lordships' attention to one fact which seems to me not unworthy of notice, when Dr Chalmers' address, preached before the first Free Church Assembly, is relied upon as a sort of prospectus on the faith of which the funds of the Free Church were collected, as if the Free Church were a joint stock concern and that sermon an invitation to the public to put their money in it. Months before the Disruption actually took place, when all Scotland was looking forward with feverish anxiety to the last act of the drama, the leaders of the Evangelical party, with Dr Chalmers at their head—a great divine and an eloquent preacher, who had a wonderful faculty of organisation and something of the genius of a statesman—set about collecting funds for the needs of the Church. "Before the meeting of the General Assembly"—(I am now quoting from a book which I believe is of recognised authority)—"the members of the popular party had arranged their course of proceeding. Associations were formed throughout the whole of Scotland, and subscriptions were collected for the purpose of building churches and providing a maintenance for the ministers who were soon to lose the benefits of the national endowments. Dr Chalmers presided over the general finance committee, and acted with an energy and success which amazed even those who had best known his labours for a similar purpose in the cause of the Establishment. The thousands of circulars which he dispersed bore the following mottoes:—'Surely I will not come into the tabernacle of my house, nor go up into my bed; I will not give sleep to my eyes, nor slumber to mine eyelids, until I find a place for the Lord, an habitation for the mighty God of Jacob. The God of Heaven He will prosper us; therefore we His servants will arise and build.'"[1]

That was the origin of the fund. Those were the winged messengers that prepared the ground and sowed the good seed. And when the Dis-

[1] Ecclesiastical History of Scotland, by George Grub, vol. iv. p. 226.

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ruption took place, and appeals were made in every parish, in every nook and corner of Scotland, calling upon the people to stand by the Church of their forefathers, denouncing the tyranny of the State, describing in harrowing terms the sufferings of ministers, old and young, driven from their homes with their wives and children, forced to seek shelter in sheds and hovels, while they faithfully ministered to their flocks, and some actually dying of want and exposure, money came in abundantly in answer to the call. Dr Chalmers' address to the first Free Church Assembly was but one of a thousand—I might say, of a million—similar discourses. It was eloquent, of course. It was stirring. But I rather take leave to doubt whether the warning that I find there against Voluntaryism and against Anarchy—an evil, as the preacher truly says, more to be dreaded than Voluntaryism—was very stirring or likely of itself to evoke a generous response. The negation of dangerous principles does not, as a rule, rouse enthusiasm. Of what is called the Establishment principle as a tenet or opinion of the Free Church I shall have a word to say presently. All I want to impress upon your Lordships at this moment is that when that sermon was preached by Dr Chalmers, on an occasion more eloquent and more stirring than any appeal in words could be, the fund was already in full swing.

Then for whom and with what purpose was the money collected? Except as regards sums devoted to special purposes and special objects, the fund was all one fund. It was collected for the needs of the Free Church of Scotland. And what was the Free Church? Did it go out as a sect, or a persuasion, or a connection with peculiar tenets cut and dried, and defined in the precise language of a conveyancer? Nothing of the kind. Those who went out went forth declaring that they were not a sect but the National Church, that they were still the Church of Scotland. "We are," they said (to quote the words of Dr Candlish, one who was only second—if he was second—to Dr Chalmers himself), "we are still the Church of Scotland—the only Church that deserves the name, the only Church that can be known and recognised by the maintaining of those principles to which the Church of our fathers was true, when she was on the mountain and on the field, when she was under persecution, when she was an outcast from the world. And, believing that we are not seceders from the Church, but are the Church separated from the State—believing that we are not a sect separated from the Established Church, but that we are the Church of Scotland separating from the State, we hold ourselves entitled, without any disparagement to other religious bodies, to assume and act upon the principle that we are to maintain the character of the National Church of Scotland."[1] An impossible position, it may be said, in point of law! They went out, not as a Church, but as individuals separating from the Church, and they united again in a voluntary body of professing Christians. That may be so. But to themselves and to their adherents, and I may add to other religious bodies which were not of their communion, they supported the character of the National Church of Scotland. And supporting that character, rightly or wrongly assumed, they must be taken, I think, in regard to their own body, to have all the powers of a National Church.

[1] Memorials of Robert Smith Candlish, D.D., p. 310.

Speaking for myself, I cannot form a conception of a National Church untrammelled and unfettered by connection with the State which does not at least possess the power of revising and amending the formulæ of subscription required of its own office-bearers, and the power of pronouncing authoritatively that some latitude of opinion is permissible to its members in regard to matters which, according to the common apprehension of mankind, are not matters of faith. I agree that a sect may erect any point or any punctilio however trifling and absurd into an article of faith. My position is, that the adherents of the Free Church were not a sect, and that they never made the Establishment principle an article of faith.

But I go further. This Establishment principle, whatever it is, can have no higher authority than the article of the Westminster Confession in which it is supposed to be embedded. If the Church has power to amend her Confession she can of course take occasion to declare that the Establishment principle is to be regarded as an open question in reference to which every man is at liberty to exercise his private judgment. Now, it seems to me clear that the Free Church when it came into existence claimed the power of altering and amending her Confession of Faith.

On the second argument the Dean of Faculty called your Lordships' attention to a little book entitled "Catechism on the Principles and Constitution of the Free Church of Scotland issued by authority of the General Assembly."[1] The preparation of this work was taken in hand in 1843. It was issued in December 1845 by authority of the Publication Committee. It sets forth in the forefront of an appendix the resolution of 1838, which I have already quoted. In 1847 the General Assembly approved generally of this Catechism "as containing a valuable summary of this Church's history and exhibition of her distinctive principles from the beginning of the Reformation to the present time." And the Assembly earnestly recommended its general use; so that it has an unquestionable claim to be considered a contemporaneous document, exhibiting the distinctive principles of the Free Church. Mr Taylor Innes in his valuable work on the Law of Creeds in Scotland,[2] quotes from it as a book of authority, but speaks of it as an intensely polemical volume. So it is. From beginning to end it attacks and flouts and belittles the Established Church, but the very bitterness of its tone shews that it was composed in the earliest days of Disruption. I will not weary your Lordships by quoting from it at any length, but I may remind your Lordships that it points out that the Church of Scotland as a Church on its own authority adopted the Westminster Confession, at the very time when Knox's Confession had the sanction of the State. The Catechism deals at some length with "Church power." It explains that this power is the power of the Keys. It declares that it is divided into four parts, and that the first part is "the Dogmatic power, in virtue of which the doctrine and laws of the Word are declared, and religious controversies are determined." It asks—"When is the Dogmatic power abused?" The answer is—"When it is made the pretext for a claim of infallibility and employed to subvert the right of private judgment, and when

[1] Quoted L. R. [1904], A. C. p. 759.
[2] 1902 ed., pp. 86, 244.

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that implicit submission which is due only to the Word is demanded for Church formularies and decrees."

In an earlier passage, in a note to Q. 44, quoted by Mr Taylor Innes, there is a sly hit at the Established Church, and a sharp contrast drawn between the view of the Evangelical party and the view of the Moderates, not altogether to the advantage of the latter. "It is one thing," says the authors of the Catechism, "for the civil privileges and endowments of a Church to be tied to a Confession by civil enactments" (that was the comparative freedom of the Evangelicals), "and quite another thing for a Church itself to be so"; (that was the bondage of the Moderates and their Established Church). "In the former case the Church when she finds that any articles of her Confession are unscriptural is at liberty to renounce them, being only bound if she do to resign her temporalities. In the latter case the law allows no relief whatever for the Church in her corporate capacity when she discovers errors in her Confession, which of course is as much as to say that the Church is bound always to go absolutely upon the supposition of its soundness and to interpret the Word of God agreeably to its declarations. Under these circumstances the supreme and ultimate standard of doctrine is—not the Bible—but the Confession of Faith." I greatly fear that that is the position into which the Free Church will be driven if Mr Johnston's argument prevails.

I could easily multiply quotations from this Free Church Catechism, but I think I have quoted enough to prove that to the fathers of the Free Church movement the notion of altering the Westminster Confession of Faith was not so very shocking.

I do not rely on the Barrier Act. If I may say so, it seems to me that that was rather a false point. The Barrier Act may possibly imply—it certainly does not assert—Church Power as understood by the Evangelical party and the Free Church of Scotland. The Resolution of 1838 belongs to a different class of legislation. It is a Declaratory Act. It speaks in the plainest and clearest language. The Free Church Catechism shews that at the time of the Disruption it was understood to mean precisely what it says, and to assert the exclusive power of the Church founded on the Word of God over doctrine—that is, over her creeds, her confessions, her formularies, and her decrees. So the Act of 1838 declares. So the Free Church Catechism of 1845 teaches. The Act of 1838 therefore supplies what was wanting in *Craigdallie* v. *Aikman*[1] and the very thing which in Lord Eldon's view would have sufficed to turn the scale. Without ignoring both the Act of 1838 and the Free Church Catechism of 1845 it seems to me impossible to deny that provision for expansion and development—for that growth without which there can be no life—was part and parcel of the original trust under which the funds in question in the present case have been collected and set apart.

If the view which I have roughly indicated is correct, I think it is enough to dispose of this case in both its branches. But there are two points on which a great deal of argument was bestowed, and on which I should like to say a few words. There is the Establishment principle as it

[1] 1 Dow, 1, 16.

is called, and there are those higher mysteries which were dealt with boldly but reverently by the learned counsel who spoke second for the United Free Church.[1]

As regards the Establishment principle, I know that that very distinguished man to whom I have already referred, and who, after Dr Chalmers, was the leader of the Free Church, doubted to the last whether the principle of a national Establishment of religion was a principle at all.[2] He maintained that throughout the whole of the Church's history there was no event—that was the word he used—that proclaimed formally and directly that the principle of a national Establishment of religion was a vital principle which the Church was bound to maintain. Speaking for myself, I do not altogether take that view, though I agree with him in thinking that the Establishment principle sinks into absolute insignificance compared with the great principle of the independence and power of the Church and "the exclusive authority of Christ in His own house." I think it must be admitted that the Establishment principle, as it may be gathered from the somewhat obscure language of the Westminster Confession, was the generally received opinion in the Church. It was necessarily the received, though unexpressed, opinion of the Church before the Disruption. When the Disruption took place circumstances were altered, and then I think there was a diversity of opinion on the subject.

Lord Trayner says that it appears to him "difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church would not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion." Well, that was exactly Dr Candlish's opinion at the very time of the Disruption. I refer to his opinion, not as the opinion of a person authorised to speak on behalf of the Church, but as the opinion of a very leading man, whom many others would probably follow.

At the General Assembly held in Glasgow in the autumn of the year of Disruption, Dr Candlish, speaking about the Establishment principle, and pointing out that the refusal of the State to establish the Church on the only terms to which the Church could consent, left them a great degree of liberty as to the terms on which they should stand with other Churches, puts the case thus:—"Is the division and schism of the Christian Church to be kept up by a question as to the duty of another party over whom we have no control? Let it be that we maintain our different opinions as to the duty of the State to support the Church, and the duty of the Church to receive support from the State when it is given consistently with spiritual freedom, still, shall that question, which has become a mere theoretical question in the Church of Christ, and which so far as we can judge seems destined to be a mere theoretical question till the time when the kingdoms of this world shall become the kingdoms of Our Lord and of His Christ—shall that question prevent cordial co-operation and harmony among ourselves, and our united action in defence of our common Protestantism against the common foe?"[3]

[1] Haldane, K.C.
[2] Memorials of R. S. Candlish, p. 554.
[3] Memorials of R. S. Candlish, pp. 317, 318.

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I have no doubt that the opinions which Dr Candlish expressed so eloquently at the time of the Disruption must have been held by many adherents of the Free Church. And as time went on, and the spendid voluntaryism of the Free Church on a basis and a scale never before understood or attempted, placed the Free Church on a level with the Established Church at home, and in a position certainly not inferior as regards missionary labours abroad, the natural tendency, I think, even among those who were disposed to regard the Establishment principle as a sacred principle (if any such there were) must have been in the direction of the conclusion that the Church of Scotland could exist not only without an Establishment, but even without the profession of the Establishment principle.

Speaking for myself, and with the utmost deference to the great majority from whom I have the misfortune to differ, I think this question about the Establishment principle is a very small question indeed, and that it occupied a great deal too much of the argument, to the exclusion of far weightier matters.

I cannot call the matters that were discussed by Mr Haldane small or insignificant. They are mysteries into which I do not think it is our province to intrude. And, indeed, I am not quite sure that at the conclusion of Mr Haldane's argument I had gained a clearer insight into these hidden things than I had before. At any rate, I am happy to think that it is not necessary to enter into such questions at all. If the Church has power to relax the stringency of the formulæ required from her ministers and office-bearers so as to avoid offence to the consciences of the most conscientious and to keep within her fold the most able and enlightened of her probationers, that is all that is required. That she has that power I cannot doubt. These formulæ were imposed by Parliament. If they owed their force and efficiency in the Established Church to Acts of Parliament, the Free Church has rejected the ordinances of men and the authority of Parliament and is free to regulate her own formulæ. If in the Established Church they owed their force wholly or in part to the antecedent recognition of the Church, the Free Church, as it seems to me, claiming to act, and recognised by her adherents as acting, in the character of a National Church, and proceeding regularly in accordance with her constitution, may do now what the Church did in the seventeenth century.

Owing to the vast importance of this case and the very able and learned arguments of counsel at the Bar, I have thought it right to state in my own language the reasons which have led me to the opinion I hold. Under ordinary circumstances I should have been content to express my concurrence in the opinions delivered by the learned Judges in Scotland, and specially in the opinions of the Lord Ordinary and Lord Trayner.

It is impossible, in my opinion, to overrate the importance of the issue awaiting decision. I do not agree with the learned counsel for the appellants that the United Free Church is a changeling, a creature of a composite nature, with a double face and two voices. I think the Free Church has preserved her identity. I think she is entitled to as much respect—I had almost said as much veneration—as when she went forth, casting off for conscience sake the fetters and the advantages of State connection. I do not think she has forfeited any of her rights by receiving into her bosom a

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reformed and Presbyterian Church, one with her in faith, in baptism, and all essential points of doctrine. And for my part I should hesitate long before I could give my voice for a decision which will, I fear, compel, or at any rate direct, her to subordinate the Scriptures to the Westminster Confession of Faith.

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LORD DAVEY.—The subject-matter of the action out of which this appeal has arisen is certain heritable and moveable property of great value, which is held by trustees, who are the first respondents, in trust for the Free Church of Scotland. That Church is a voluntary and unincorporated association of Christians united on the basis of agreement in certain religious tenets and principles of worship, discipline, and Church government. The pursuers and present appellants were in the year 1900, and claim to be still, members of the Free Church, and their complaint, so far as it is cognisable by a civil Court, is that their trustees, at the bidding of other members of the Free Church, but in breach of their trust, have applied, and threaten and intend to apply, the trust property to purposes which are alien to the purposes of the trust, and for the benefit of persons who have no title to call themselves members of the Church. In fact, the appellants say that they alone hold in their integrity the tenets and principles of the association for whose benefit the trust was founded.

The law on this subject is free from doubt. It has been settled by numerous decisions of the Courts both in Scotland and in England, and has been affirmed by judgments of this House. The case of *Craigdallie* v. *Aikman*[1] came twice before this House. In the second appeal Lord Eldon thus stated the principle on which the House proceeded:—"When this matter was formerly before the House we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel we should hold the building appropriated to the use of persons who adhere to the same religious principles." And after stating the result of the inquiries directed by the former judgment, Lord Eldon said,—"Supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to their religious principles being more properly to be considered as the *cestuis que trust* of those who held this place of worship in trust than those who have departed altogether from the religious principles of those who founded this place, if I may so express it."

In an English case (*Attorney-General* v. *Pearson*[2]) decided in 1817, and therefore between the two appeals in the *Craigdallie*[3] case, Lord Eldon, referring to that case, expounded the principle acted on by the House more at large. "But if," he said, "on the other hand, it turns out (and I think that this point was settled in a case which lately came before the House of Lords by way of appeal out of Scotland) that the institution was established for the express purpose of such form of religious worship, or the teaching of

[1] 1 Dow, 1, 16, 2 Bli. 529, at pp. 539, 541.
[2] 3 Merivale, 353, at p. 400, 17 R. R. 100, 101.
[3] 1 Dow, 1, 16, 2 Bli. 529, 21 R. R. 107.

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such particular doctrines as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution at any time to alter the purpose for which it was founded, or to say to the remaining members—'We have changed our opinions, and you, who assemble in this place for the purpose of hearing the doctrines and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration which has taken place in our opinions.' In such a case, therefore, I apprehend—considering it as settled by the authority of that I have already referred to—that when a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court, and that to refer to any other criterion as to the sense of the existing majority would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties and character of this Court."

I disclaim altogether any right in this or any other Civil Court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the Civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed. I appreciate, and if I may properly say so, I sympathise with, the effort made by men of great intelligence and sound learning to escape from the fetters forged by an earlier generation. But sitting on appeal from a Court of law, I am not at liberty to take any such matter into consideration.

The question in each case is, what were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association.

I do not propose to travel through the numerous documents which state the grounds of the great Disruption in 1843, and the principles held and professed by the founders of the Free Church. The result, in my opinion, is that the Free Church took with it the doctrine, government, and discipline of the Established Church, freed from the fetters and conditions imposed on that Church by its connection with the State. The Free Church adopted as its standards the Westminister Confession and the other subordinate standards of the Established Church. It also adopted the provisions of the Barrier Act, and any other provisions affecting the constitution of the Church or the powers of its General Assembly. In fact, the

founders of the Free Church claimed that "in doctrine, polity, and discipline they truly represented the Church of their fathers," and that "it is her being free and not her being established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland."

There is, however, one document which should be more particularly referred to, viz., the protest put forth as their first act by the members of the General Assembly of the Established Church who withdrew from that Assembly on the historical 18th May 1843. This protest was ordered to be recorded by the several Presbyteries of the Free Church at the beginning of their Presbytery books as the ground and warrant of their proceedings, and it may fitly be called the charter of the Free Church. It is at once an apologia and an affirmance of the distinctive position taken up by the founders of the Church. In vindicating in vigorous terms their right and duty to separate from the Establishment—maintaining the Confession of Faith and other standards of the Church of Scotland as theretofore understood—they are careful to firmly assert the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word.

It is a matter in dispute whether it was a tenet of the Established Church that it is the duty of the State to establish and endow a National Church. It has been said by learned Judges in the Court of Session (see Lord Meadowbank in *Smith* v. *Galbraith*[1]) that it was not required that the principle of a religious establishment in connection with and endowed by the State should be professed as an article of faith. It was pointed out that the article on the civil magistrate admits of other constructions, and that a civil ruler may perform the duty ascribed to him in that article in other ways than by establishment and endowment. But, however this may be, I think it is plain from their public utterances that the founders of the Free Church considered that the Establishment principle was part of the body of doctrine which they brought with them from the Established Church, and that they held and stated it in the clearest terms. It is impossible, in my opinion, to get rid of the explicit statement of the doctrine in the protest of 18th May 1843 by calling it "parenthetical," or a matter of opinion. The affirmance of the doctrine may be said to derive strength from the form of the sentence. For it shews that the authors of the protest regarded it as of so much importance that they go out of their way to state it, and thus define more clearly their position, and avoid the imputation that by separating from the Established Church they had become Voluntaries. Again, in the Act of 1846, "anent questions and formula," while disclaiming intolerant or persecuting principles, "the Church firmly maintains the same Scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended." And (not to multiply evidence of what is not really disputed) in the address of Dr Chalmers, which was incorporated in a manifesto issued by direction of the General Assembly of May 1843, and entitled "The Affectionate Representation of the Free Church of Scotland," that eminent person expressed himself in language which I will

[1] 1843, 5 D. 665, 685.

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not repeat, as it has been read by my noble and learned friend on the Woolsack.

I cannot bring myself to doubt that a doctrine thus "firmly" asserted and maintained, and officially put forward, was a distinctive tenet of the Free Church of Scotland, and formed a link in the bond of union between the members of that association. The Lord Ordinary and the learned Judges in the Inner-House treated it as neither fundamental nor essential, and they seem to have regarded it as a pious opinion, held, indeed, by the founders of the Church, but destitute in the circumstances of any practical importance. I have already said that I have no means of testing the fundamental or essential character of the doctrine apart from the utterances of the parties themselves. They certainly were as far as possible from treating it as an open question, and that attitude was maintained for many years after the foundation of the Church. The doctrine of the independence of the Church under the Headship of Christ alone was the very foundation of their position, and was necessarily put forward by them as fundamental, but that is no proof that they did not regard other tenets also as essential or distinctive articles of belief.

The questions therefore in my opinion come to be whether it was a term in the compact or bond of union that the General Assembly should have power to alter or vary the doctrines of the Church, and what are the limits (if any) of such a power. I was impressed (as I believe all your Lordships were) by the powerful argument of the Dean of Faculty. If I understood the learned Dean correctly, he maintained that the General Assembly of the Church of Scotland had by its constitution an inherent power of plenary legislation over all matters ecclesiastical, including doctrine, subject only to the conditions imposed by the Act of Assembly called the Barrier Act. And he carried his argument so far as to maintain that the General Assembly of the Free Church, exercising the inherent powers of the Established Church, but freed from the fetters imposed by Acts of Parliament, might derogate from or even reject the Confession of Faith itself.

The freedom of the Church from the control of the civil power *in spiritualibus*, which is asserted by the Free Church, does not appear to me to warrant any *a priori* inference of the existence of such a plenary power of legislation in the General Assembly. It is, indeed, almost a truism that an unestablished religious association is free from State control as regards doctrine, government, and discipline. But that freedom which differentiates a voluntary association from an Established Church is not inconsistent with the adoption by the association of certain tenets which distinguish it from other similar bodies. The right of the Assembly to impose any innovation from established doctrine on a dissentient minority, and the limits of such right (if any), must be found in the constitutional powers of that body, and must be proved by evidence. The historical argument of the learned Dean appears to me on examination to afford but little assistance on this crucial point. Knox's Confession of Faith was not adopted by the General Assembly of the Church, for at that time the Presbyterian form of Church government was not established, and there was no such body. It was presented by the Barons and others to Parliament and then passed into law. The Statutes of 1638 and the subsequent years

were passed during the period which is called in Scotch ecclesiastical history the Second Reformation, and appear to be in the nature of protests against the action of the King's Government, and in some instances the King's Commissioner is supplicated to obtain the ratification by Parliament of the Acts of the Assembly. The Westminster Confession was adopted by an Act of the General Assembly in 1647, and did not, it is true, receive Parliamentary sanction until 1692, after the period of disturbance between the Restoration and the Revolution of 1688 had passed away. It is to be observed, however, that in the Act of 1647, approving the Westminster Confession, it is expressly stated that the said Confession was found by the Assembly to be "in nothing contrary to the received doctrine, worship, discipline, and government of this Kirk." The Assembly therefore did not consider itself to be introducing into the Church any innovation in doctrine. The Westminster Confession was intended to be an eirenicon or basis of union between the Churches in the two kingdoms, and the adoption of it by the Scottish Assembly was as much a political as an ecclesiastical act. The "Chapels Act" and the "Veto Act," which were the forerunners and indirectly the cause of the great Disruption, can hardly be cited as evidence of the power of legislation which is claimed. These Acts were said by their authors to be declaratory only of existing rights, and although they involved the assertion of the larger principle for which the majority in the General Assembly were then contending, the particular subjects dealt with would seem to come within the scope of the internal management of an established Church. They were held in the Court of Session and in this House in the course of the litigation which ensued to be of no effect, because their provisions (it was held) were at variance with those of Acts of Parliament. It was not necessary, therefore, for the learned Judges to give any decision as to the abstract power in the General Assembly to pass them. But the *dicta* of the learned Judges were not favourable to the respondent's contention (see the opinions in the first *Auchterarder* case [1]).

Counsel referred to chap. vii. of the Second Book of Discipline. The sections numbered from 6 to 8 describe the powers of all assemblies from kirk-session to an Ecumenical Council, and do not relate specially to the General Assembly. It does not appear to me that any of these sections either confer or recognise the existence of a power in the General Assembly to impose new doctrines on the Church, for that is what is claimed. They seem to be directed to the preservation and maintenance of established doctrine and the reform of abuses. Sections 21 to 26 describe the powers of what is there called the National Assembly, corresponding to what is now designated the General Assembly. There are large powers for the protection of the spiritual jurisdiction, the patrimony of the Kirk, and generally concerning "all weighty affairs that concern the well-being and good order of the whole Kirks of the realm." But nothing is said as to doctrine. Counsel did not in fact bring to your Lordships' attention any work of recognised authority in the Presbyterian Churches in which it is clearly laid down that the General Assembly possesses this plenary power of legislation over doctrine. And I cannot say that it has been proved to my

[1] 2 Robertson's Report, p. 25 *et seq.*

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satisfaction that either by inherent right or by usage or by contract the General Assembly of the Free Church has any such power.

But I think that the learned Judges of the Court of Session relied principally on the provisions of the Barrier Act, 1697. The first observation is that that Act is a procedure Act, and not an enabling Act. It does not purport to confer any new powers whatever, but it regulates the exercise of such powers as the General Assembly may possess. It is said, however, that the provisions of the Barrier Act contemplate and imply the existence of a power in the General Assembly to make some innovations or alterations in (amongst other things) doctrine. I think this would be true if, after the word "existence," you added the words "or the possible exercise by the Assembly." The Act may have been passed for the purpose of preventing a majority from making or assenting to sudden innovations and alterations which it was expected or feared might be attempted from within or from without, without very carefully weighing what the strict constitutional powers of the Assembly were. But, let it be assumed that the language of the Act does imply the existence of some power. Certainly it is not necessarily an unlimited or general power, and the question then is, what is the extent or what are the limits of the power? It has been said that it is a power to legislate in any manner not inconsistent with the continued existence of the Church. But applying that to the case now before us what, it may be asked, is the Church but an organised association of Christians holding certain doctrines and principles in common? I was at one time disposed to think that a sound limitation might be found if the power were confined to the interpretation of formularies. But further reflection has satisfied me that if your Lordships were so to hold, you would only be making a more or less plausible but wholly unverified assumption. I also think that not only an accepted interpretation of Scripture, but an accepted interpretation of or inference from a subordinate standard may just as well be an article of faith as any other opinion, and there is no tenable distinction for this purpose between one religious principle or opinion and another. I do not think, for example, that you advance the argument by calling the Establishment principle a question of policy only. I have come to the conclusion that it would be contrary to all principle to infer from the provisions of the Barrier Act, unsupported by any evidence of usage or other evidence, a power in the General Assembly, or the majority, to vary the trusts upon which this property is held to the prejudice of a dissentient minority. I think the Dean of Faculty was logically right in contending for an unrestricted power of legislation. But if the property was intended to be held in trust for a body of Christians holding such doctrines as the majority acting through the General Assembly might from time to time approve, such an intention should be made clear beyond the possibility of question.

Now, what is it that the General Assembly has done? I shall content myself by referring to three documents. In 1867 there was a movement in the Free Church for union with the United Presbyterian Church. In a report of a committee of the Free Church of that year on union with other Churches there is contained a statement of the United Presbyterian Church Committee under the heading of "Distinctive Articles":—"That it is not

competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil Establishment of religion, nor is it within his province to provide for the expense of the administration of religion out of the national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon His people to provide for maintaining and extending it by freewill offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to civil Establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held, and universally acted on, are opposed to these institutions." I will only ask your Lordships to contrast this language with the views on this subject expressed by Dr Chalmers, and put forward by the founders of the Free Church in their manifesto entitled "The Affectionate Representation of the Free Church of Scotland, 1843," to which I have already referred. In fact the voluntary principle—*i.e.*, the unlawfulness of accepting aid in any form from the State—was put forward as one of the most distinctive principles of the United Presbyterian Church in a tract published by authority on the jubilee of that Church in the year 1897.

By an Act of the General Assembly of the Free Church dated October 30, 1900, after a recital that a union of the Free Church of Scotland and the United Presbyterian Church of Scotland was in contemplation, and was about to be consummated, it was enacted and ordered (amongst other things) that all property held by trustees for behoof of the Free Church of *Scotland* should belong to and be held for behoof of the United Free *Church* of Scotland.

On the following day the Act of Union was passed, and certain declarations were adopted by the United Assembly defining the basis of union, the third of which is as follows:—

"As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so in particular it is hereby declared that members of both Churches and also of all Churches which in time past have united with either of them, shall have full right as they see cause to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

In other words, the Establishment principle and the doctrine as to the duty of the civil magistrate towards the Church which was maintained and firmly held by the founders of the Free Church are henceforth to be open questions for members, ministers, and office-bearers, and the property which was placed in trust for the Free Church is henceforth to be held in trust for the maintenance of a Church, in the pulpits of which distinctive tenets of the Free Church may or may not be taught, and, indeed, doctrines at variance with them, and directly contradictory of the Establishment principle, may lawfully be maintained. The appellants also say that in the constitution of the United Free Church another distinctive principle of the Free Church as declared by the founders of that Church has been abrogated, namely, the unqualified acceptance of the Westminster Confession. They point to the change in the language of the question relating to the Confession which candidates are required to answer in the United Free

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Church. They say that this change, accompanied and explained by the declaration contained in the preamble of the Act prescribing these questions, has the effect of substituting for a belief in the whole doctrine of the Confession of Faith belief in such portions thereof only as the General Assembly may from time to time determine to be of the substance of the Reformed Faith, or (in other words) such portions as the Assembly may from time to time approve. This is not a mere question of interpretation of formularies, and I am disposed to think that on this point also the argument of the appellants is well founded. The learned Dean of Faculty rightly said that the substantial question was, whether the United Free Church had preserved its identity with and is the legitimate successor of the Free Church. I find myself quite unable to answer that question in the affirmative.

The other case relates to the trusts of buildings held for particular Free Church congregations on trust-deeds which are in the form of the Model Trust Deed approved by the General Assembly of the Free Church. The terms of this trust-deed were much relied on by the counsel for the respondents not only with reference to these congregational trusts, but also on the general question. The trust is that the building shall be enjoyed as a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such body or bodies of Christians as the Free Church may at any time hereafter associate with themselves under the aforesaid name of the Free Church of Scotland, or under whatever name or designation they may assume. The operative part of the deed is preceded by a long historical narrative, which is interesting and appears to me rightly to define the position and constitution of the Free Church, but it does not appear to me to carry the case further than the facts themselves do. Nor do the terms of the trust seem to affect the general question beyond shewing that it was in the contemplation of the parties that the Free Church might unite with some bodies of Christians. With regard to the congregational property, I feel more difficulty. I think the soundest view, however, is to hold that there is a general overriding trust for the purposes of the Free Church, and it was not intended that the majority controlling the Free Church might by subverting the basis of that Church divert the trusts of the congregational property. I think, therefore, that the union here contemplated must be taken to be one with other Churches which might properly be made without detriment to the distinctive tenets of the Free Church. More than one union of that character has in fact been made without objection.

For the reasons I have given I am of opinion that the two appeals should be allowed.

LORD JAMES.—In the cases before your Lordships for decision the secular Courts have been appealed to for the purpose of determining differences that have arisen between two sections of the Church until lately known as the Free Church of Scotland.

The jurisdiction of the Courts, and therefore of your Lordships, to determine such differences proceeds from the fact that property held by trustees

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upon certain trusts has lately been dealt with, or sought to be dealt with, for the purpose of carrying out a union between the Free Church of Scotland and another body, known as the United Presbyterian Church; and the pursuers in the Court below—the appellants before your Lordships—allege that the application of the properties in question to the purposes of the Churches thus united constitutes a breach of the trusts under which the properties are held.

It is obvious that the first step towards the elucidation of the question before your Lordships' House is to determine the nature of the trusts controlling the properties in question. In order to do so a brief reference to facts, some of which have become historical, is necessary.

Prior to 1843 the Presbyterian Church of Scotland was in existence as the Established Church. But grave questions deeply affecting the minds and opinions of some of its members had come into existence. The Protest of the General Assembly of the Free Church, dated May 18, 1843, complains, —"That the Courts of the Church, by law established, and the members thereof, are liable to be coerced by the Civil Courts in the exercise of their spiritual functions and, in particular, in the admission to the office of the holy ministry and the constitution of the pastoral relation, and that they are subject to be compelled to intrude ministers on reclaiming congregations in opposition to the fundamental principles of the Church and their views of the Word of God—and to the liberties of Christ's people."

On this ground, and apparently on this ground only, a large number of the members of the Established Church seceded from it and formed themselves into a new body, under the name of the Free Church. As far as I know, the seceding body adhered to all the tenets and views of the Establishment, excepting upon the above question of secular interference with the spiritual affairs of the Church.

Upon the Free Church thus constituted as a whole, and upon certain congregations of it, considerable property has been conferred by different settlors and donors.

The case set up by the pursuers is, that these properties are held under certain trusts; that those who conferred the properties upon the Free Church intended that they should be applied for the purposes of that Church as it existed at the time when the transfers of property were made. It is also alleged that the Free Church, having united with another body known as the United Presbyterian Church, has so varied its conditions as to cease to retain its original identity. In the Courts below reliance in support of this contention was almost entirely placed upon the argument that a fundamental difference existed between the two Churches in this: that the Free Church acknowledged and asserted the principle of an Established Church, whilst the United Presbyterian Church condemned that principle, and was, to the fullest extent, a voluntary Church, accepting Voluntaryism as a necessary and fundamental article of its faith.

Such being the case presented in the Courts below and at the bar of your Lordships' House by the pursuers, it is necessary first to determine to what extent the Free Church was based upon the principles of Establishment. But before entering upon such inquiry it is, I think, worthy of remark that the Church is not a positive defined entity as would be the

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case if it were a corporation created by law. It is a body of men united only by the possession of common opinions, and if this community of opinion ceases to exist, the foundations of the Church give way. But difference of opinion to produce this result must be in respect of fundamental principles, and not of minor matters of administration or of faith.

The basis of the Established Presbyterian Church was the Westminster Confession of Faith. At the time of the Disruption in 1843 full adhesion to the principles of this important document was declared by the seceders. Article III. of Chapter XIII. of the Westminster Confession is as follows: —"The civil magistrate may not assume to himself the administration of the Word and Sacraments or of the power of the Keys of the Kingdom of Heaven; yet he hath authority and it is his duty to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

It seems to me that this Article clearly enunciates the principle of an Establishment, and that this principle, as distinguished from its application, has never been repudiated by those who formed the Free Church.

But the opinion of anyone on that point at the present day is of but little importance compared with the views expressed by those who formed that Church. Clear and distinct expression of those views can be found.

In the first place, in the Claim, Declaration, and Protest issued by the General Assembly of the Church of Scotland on May 30, 1842, it is stated,[1] —"Whereas it is an essential doctrine of this Church and a fundamental principle in its constitution as set forth in the Confession of Faith thereof in accordance with the Word and Law of the Most Holy God, that there is no other Head of the Church but the Lord Jesus Christ (Chapter XXV., s. 6), and that while God, the supreme Lord and King of all the world, has ordained civil magistrates to be under Him over the people for His own glory and the public good, and to this end hath armed them with the power of the sword (Chapter XXIII., s. 1), and while it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake, from which ecclesiastical persons are not exempted (Chapter XXIII., s. 4), and while the magistrate hath authority, and it is his duty in the exercise of that power, which alone is committed to him, namely, 'the power of the sword' or civil rule, as distinct from the 'power of the Keys,' or spiritual authority expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church, yet, 'The Lord Jesus as King and Head of His Church hath therein appointed a government in the hand of Church officers distinct from the civil magistrate (Chapter XXX., s. 1), which government is ministerial, not lordly, and to be exercised in consonance with the laws of Christ and with the liberties of His people.'"

[1] See Appx. G., L. R. [1904], p. 737.

And again in the same document there appears as follows:—"And whereas the Church highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church of Christ."

Coming to the Protest of May 1843, we read:—"And finally while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and successors to strive by all lawful means as opportunity shall, in God's good providence, be offered to secure the performance of this duty according to the Scriptures." Yet the document proceeds to announce separation.

Again, in the Pastoral Address issued by the General Assembly of the Free Church on the same day, May 30, 1843, it is stated,—"Long was it the peculiar distinction and high glory of the Established Church of Scotland to maintain the sole Headship of the Lord Jesus Christ, His exclusive Headship in the Church which is His Kingdom and House. It was ever held by her indeed that the Church and the State being equally ordinances of God, and having certain objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ and on the employment of the means and reasons belonging to them respectively for the advancement of His cause. But while the Church in this manner might lend her services to the State, and the State give its support to the Church, it was ever held as a fundamental principle that each still remained, and ought under all circumstances to remain, supreme in its own sphere, and independent of the other. On the one hand, the Church having received her powers of internal spiritual government directly from her Divine Head, it was held that she must herself at all times exercise the whole of it, under a sacred and inviolable responsibility to Him alone, so as to have no power to fetter herself, by a connection with the State or otherwise, in the exercise of her spiritual functions. And in like manner, in regard to the State, the same was held to be true, on the same grounds, and to the very same extent in reference to its secular sovereignty. It was maintained that as the spiritual liberties of the Church, bequeathed to her by her Divine Head, were entirely beyond the control of the State, so, upon the other hand, the State held directly and exclusively from God, and was entitled and bound to exercise, under its responsibility to Him alone, its entire secular sovereignty, including therein whatever it was competent for, or binding upon, the State to do about sacred things, or in relation to the Church, as, for example, endowing and establishing the Church, and fixing the terms and conditions of that Establishment."

But perhaps the most explicit declaration on the subject of the principle of Establishment is to be found in the following words of Dr Chalmers, rendered authoritative by their circulation by the orders of the General Assembly of May 1843: "The Voluntaries mistake us if they conceive us to be Voluntaries." (These are the words which were read by my noble

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and learned friend on the Woolsack.) "We hold by the duty of government to give of their resources and their means for the maintenance of a Gospel ministry in the land; and we pray that their eyes may be opened, so as that they may yet learn how to acquit themselves as the protectors of the Church, and not as its corrupters or its tyrants. We pray that the sin of Uzziah, into which they have fallen, may be forgiven them; and that those days of light and blessedness may speedily arrive, when kings shall be the nursing fathers, and queens the nursing mothers of our Zion. In a word, we hold that every part and every function of a commonwealth should be leavened with Christianity; and that every functionary, from the highest to the lowest, should, in their respective spheres, do all that lies in them to countenance and uphold it. That is to say, though we quit the Establishment, we go out on the Establishment principle—we quit a vitiated Establishment, but would rejoice in returning to a pure one. To express it otherwise, we are the advocates for a national recognition and a national support of religion, and we are not Voluntaries."

To these declarations of Dr Chalmers I feel great importance should be attached. Apart from the fact that they were issued under the authority of the General Assembly, Dr Chalmers was specially appealing for material support for the Free Church as a seceding body; and I know nothing more likely to influence the generosity of donors than the eloquent appeal of such a man as Dr Chalmers. From him those who gave would seek both guidance and information as to the body upon which their gifts would be conferred.

Then in December 1843, the Assembly of the Free Church, replying to the address from the Congregational Churches of North Wales, said: "But you misapprehend the nature of the movement we have made in supposing that we have in the least degree altered our views respecting the lawfulness and desirableness of a right connection between Church and State."

That the Establishment principle was adhered to by the Free Church seems to have been accepted in the Court below. Lord Trayner in his judgment says: "It is not open to doubt that the Free Church from its constitution in 1843 down, at least, to its union with the United Presbyterian Church professed the Establishment principle."

Even the separation from the Established Church was apparently intended to be of a temporary character only, because we find in the Claim and Protest of 30th May 1842, the following statement: "But that it shall be free to the members of this Church or their successors at any time hereafter when there shall be a chance of obtaining justice to claim the restitution of all such civil rights and privileges and temporal benefits and endowments as for the present they may be compelled to yield up in order to procure to their office-bearers the best exercise of their spiritual government and discipline and to their people the liberties of which respectively it has been attempted so contrary to law and justice to deprive them."

Such being the declarations of the seceders at the time of the Disruption, I can find no departure from such views at any time before the union with the United Presbyterian Church. On the contrary, between the years 1842 and 1900 repeated declarations of adhesion to the principle of Establishment were made on behalf of the Free Church.

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I have thus dealt at length with the position accepted by the Free Church in relation to Establishment, and the result seems to be that the seceders of 1843, having belonged to the Established Church, seceded from it, not because it was an Established Church, but because the principle of the Establishment within it had become vitiated. To the principles of Establishment the seceders still fully adhered; and to the Established Church itself they would gladly have returned as soon as there was any discontinuance of the interference with spiritual government which they regarded as vitiating the true principles of Establishment.

It still has to be considered whether the principle was essential and fundamental or a mere matter of policy. It is difficult to define any positive standard between an essential and a non-essential principle. But surely there is a great gulf between the principle of Establishment and that of Voluntaryism. It seems to me, having read the declarations of the General Assembly and the distinct utterances of Dr Chalmers, that scant justice would be done to the eloquent leaders of the secession movement of 1843 if we construed them as treating the Establishment principle as being non-essential or unimportant.

Still more important is it to consider what was the view of the importance of the principle entertained by those donors who, may be, listened to the appeal of Dr Chalmers. Would they have regarded it as non-essential? Would they have endowed a Church pledged to Voluntaryism? I think not.

It is a much easier task to gather the views of the United Presbyterian Church on the subject of Establishment. That Church came into existence in the year 1847 by virtue of the union of two Churches which had previously seceded from the Established Church. It is not denied that from first to last the United Presbyterian Church has existed without connection with the State, and as a voluntary Church accepting as a fundamental principle that of Voluntaryism. A most emphatic declaration in favour of that principle was made as late as the year 1897 in a tract, No. XXV., issued by the United Presbyterian Church. Again I quote Lord Trayner's authority in the Court below. He says that it is not open to doubt "that the United Presbyterian Church throughout the whole period of its existence has repudiated the principle of Establishment and professed instead the principle of Voluntaryism."

Entertaining these different views, the Free Church and the United Presbyterians have taken steps, seemingly correct in form, to become united under the name of the United Free Church. And this union is sought by the majority who support it to be imposed on the minority who object to become members of the new United Church, and to take effect upon property held by the Free Church so as to transfer it to the new body, the United Church.

Apparently it was sought to make the union subject to a reservation, so as to leave an independent and different judgment to members of the two Churches. Clause 3 of the declaration of the United Assembly is as follows:—"As this union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so in particular it is hereby declared that members of

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both Churches, and also of all Churches which in time past have united with either of them, shall have full right, as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches."

But this freedom to differ, whilst admitting the differences, does not lessen or remove them. The United Free Church, as a whole, holds within it neither the principle of Establishment nor of Voluntaryism; such questions were to be open questions. But the man who as a member of the Free Church had accepted the views of a Church which claimed Establishment as one of its fundamental principles may well object when he is told that he shall no longer belong to a Church holding that principle, but that he must, under compulsion, join a Church wherein members of it may think as they will on this broad subject, and must, whether he wishes it or not, be in communion with the supporters of the voluntary system to the same extent as if they had been adherents to the principle of Establishment in accordance with the tenets of the Free Church.

We must recollect that we are dealing with property applied to the use of men in return for services rendered as ministers of the Free Church—to the use of men who have adhered to the tenets of that Church—who have changed nothing, who have varied nothing. From an answer I received from counsel at the bar I learnt that the refusal of these ministers to become members of this mixed body was treated as a matter of discipline, and so the sentence for thus adhering to an old unaltered faith apparently amounts to deprivation.

That this is so seems to proceed from the effect of the Act of 30th October 1900, whereby it was resolved that the whole property of the Free Church should be transferred to and belong to the United Free Church. The assertion that the dissenting minority by so dissenting ceased to be members of the Free Church, and lost and forfeited all their rights and privileges as members thereof, is to be found at statement 15 of the defenders' case. The sentence thus imposed upon the ministers who adhered to their old opinions is somewhat draconic: "They separated and cut themselves off from the said Church," says the statement of the defenders, "and by so doing lost and forfeited all their rights and privileges as members thereof. They do not constitute or represent the Free Church of Scotland, and they have no right or title to any property which belonged to the said Free Church of Scotland. They are not members of the United Free Church of Scotland, and they have no right or title to any property belonging to it."

There are one or two subjects that must be referred to. Lord Trayner in his judgment says,—"But *esto* that the Establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle, and to that extent alter that principle." From this view I differ, because, regarding "essential" as meaning fundamental, I do not think that a Church can change such fundamental principle and yet at the same time preserve its identity. As I understood, it was admitted at the bar this power of change is restricted so as to keep the Church within the limits of identity. The retention of the name does not preserve identity, and yet the change of principles might be so great as to leave nothing but the name of the

Church. I think, too, it was admitted by way of example that if change had introduced the doctrines of the Church of Rome the identity of the Free Church would be lost, and surely this view brings us back to the question whether there has been any change of a fundamental or vital principle of the Church, and to this an answer has been given.

An important document, the Model Trust Deed of November 1844 has also to be dealt with. The respondents naturally rely upon it as shewing that at the very time of the secession it was contemplated that the Free Church might unite with other Churches. I agree that this is so, for the deed sets out a trust in favour of the congregations "of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them, and of such other body or bodies of Christians as the said Free Church may at any time hereafter associate with themselves."

Even if the Model Trust Deed contained no such reference to union with other Churches I should regard the power as existing, for I agree with Lord Young when he says in his judgment that "any two or more Churches may lawfully unite so as to form one Church, and that nothing more is necessary to the union than their own consent, which they are respectively free to give or withhold."

Doubtless that is so in respect of the mere legality of the act of uniting, but different considerations are raised in these suits. We have to deal with the rights of property, with the execution of trusts, and we have to see that the objects the donors had in view are carried out. Such being the case, I do not think that the Model Trust Deed gives greater power of union than the Free Church possessed without it. The Church may unite, and so says the Model Trust Deed, but if property is sought to be transferred to the new body the identity of that new body—that is the Free Church—after the union must be maintained; and nothing in the deed gives a power to unite so as to bring into existence a Church incapable of identity with the Free Church. And if this be so, we are recalled to the consideration of the main question argued in this case.

Great stress was laid at the bar upon the effect of an Act passed in the year 1697 called the Barrier Act.[1] It was argued that this Act conferred legislative powers upon the General Assembly in respect of matters of doctrine or worship, discipline, or government within the Church. I cannot agree in this view. The Act is entitled "An Act anent the method of passing Acts of Assembly of general concern to the Church, and for preventing of innovations." It is a procedure Act regulating the exercise of the existing powers of the Assembly, but conferring no new jurisdiction and increasing no powers. Doubtless the Assembly had before the passing of the Acts certain powers in respect of the matters referred to, and it was thought desirable to enact that such powers should only be exercised after full notice given. That is all the Barrier Act did. Certainly nothing within it gives any power to alter the identity of the Church.

I have not thought it necessary to enter upon any detailed statement of the law affecting the application of property left in trust for a voluntary body such as the Free Church was. It seems enough to say that sufficient

[1] Quoted in Court of Session Report, 4 F. at p. 1089, note.

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guidance on that subject is to be found in the case of *Craigdallie* v. *Aikman*,[1] the decision in which case supplies principles applicable to the present.

I probably have already conveyed to your Lordships the result I have arrived at. After very earnest consideration of the facts before this House, and of the very able arguments presented at the bar, I have come to the conclusion that the appellants are entitled to the judgment of your Lordships. That conclusion is founded upon the grounds I have above referred to. I am thus relieved from dealing with the second ground upon which the union of the Churches is attacked, and I am glad that there is no necessity for me to deal with that interesting but difficult problem presented by the alleged difference of doctrine existing in the two Churches.

I am aware that your Lordships' duty is only to give judgment upon the strict issues raised before you, and that that judgment must lie where it falls; but, even at the risk of exceeding my duty, I venture to express the sincere hope that some way will be found to avoid the capture by either litigants of any spoils of war; and that hope is confident, because I believe that the primary, indeed the only, object of those who have united and those who have dissented has been to promote the interests of the Church, and that equally now will it be their care that the Church as a whole, and the individual members of it, shall in no degree suffer from the events with which your Lordships have had to deal.

Lord Robertson.—In the elaborate arguments submitted to the House many questions have been discussed which involve difficult theological and historical inquiries. I have, as in duty bound, carefully considered those various aspects of the controversy, and I have come to the conclusion that the case admits of decision, and ought to be decided, upon grounds much more palpable and certain.

The question is, to whom does certain property now belong which was given to the denomination of Christians which called itself the Free Church of Scotland? That body was founded in 1843; it consisted of ministers and laity who seceded from the Established Church of Scotland on certain questions of Church polity, but who professed to carry with them all the doctrine and system of the Established Church, only freeing themselves, by secession, from what they regarded as intolerable encroachments by the Law Courts upon the Church's spiritual functions. Rightly or wrongly, the theory of the Free Church was that they, and not the Established Church, were the Church of Scotland.

The Church thus set up was endowed, by the liberality of its members, with the property now in dispute. Two competitors now claim it. Of the respondents, the first remark to be made goes to the very root of their claim. They are not, either in name or composition, the Free Church of Scotland. They are not even the majority of the Free Church, but the assignees of the majority of the Free Church; they are a body formed in 1900 by the fusion of the majority of the Free Church with another body of Presbyterian Dissenters, the United Presbyterian Church. The property of the Free Church is claimed by this composite body, which, to the extent

[1] 1 Dow, 1, 2 Bligh, 529, 6 Paton, 618.

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of a third or some large proportion (for the particulars are not before us and are unimportant), is composed of United Presbyterians. Of this new body it may be affirmed nearly as truly that it is United Presbyterian as that it is Free Church, and its name, the "United Free Church," suggests the fact.

Now I do not attach conclusive importance to the name; but it is important and still more significant. In any view, the change of name and the fact of fusion put it on the respondents to prove their identity with the original beneficiaries. They have to do this, too, not in a question with the heirs-at-law of the founders, but in competition with an existing body of ministers and members of the original Free Church, who have simply stayed where they were, and about whose pedigree there is no dubiety.

For reasons to be afterwards stated, it is not too lightly to be assumed that such unions are within the competency of any majority, however large, even if there existed no essential differences between the uniting bodies. The present, however, is not a case in which (as in some instances, which will presently be examined in detail) the Free Church has absorbed smaller Presbyterian bodies holding all her own pristine principles, and has done so without any change of her name or formularies. The United Presbyterian Church treated with and joined the Free Church not only formally, but in fact, on at least equal terms. The two bodies which met to consummate the union enacted and declared that the Free Church and the United Presbyterian Church "do and shall henceforth constitute one united Church, that the name of the united Church shall be the United Free Church of Scotland, and that its supreme Court shall be designated the General Assembly of the United Free Church of Scotland." From these proceedings it resulted that, so far as the respondents were concerned, the Free Church judicatories ceased to exist, their place being taken by Kirk-Sessions, Presbyteries, Synods, and General Assemblies of the new Church, composed in part of gentlemen who formerly were United Presbyterians, and in part of gentlemen who formerly were Free Churchmen.

On 30th October 1900, the General Assembly of the Free Church made over the whole property of the Free Church to the United Free Church. On the following day, 31st October 1900, the General Assembly of the new Church proceeded to set up a new formulary for the admission of their preachers, which had been preconcerted and made matter of treaty. Whereas a probationer of the Free Church used to be required to affirm his belief that "The whole doctrine of 'the Confession of Faith' is the truths of God," the United Free Church probationer requires to affirm his belief in "the doctrine of this Church" (*i.e.*, the United Free Church), "set forth in the Confession of Faith." (The elasticity of "the doctrine of the United Free Church," which is thus made the object of belief, is ascertained by the fact that the various matters of agreement between the Churches with a view to union were declared by the United Assembly to be "accepted and enacted without prejudice to the inherent liberty of the United Church as a Church of Christ to determine and regulate its own constitution and laws as duty may require in dependence on the grace of God and under the guidance of His Holy Word.") The United Free Church probationer has also to affirm the general principles of the (United Presbyterian) "Basis of

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Union, 1847," as well as those of the (Free Church) "Claim of Right of 1842," to be principles sanctioned by the Word of God and the subordinate standards of the Church. I do not at present comment on the importance of such changes, but note them as shewing that the constitution of the new Church is a new constitution enacted by the new and composite body, and adapted to the exigencies of the United Presbyterians.

Another matter of salient importance demands attention. One of the recitals in the Act of General Assembly of the Free Church by which they authorised the union is that, "the committees of the two Churches having met and communicated to one another the existing doctrinal standards, rules, and methods of the two Churches, it appeared that in regard to doctrine, government, discipline, and worship therein set forth a remarkable and happy agreement obtained between them, and also in particular in the views of the two Churches in respect to the spirituality and freedom of the Church of Christ—her subjection to Him as her only Head and to His Word as her supreme standard, and that an incorporating union might harmoniously be accomplished." There is no profession of identity, but of an "agreement" having been "obtained," which is described as "remarkable." Now the steps and stages of these long negotiations are before the House, and from these it appears that on this question of Establishment there were in 1863 and in 1867 sharp differences. The tenets of the two bodies are printed in parallel columns in the printed papers, and I am going shortly to refer to them.

Nothing before the House shews or suggests that the United Presbyterians departed by an iota from their own doctrine. On the other hand, there is no avowal by the Free Church that she departed from the position formulated in the parallel columns. What was done was simply to drop the subject and unite.

While such is the name and such the composition of the respondents' body, the position of the other competitor, the appellants, is very much simpler. They are those ministers and laity of the Free Church who did not concur in the union of 1900, but protested against it; they have done nothing but remain where they were, holding to the letter all the doctrines of the Free Church, adhering to it as an institute, and continuing its existence according to the measure of their powers. They say that in the event which has happened they are the Free Church—their brethren having left them for this new Church—just as those brethren might have left them for the Establishment or for the Episcopalians. They have, however, been declared by the respondents no longer to be of their communion, and their manses and churches have been formally claimed by the respondents for their own exclusive use. The adherents of the appellants are numerically few—some few thousands—but it has not been suggested that this introduces any legal difference from the situation as it would have been had they been more numerous. Since the days of Cyrus it has been held that justice is done by giving people, not what fits them, but what belongs to them.

Such being, in sketch, the relative positions of the two claimants to this property, it is plain that the respondents can only succeed by making out that it was an inherent quality of that Free Church to which this property

was given that it could transform itself in the way that I have described, and oust from the property those who desire to remain where they were, in principle, doctrine, and organisation. For let it not be forgotten that the contention of the respondents necessarily involves that the majority is entitled, not merely themselves to retain the property, but (1) to introduce the United Presbyterians as beneficiaries, and (2) to oust the dissentient minority from the benefits of the foundation. This is why I protested at the outset against the too ready acceptance of the doctrine that "union" is competent to a majority.

In considering this contention, I steady myself by dwelling on an observation very frequently repeated by the Dean of Faculty in his able speech for the respondents. "This case," said the Dean, "differs from all previous cases in the same region of law in this—this is a gift to a Church," not to a congregation, nor for the promotion of certain doctrines, but to a Church named and designated. I think there is great force in this, but in another way from that intended. This property was given to the Free Church, an existing Church, complete within itself as an ecclesiastical organism and separate from other Churches. This becomes extremely clear when it is remembered that there were already existing, at the moment of the Disruption, the two dissenting Presbyterian bodies which now form this very United Presbyterian Church, and that the incorporation of those two into the United Presbyterian Church took place in 1847, during those early years of the Free Church when this property was being accumulated. Those dissenting bodies were, so far as worship, doctrine, discipline, and government were disclosed in their standards, exactly the same as the Free Church which was set up side by side with them. Accordingly, even if we knew nothing to corroborate the inference which this gives rise to, the broad fact is that the Free Church was set up as an independent Church separate from those with whom the recent union has now been effected. Therefore, with the Dean of Faculty, I say this property was given to a particular Church, and it is very difficult to see that it will do to end that Church, and then, picking up most of her doctrines, come forward to claim that United Presbyterian and Free Church alike shall share as members of a body which is not even called the Free Church.

When the history of the foundation of the Free Church is more closely examined, we see that it was not fortuitously or from mere love of separation that the Free Church was founded and endowed as a Church separate from the two confluents of the United Presbyterian Church.

Those existing dissenting bodies held opinions about Church government and Church and State which were inherited and carried forward by the United Presbyterian Church; and in 1843 they, as after 1847 their successor the United Presbyterian Church, were the exponents in Scotland of voluntary principles. By this, as it ought to be unnecessary to say, I mean, not merely that in fact they were not endowed by the State, but that they were opposed on principle to the endowment of religion by the State. It is honourable to the United Presbyterian Church that, in good times and in bad, it has never used ambiguous language or nicely balanced phrases about this matter, and has never sailed under false colours. All through the negotiations with the Free Church, as before them, it was strenuous and

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busy in "diffusing a knowledge of the voluntary principles of the Church"; it year by year upheld "the Church's testimony on the proper relations of Church and State, and in favour of religious equality by disestablishment and disendowment," and "renewed the testimony of 1847, constantly maintained 'That it is not within the province of civil government to provide for the religious instruction of the subject.'"

In order, once for all, to ascertain precisely the true position of the United Presbyterian Church upon these subjects, it is convenient to read the statement of their distinctive principles made by their committee when negotiating for union with the Free Church in 1867; and the passage has a special value, because, in the circumstances, it was not likely to contain overstatements on controversial points. It stands out also as a landmark, because it has never to this day been abandoned by the United Presbyterian Church, either before, in, or after their union with the Free Church. Here is what is said: "That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources; that Jesus Christ, as sole King and Head of His Church, has enjoined upon His people to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ, it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to civil establishments of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these constitutions."

All of this declaration is very clear, but the closing sentence has a special significance in regard to the whole of the present case. On paper, the United Presbyterian Church held just the same general doctrines as the other Presbyterian Churches; like them, she held the Scriptures to be the only rule of faith; as with them, so with her, the Westminster Confession and Catechisms were her Confession and Catechism. None of her formularies made mention of Voluntaryism or exacted the profession of that principle from her office-bearers or members. The learned Judges whose decision is now under review would, I suppose, have thought that this fact removed all ground of division between the voluntary bodies and the Free Church bodies in 1843. But the founders of the Free Church were not content with these criteria of the distinctive notes or testimonies of a Church, and they declined to coalesce with the Voluntaries, although Voluntaryism was not then, any more than now, a term of communion in those bodies. "The Affectionate Representation of the Free Church of Scotland, 1843," is conclusive on this point, and it has a peculiarly direct authority and relevance in the present controversy. It has been called, and I think accurately, "the prospectus" of the new Church, and it states the grounds and principles on which support was asked for it. Now, this manifesto or prospectus discusses this very question of the proper relations of the Free Church to the Dissenters, who now form the United Presbyterian Church. The manifesto seems to anticipate the not unnatural objection to the formation of a new Church, that here were existing orthodox Presbyterian

Churches—why not join them? The answer is conclusive. That would be against our principles. And in two very eloquent pages—for the writer was Dr Chalmers—the Establishment principle is urged upon those addressed, in the most peremptory terms, as being still binding on them as "a doctrine or article of faith"—the Voluntaries are warned that they mistook the Free Church if they conceived them to be Voluntaries; and it is emphatically asserted for the Free Church that, "though we quit the Establishment we go out on the Establishment principle; we quit a vitiated Establishment, but would rejoice in returning to a pure one." The same attitude is politely but firmly expressed in the General Assembly's replies to the various bodies of Voluntaries who addressed the Free Church with congratulations at the time of the disruption. They are all asked not to mistake the Free Church for Voluntaries.

The conclusion which I draw from all this is that it was of the essence of the foundation to which this property belongs that it should be a Church separate from Voluntary Dissenters. On broader grounds, though closely connected, it is difficult to see how the pretensions of the Free Church, such as they were, could have been embodied in anything but a Church of her own. Her theory was that she was, amid right-hand and left-hand defections, the Church of Scotland—the Church of the first and the second Reformations—the burning bush, never consumed. With all Presbyterians, this is a noble claim to allegiance; nor was it the less inspiring in 1843, because the Church had been (as she held) unjustly deprived of the benefits of Establishment, and her loyalty to the principle of national religion was proving itself to be of the sort that is true although it be not shone upon.

Now, in dealing with the question before your Lordships' House, it is necessary from the outset to bear firmly in mind that the Establishment principle can be held by Churches that, in fact, are unconnected with the *State*, and are, in fact, supported by voluntary contributions alone. I should have thought this the necessary hypothesis of the whole question, as we have to do with a dissenting Church; but in two passages of the learned Judges' opinions, afterwards to be adverted to, this seems to be forgotten.

Again, the intrinsic importance of any particular doctrine in relation to the general body of Christian teaching is no criterion of whether it is or is not an essential or fundamental doctrine in a particular Church, and least of all in Scotland. It is not its own importance, but the place assigned to it in the foundation of the new Church that has got to be ascertained. I dwell on this for a moment, and illustrate it from the case in hand. Whether the Establishment principle is or is not a fundamental doctrine of the Free Church is the dispute in this case; but there is no doubt at all that the claim of the Free Church as against the Law Courts (I put it shortly) is of the essence of her foundation. This question is settled, not because the Judges or your Lordships so appraise that doctrine, in comparison with all the various doctrines of faith and morals set out in the Confession of Faith, but because that was the undoubted ground on which the new Church was set up. Now, I observe in Lord Low's very able judgment that he makes much of the fact that here were two Churches identical in doctrine, worship, and form of government, and they were working together in the same field, so that their agencies overlapped and their efforts were to some extent

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wasted. And his Lordship goes on to speak of the duty of unity among Christians.

This is all very true; but then these considerations were full in view of the founders of the Free Church. This is not a case where the new Church was set up in Scotland to preach the Gospel to people who were not within reach of the common doctrines of Christianity, or even of Calvinistic Christianity. In the theory of the founders of the Free Church, it was intolerable that their adherents, although agreeing in all other matters, should continue to worship along with those who were content that the Court of Session should force the Presbytery to ordain the patron's presentee and do all the various things which led to the Disruption. In fact, again, they set up their churches side by side with those of the other Presbyterian bodies who also held exactly the same doctrinal standards. And the evil consequences of having two separate churches instead of one, which Lord Low adverts to, being palpable and flagrant, then as now, the just inference seems to be that the founders of the Free Church deemed the difference between themselves and the Voluntaries so vital that the duty of Christian unity must give way to the more imperious duty of Christian fidelity to truth. In the same fashion the older secessions had taken place on questions not about any of the doctrines of personal religion or of theology, but about Church polity. Questions of polity had, in short, been in Scotland often made the causes of separation between Churches, and in 1843 this unquestionably was again the case. The only question is, Was the doctrine of polity on which the Free Church was founded solely what was called spiritual independence, or did it not also comprehend the Establishment principle?

I am, of course, not to be understood as speaking in praise of separation (or of any doctrine on one side or another of this dispute), but no one will understand the present case unless he receives into his mind the possibility of people valuing separation as a safeguard for doctrines which they hold intensely, and as to which they know that the surrounding world is indifferent or hostile. And the error of the respondents seems to me to be that, shutting their eyes to the extremely special and limited *raison d'être* of the Free Church, and contemplating themselves as a Christian Church, they measure the importance of any doctrine in relation to Christianity as a whole, and not with reference to their own distinctive origin.

Another fallacy must be guarded against. To prove that spiritual independence is more important than the Establishment principle is only to prove that the latter is in importance subordinate to the former; but it does not entitle us to call the Establishment principle a principle of subordinate importance. The true question, as I view the matter, is whether the two doctrines (spiritual independence and Establishment) have not been made by the founders of the Free Church complementary parts of one doctrine.

The instrument of the highest and most direct authority, as evidencing the position of the Free Church, is the Protest of 1843. It was by Act of Assembly enjoined on the Presbyteries to record this Protest, together with the Act of Separation and Deed of Demission, at the beginning of their presbytery books as the ground and warrant of their proceedings. The

Protest seems to me, on the face of it, amply to support the "Affectionate Representation" (already referred to) in the assertion that "we come out on the Establishment principle." The Protest is that it shall be lawful to them, in the circumstances in which they are placed, to withdraw from the existing Establishment (as if this act required defence); but they make this protest "while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's providence be offered, to secure the performance of this duty agreeably to the Scriptures," and so on. Your Lordships have doubtless read the document as a whole, and there is nothing in the context which detracts from the significant and solemn emphasis of what I have quoted. They had come to the conclusion that, in the circumstances in which they found themselves, "a Free Assembly of the Church of Scotland as by law established cannot at this time be holden," and therefore, and therefore only, they came out.

The Claim, Declaration, and Protest of 1842 is referred to in the Protest of 1843 as setting forth the true constitution of the Church. Now, Lord Low, admitting that in this document also the Establishment principle is affirmed, remarks that it is "in a parenthetical way." The simple explanation of the form of the sentence, and of the lesser saliency of the position assigned to that principle in this paper, is that it is a manifesto from and by an Established Church. The motive of the paper is to protest against interference with the judicatories of that Church. Accordingly, *the* hypothesis is that Establishment as a principle requires no vindication *or* assertion; and it in fact only enters the argument when the loss of Establishment is referred to as one of the national dangers impending. But the references in this connection are of unmistakable import.

The unqualified language of the Protest of 1843, the document which, as we have seen, each presbytery was to take as the warrant of its proceedings, stands witness, therefore, of the distinctive principles of the Free Church. I have already spoken of the Affectionate Representation of 1843 as the manifesto on which endowment was invited; and these two historical papers are those which bear most directly on the question, What are the trusts of this foundation?

There are a number of authoritative documents of the General Assembly in following years, and having examined them all I find them all to bear out the statements made to the public in the Affectionate Representation. The degree of prominence attached to the one or the other of the Church's doctrines of course depends on the occasion of the pronouncement, and it would be unfair to isolate any statement from its motive and context. I shall mention three utterances as instructive in more ways than one, especially as the first of these is founded on by the respondents.

In 1851 (the matter in hand rendering this appropriate) it is spiritual independence that is put into the "parenthesis" and the Establishment principle that is substantively asserted. "While this Church has ever held that she possesses an independent and exclusive jurisdiction or power in all ecclesiastical matters," and so on, "she has at the same time always strenuously advocated the doctrine taught in Holy Scripture, that nations and

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their rulers are bound to own the truth of God and to advance the Kingdom of His Son." The Assembly goes on, in a historical review of Scottish history, to illustrate how this had been done and how it had not been done, the first instances approved being the statutes establishing the Church in 1567 and 1592. Now, in this paper there occurs a passage which has been founded on by the respondents in which the Assembly says that "it is her being free and not her being established that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland." Of course it is not the fact of her being established that constitutes the identity, or the Free Church claim would be impossible. But I entirely fail to see what this has to say to the principle of Establishment. This argument of the respondents is merely another instance of the recurring fallacy which confuses the fact of a Church being established with the holding by a Church of the Establishment principle.

The "Act VII. 1853" is "anent the principles of the Church"; it is short and unequivocal, and it contains an authoritative exposition or gloss of the Claim, Declaration, and Protest of 1842 and the Protest of 1843. It "declares that this Church maintains unaltered and uncompromised the principles set forth in the Claim, Declaration, and Protest of 1842 and the Protest of 1843 relative to the lawfulness and obligation of a scriptural alliance between the Church of Christ and the State." It will be remembered that in the Protest the protestors reserved to themselves and their successors "to strive by all lawful means to secure the performance of the duty of the State to support an Establishment of religion in accordance with God's Word." So now the General Assembly goes on to explain that there is not, in 1853, any "present call" to take steps in that direction. This, the return to a purified Establishment, was the only "union" ever thought of by the old Free Church.

The only other Act of Assembly of the Free Church to which I need refer is that of 1873, in which, in full view of the United Presbyterians—for the Act relates to the mutual eligibility of their ministers—the Assembly "declare their adherence to the great fundamental principles of this Church, regarding, first, the sole and supreme authority of the Lord Jesus Christ" (I need not quote this in full—it is the doctrine of spiritual independence); and, secondly, "the prerogative of the Lord Jesus Christ as head over all things to His Church and supreme over nations and their rulers, who are consequently bound collectively and officially as well as individually and personally to own and honour His authority, to further the interests of His holy religion, and to accept the guidance of His Word as making known His mind and will." We are now, in 1873, entering the zone of negotiation, and the language is becoming a little general; but the important thing is that the doctrine about the State, whatever it was, is put abreast of the doctrine about spiritual independence, the two being declared "great fundamental principles of this Church." And what the second of these doctrines was in 1843 is not in doubt.

What has now been said relates to authoritative declarations of the Free Church herself; and now a word must be said of her inherited standards. I shall put the argument very low indeed when I say that the Confession of Faith, on the face of it, is consistent with the high place given by the

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Disruption leaders to the Establishment principle. It is quite certain that the Confession of Faith is inexorably opposed to the theory of religious equality, which is, as we have seen, to this day avowed by the United Presbyterians, who now form part of the respondents' Church. The notion that the State is to stand neutral between good religions and bad, which is what is meant by religious equality, is diametrically opposed to the whole teaching of John Knox. Upon this subject, and on this occasion, I cannot do better than quote from one of the Disruption leaders themselves, the historian of "The Ten Years' Conflict" (1876 edition, pp. 39 and 41 of vol. i.). "Knox," says Dr Robert Buchanan, "and his enlightened and able associates were clear and decided about these two things: first, that no State can, without grievous sin, lend its countenance to the Roman Antichrist or to any false religion whatever; and, second, that every State is bound to embrace, acknowledge, and encourage the true religion." "In Scotland, as everywhere else, at the period of the Reformation, the duty of the State to own and uphold the true religion was looked upon as a first principle, which did not require and hardly admitted of discussion." To those who realise the high theocratic views of the sixteenth and seventeenth centuries in Scotland, it is easy to understand that the autonomy of God's Church and the duty of the State to support it were but two essential parts of the one great conception of a Christian nation. And this is in truth the clue to the Disruption documents.

On the specific question about the 23d chapter of the Confession of Faith, I own that I read with some surprise that doubts had been entertained by learned Judges as to the effect of the words that it is the duty of the civil magistrate to "take order that" "the ordinances of God" be "duly settled, administered, and observed." I must still take leave to think that those words do describe what we call Establishment; and I observe that in the *Campbelton Case*,[1] where these observations were made, the question before the Court was State endowment, which is a different thing.

On all the grounds which I have stated, I come to the conclusion that the doctrine of Establishment was one of the distinctive and fundamental doctrines of the Free Church.

I shall now mention one or two points in the judgments in the Court of Session, so far as relating to that question, which demand attention. Lord Trayner, whose judgment is most clear, has stated a very curious objection to the likelihood of the Establishment principle being a fundamental doctrine of a Church. His Lordship finds it "difficult to hold that a mere opinion as to what some third person was bound to do, which he might neglect or refuse to do, and which the Church could not compel him to do, could in any way be an essential part of the constitution of the Church which held that opinion." This difficulty really arises out of the time-honoured personification of the State as the civil magistrate. It would certainly not have been admitted by John Knox, even when Queen Mary represented the civil magistrate. And in these latter days of popular power the civil magistrate sits in every pew, and his religious duty may be preached from every pulpit.

[1] Galbraith v. Smith, 1837, 15 S. 808; 1843, 5 D. 665.

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Again, Lord Trayner thinks that "the history of the Free Church shews that as a Church, apart from the opinions of individual members, it did not regard the Establishment principle as one of its fundamental principles." I pause to observe that I have founded in no instance on the opinion of individual members, but on the collective and official declarations of the Church. Now, his Lordship's first point is, "It was from the commencement and down to the date of its union a Church conducted and maintained in point of fact according to the voluntary principle. If in theory it was something else, the theory did not square with the fact." This comes to no more than that the Free Church had not, in fact, State endowment, which is the hypothesis, without which no question could arise. His Lordship's next point is that the Free Church not only did nothing to give effect to the Establishment principle, but, on the contrary, devoted much of its time and energy to bring about, if it could, the disestablishment of the Church of Scotland. Now, this agitation took place only in the later and, as the appellants would say, the backsliding days, when union with the Voluntaries also came in view. The important correction to be made is that nothing of this kind took place in times which in any possible view can be looked to as evidencing the principles of the Church set up in 1843, and, therefore, as fixing the score of this foundation.

I find in Lord Trayner's judgment an antithesis set up between matter of faith (and sometimes the Latin equivalent is used) and matter of polity. This can only be important if what is matter of polity, as distinguished from matter of faith, cannot be made by a Church one of its distinctive and fundamental doctrines in the sense of this controversy. I have already given my reasons for thinking this untenable, and the distinction, therefore, inconclusive.

The Lord Justice-Clerk attaches very great, and Lord Trayner great, importance to the decision in the *Campbelton*[1] case, to which I have already alluded. Now, that decision was that the principle of State endowment was not an essential or fundamental doctrine of a particular congregation in Campbelton. It was not a Free Church congregation at all, and the question arose before 1843. The Judges thought that its mere adherence to the Confession of Faith did not pledge that congregation to the doctrine of State endowment. But what in my judgment ties the Free Church to the doctrine now in question is a series of acts with which the Campbelton congregation had nothing to do, and the doctrine is State Establishment.

I must add that the grounds upon which the Lord Justice-Clerk comes to the conclusion that the principle of Establishment was in the early days of the Free Church treated as "subordinate" do not seem very cogent. In the first place he quotes, as proving the doctrine of "the early days," two documents which belong to the later days, 1871 and 1873, and must be read in the light of their dates. But, further, to say that in 1843 the "principle" of Establishment was "repudiated" is to ignore the whole theory of the appellants' case and the argument it gives rise to.

Lord Low decided the case on the ground that the Establishment prin-

[1] 15 S. 808, 5 D. 665.

ciple was not so essential that the General Assembly could not depart from it. He expresses a cautious and guarded view as to its power to deal with what he deems more essential doctrines. The Lord Justice-Clerk seems to take much the same view, but he rates very high the "legislative" power of the Church. Lord Trayner, however, takes a much bolder position: "*Esto* that the Establishment principle had been explicitly declared in 1843 to be an essential principle of the Free Church, I think the Church had the power to abandon that principle, and to that extent alter the original constitution." Lord Trayner's view was argued at your Lordships' bar with great vigour and confidence.

Before proceeding to consider this argument, I ought to point out that the judgment of Lord Young is wholly rested upon the ground, stated in very sweeping terms, that there is nothing to prevent a dissenting Church from abandoning a religious doctrine, however essential and fundamental, and that an *ex facie* absolute property title cannot be limited by reference, not expressed, to "the essential doctrines and fundamental principles in the constitution of the Church." It is unnecessary to say more of this ground of judgment than that it is in flat contradiction of the decision of your Lordships' House in the case of *Craigdallie*.[1]

The more plausible theory of the respondents is that there are to be found inherent in the Free Church some extremely elastic powers of altering her constitution. Those powers, it is said, were as much a quality of the Free Church when it received the endowments now in dispute as the doctrine of Establishment, and any one giving to the Church gave on that footing. *This* must mean, if it has any effect on the present controversy, that such *alterations* may be made by a majority of the General Assembly with the consent of a majority of presbyteries. The extent of the powers so claimed is shewn by the respondents' counsel having avowed that they held that the Free Church could do away with the Confession of Faith as one of her standards; and Lord Trayner is not prepared to say that the doctrine of the Divinity of Christ does not stand in the same precarious position.

I shall state in advance the answers to this view, and then examine the opinions of the Court in a little more detail.

First, the learned Judges have greatly overrated the "legislative" power of the Church, misled by what I think an erroneous construction of the Barrier Act. Second, putting this legislative power as high as you choose, it is a power affecting the internal affairs of the Church, and has no relation at all, and for historical reasons could not have, to such operations as this union of 1900. Third, the Lord Justice-Clerk has been completely misinformed as to the tenets of the three dissenting bodies whose unions with the Church of Scotland in 1839, and the Free Church in 1853 and 1876, his Lordship regards as precedents; and this error brings to the ground the argument from actual practice.

The main ground of the respondents' argument is the Barrier Act of 1697. It is an Act of the General Assembly, and Lord Trayner says that it "confers" on the Assembly a certain legislative power. Now, if the Barrier Act be examined it will be seen that it does not "confer" or purport to "con-

[1] 1 Dow, 1, 2 Bli. 529, 6 Pat. App. 618.

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fer" any legislative power. What it does is, it imposes certain checks on sudden alterations or innovations in doctrine, worship, discipline, or government. The respondents' argument is that this implies that the General Assembly has unlimited power of legislation in the matters named. I do not think this a legitimate deduction. The Act, on the contrary, rather hints that some recent Acts had been of questionable legality, or at least had not commanded "exact obedience." It names doctrine, worship, discipline, and government, not as being the ambit of the Assembly's power, but as the regions of apprehended attack. When all this is read in the light of contemporary history, the motive of the Barrier Act is obvious as a desire to ward off incursions of the Episcopalians. And I do not think that at the very most it comes to more than furnishing some evidence that the General Assembly either had been dealing, or might be induced to deal, with those high matters. The respondents' argument incidentally called attention to a prior Act of Assembly about innovations, which is instructive in the same direction. For this Act, August 6, 1641, forbids novation in doctrine to be brought in or practised in the Kirk unless it be first propounded, examined, and allowed in the General Assembly. The inference from this, if the respondents' argument were applied to it, must be that, according to use, novations in doctrine had formerly been brought in by the inferior Courts or officers of the Church, and that this was the law.

But on the question of historical fact there is no need to rely on the implications (for they are no more) of one Act of Assembly. Where is the Act—where are the Acts—which evidence the actual exercise of those powers? The respondents' appeal to the Act of 1560, adopting Knox's Confession of Faith, entirely fails them. It was adopted by the Estates, as Mr Taylor Innes very justly observes in a passage which appears in the first, though not in the second edition of his admirable work on Creeds. "Nothing," he says, "can be clearer than that the doctrine was not adopted in any way upon the authority of the new-born or Reformed Church; all the forms of free and deliberate voting of the doctrine as truth, as the creed of the Estates, not of the Church, were gone through." Of the other most extreme instances of independent action which were cited, it may be observed that the Book of Discipline was not an alteration of an existing creed, except to the indirect extent to which an added standard usually affects the authority of the old, even if (as here) both old and new were consentaneous; that the adoption of the Covenant was a revolutionary act in a revolutionary time; that the Westminster Confession of Faith, while it was adopted by the General Assembly (with certain qualifications), was the offspring of parliamentary action, initiated before the General Assembly took it up. Of the two modern instances, the Chapel Act and the Veto Act, the Chapel Act was held by its authors to be so clearly declaratory that it was not sent down to presbyteries under the Barrier Act, and the whole theory of the Free Church party was that neither Act was an alteration of the constitution of the Church, so much so that the Assembly hesitated before sending the Veto Act to the presbyteries.

The case of the respondents, therefore, on the Barrier Act does not stand the test of examination, and does not support their theory that, in giving to the Free Church, the pious founders of the Free Church were knowingly

giving to a Church one of whose inherent qualities was that she could alter her essential principles. Neither history nor law make this out.

The House is in a much better position to deal with this question after the rehearing than before it, because of the complete presentation in print of the historical documents relied on. In my own case, a very careful study of those papers has largely increased my confidence in rejecting the respondents' argument. I find nothing from beginning to end which supports the theory that the Church of Scotland exercised or claimed the right to alter doctrines which she had asserted to be scriptural. (I am not now, of course, speaking of the doctrine of Establishment, which is in dispute, but of doctrine generally, and more especially of the Confession of Faith.)

Amid the mass of documents the Second Book of Discipline has been confidently relied on by the respondents. Conceding, as I think is their right, that this book was an adopted standard of the Free Church, I fail to discover in it any help in their present trouble. That it stood them in good stead about non-intrusion is certain, but this is not *hujus loci*. What strikes any one who reads the book through is that it is not, and does not purport to be, a picture of an existing institution, and even as an ideal it is vague. As matter of fact, it was promulgated before the system of Presbyterian government had been systematised and set up in Scotland. It is not surprising, therefore, that beyond negativing the theory of Episcopacy it contains no recognisable description of the Scotch Presbyterian Kirk as an ecclesiastical organism, and more particularly it never confronts the question with which your Lordships have to deal, namely, what control has that ecclesiastical organism, even when taken as a whole (and still less when examined in its parts), over her doctrine? The truth is that here, as throughout the case, the respondents mistake the emphatic denial of the right of the State to meddle with those matters for an assertion of the right of the Church to absolute power over her own declared doctrine. The passage mainly relied on (Chapter VII., head 8) proves too much, for it applies to all the four kinds of Assemblies; but, on the face of it, it deals with ordinances depending for their utility on circumstances of time and place, and this cannot possibly include doctrine. The only hint or reference to the subject of doctrine in relation to a judicatory (in VII., 25) would rather imply that œcumenical councils are the bodies to declare doctrine; but this is not clear, and it is enough to say that the subject now before us is not dealt with in relation to the Scotch Kirk.

One admitted fact, indeed, in what may be called the consuetudinary law or common law of the Established Church and the Free Church, directly negatives this theory of the unrestricted command of the Church over her creeds. The General Assembly itself is made up of Commissioners, and each commission is in writing. By immemorial custom, this commission bears that the Commissioners are to repair to the Assembly "and there to consult, vote, and determine, in all matters that come before them, to the Glory of God and the good of the Church according to the Word of God, the Confession of Faith, and agreeably to the constitution of the Church, as they shall be answerable." Now I must own my inability to see how it would fall within this mandate to do away with, or help to do away with, the Confession of Faith as a standard of the Free Church; and I mention

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this as testing the argument for the unlimited power of the General Assembly under the Barrier Act.

It has, indeed, been attempted to use one remark of Lord Cranworth in *Forbes* v. *Eden*[1] as implying that in all Churches there is a legislative power. The case was that of a specific change in one of the canons of the Scottish Episcopal Church made by the Synod of that body, and I do not think it was laid down as law that powers of legislation are necessarily inherent in every dissenting body, this being in each case really a question of fact. But Lord Cranworth's remarks make perfectly clear that what he is speaking of is entirely internal regulation, and it is here that the whole argument of the respondents about legislation falls short of the required conclusion.

To revert to the Presbyterian Church of Scotland. It may be a merit or a demerit, but the original and historical theory of the Reformed Church of Scotland was that within and not outside her pale was truth to be found. Without were Prelatists and Papists. When, later on, some Presbyterians had held aloof from the Revolution settlement, and, still later, others had made the several secessions of the eighteenth century, their attitude and the attitude of their parent Church never raised the question of comprehension, the seceders in more than one instance having been deposed. The single instance which we referred to in pre-disruption days of a dissenting body coming back into the Church was the return of the Associate Synod in 1839, and it is enough to say that while the Act of Assembly is called "Act anent Reunion with Seceders," each office-bearer of the Associate Synod was required, before taking his seat as a member of presbytery, to subscribe the Westminster Confession of Faith and the formula of the Church of Scotland; and this being done they were "received," and were declared to enjoy all the rights and privileges of ordained ministers and elders of the Church of Scotland. In passing, it may be noticed that one of the recitals in the Act is, "whereas the members of the Associate Synod do heartily concur with us in holding the great principle of an ecclesiastical establishment and the duty of acknowledging God in our national as well as our individual capacity." The only reservation made by the returning dissenters was "reserving only to themselves the right which the members of the Established Church enjoy, of endeavouring to correct in a lawful manner what may appear to them to be faulty in its constitution and government." If it had been desired to furnish an illustration of a contrast to the union now in question, it would have been difficult to picture one more complete than the one thus supplied by history.

The second case of "union" is that of the Original United Seceders, another of the bodies who held by the covenanting traditions. They, in 1852, had come to be satisfied that "we may, with honour and consistency, drop our position of secession and maintain our principles in communion with the Church of Scotland," *i.e.*, the Free Church. Accordingly they were "received and admitted" by the Free Church "as pastors, congregations, and kirk-sessions of the Free Church of Scotland."

The other case of union took place in 1876, also in the days of the Free Church. It is founded upon by the Lord Justice-Clerk in his judgment

[1] April 11, 1867, 5 Macph. (H. L.) 36.

under a misapprehension, which unfortunately enters pretty deeply into his Lordship's judgment. The Lord Justice-Clerk says of the Reformed Presbyterian Church that it "certainly did not hold the Establishment principle"; and for this surprising statement he gives as his reason that since 1689 they declined to become members of the Church of Scotland as established, abode by their objections to the Revolution settlement, and did not "commit" themselves "to an approval of an alliance of the Church with the British State as at present constituted, having in view especially the unscriptural character of its ecclesiastical relations." Now, so far from the Reformed Presbyterians not holding the Establishment principle, they were the ecclesiastical heirs of the Covenanters, who held it passionately, and they represented the extreme right in Presbyterian orthodoxy. But they washed their hands of the Revolution settlement, because the same State which established the Presbyterian Church in Scotland ignored the "second Reformation," and established in England the Prelatical Church, against which woe had never ceased to be denounced by the Church of the second Reformation. Accordingly, the attitude of the Reformed Presbyterians on the Establishment question was exactly analogous to that of the Free Church—holding the Establishment principle, they held aloof from the existing Establishment because, as they held, constituted on wrong terms. The statement of the Lord Justice-Clerk, therefore, can only be supported if his Lordship means that men do not hold the Establishment principle if they decline to join the Establishment as constituted at the time. And if this be sound, it furnishes (as already pointed out) a very simple end of the present case.

The net result, then, of the history of these unions is this, and nothing more, that where the General Assembly have been satisfied about Presbyterian bodies that they held the same standards as themselves, and were sound on the Establishment principle, those bodies have been admitted with full honours.

I have hitherto discussed the case relating to the general property of the Free Church, and I have come to the conclusion that the appellants are entitled to prevail. The other action only differs because of the Model Trust Deed. Of it I have only to say that it is, and was treated in its inception as, a conveyancer's instrument; that its clauses about union seem to me to apply necessarily only to such unions as were competent to the Free Church; and that they are entirely satisfied, and were probably suggested, by such cases as had occurred. It is not in such a deed that you can look for constitutional changes, or for new powers not hitherto possessed.

Regarding the whole of the property now in dispute, I cannot see how, in law or in fairness, a majority of the men who acquired it on the representations made in the Affectionate Representation could have been allowed, say in 1850, to carry off the property to the Voluntaries and come forward, arm in arm with the Voluntaries, and claim it for the fused body. And after all the argument we have heard, I have discovered no reason which makes that fair and lawful in 1900 which would not have been so fifty years earlier.

A serious and weighty argument was adressed to your Lordships on both sides of the bar relating to the Confession of Faith. That argument treated of two separate matters which in my judgment must be separately considered.

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The first is whether the respondents have not deposed the Confession of Faith from its place of authority as a standard of the Church, and whether this of itself does not take them outside the trusts under which the property is held. The second and quite separate question is whether on one specific doctrine, namely, Predestination, the new formulary is not contradictory of the Confession of Faith.

On the former of these questions my judgment is in favour of the appellants. First of all, I put aside any confusion which may arise from the substitution of the Westminster Confession for John Knox's Confession. It is with the Westminster Confession that we have to do, and it seems to me that if anything is certain, it is that the Free Church was pledged to the doctrine of the Westminster Confession as her doctrine and the doctrine of her office-bearers. Through all her history, and at every crisis of her history, assuming her identity with the historical Church of Scotland, she proclaimed this on the house-tops and in the most solemn and deliberate of her testimonies. Freed from State interference in 1843, she proceeded to fasten on herself the old obligations. Of her rights in judicial cases to construe the Confession of Faith there is no need to speak. But that the Confession of Faith is "the truths of God" was solemnly attested to be the personal belief of all who signed it. That this was found to be a hard yoke is credible, and has been asserted. Of the means at the command of the Free Church to alleviate this pressure I do not know. But what she has now done is to substitute a belief in "the doctrine of the Church as expressed in the Confession of Faith," and the general words in the first of the declarations adopted by the United Assembly on 31st October 1900 make it plain that the doctrine of the Church, as part of her constitution, is intended to be mutable. This places the Confession of Faith in a precarious instead of a stable position, and in my opinion this is an abandonment of an essential characteristic of the Free Church.

Such being my opinion on the more general question as to the Confession of Faith, I deem myself absolved from the necessity of entering on that one of its articles which has been separately discussed, namely, Predestination.

I am of opinion that in both cases the judgments ought to be reversed, with costs.

Lord Lindley.—In the year 1900 the Free Church of Scotland (which the pursuers and appellants claim to represent) and the United Presbyterian Church united and formed the United Free Church of Scotland. Property previously held by trustees in trust for the Free Church was transferred to trustees in trust for the united body, *i.e.*, the United Free Church; and the question raised by the first appeal is whether this transfer of property was or was not a breach of trust and invalid, although sanctioned by the General Assembly of the Free Church and by the great majority of the members thereof. The Court of Session decided this question against the pursuers, and they have appealed to your Lordships' House against this decision.

The second appeal relates to property conveyed to trustees for particular congregations of the Free Church, the trusts of which are fully set out in the Model Trust Deed of 1844, which is one of the most important docu-

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ments in the case. The question raised by the second appeal is whether the trusts declared by that deed are confined to members of the Free Church, represented by the appellants, or whether the trusts are wide enough to include all the members of the United Free Church formed in 1900. The Court of Session decided this question also against the appellants.

Both appeals are really based upon the ground that the union of the two Churches could not be legally effected consistently with the constitution and standards of the Free Church, and that consequently the transfer of the property of that Church to the United Free Church was a breach of trust and invalid; and that as regards the congregational property, the benefit of the trusts of the Model Trust Deed can only be enjoyed by persons professing the doctrines which the appellants contend were the unalterable doctrines of the Free Church.

The whole controversy turns on the powers of the General Assemblies of the Free Church. If they have no power to relax the fetters which the appellants contend bound the Free Church hard and fast from its birth, then these appeals ought to succeed. But if, as the Courts in Scotland have held, the General Assemblies of the Free Church have power to do what they have done, then these appeals must fail. I propose, therefore, to confine my observations entirely to this one crucial question.

The circumstances which led to the secession of the founders of the Free Church from the Established Church and the views of the seceders are fully set out in the Claim, Declaration, and Protest of 30th May 1842, and in the Protest of 18th May 1843. These documents and the Model Trust Deed framed on the basis of these documents in 1844 shew that whilst the seceders renounced all the benefits derived by the Established Church from its connection with the State, and shook off so far as they could all interference and control by the State, yet they clung tenaciously to the Holy Scriptures, the Westminster Confession, the two Catechisms, and the Second Book of Discipline, and regarded them as determining and regulating their doctrine, worship, discipline, and government. The government of the Church is declared to be in the hand of the Church officers, which means in the last resort the General Assembly. The powers of this body, as originally established, are to be found in the Westminster Confession and in the Second Book of Discipline; but the Free Church greatly enlarged these powers in 1843 and 1851, as will be seen presently. The Claim, Declaration, and Protest above referred to treat the immunity of the General Assembly from all State control as a fundamental principle of the Church of Scotland; and the Free Church was formed in order to secure this immunity more completely than the Civil Courts had declared to be possible for members of the existing Established Church. Freedom from all State control in spiritual matters, as understood by Free Churchmen, is the *raison d'être* of the Free Church. The address to Her late Majesty (30th May 1842), the Act of Separation and Deed of Demission by Ministers (23d May 1842), and the Deed of Demission by Elders (30th May 1843), which followed it, all put this as the great object of the whole movement. At the same time the claims of the seceders are declared to be based on the constitution and standards of the Church of Scotland as heretofore understood; and in particular they considered it the duty of the State to promote

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religion as inculcated in the Westminster Confession and the other standards of the Established Church. By the expression "heretofore understood" I think is meant understood by the Church of Scotland unfettered by legislation and by legal decisions based upon it.

I must now invite your Lordships' attention to the powers of a General Assembly of the Church of Scotland, as declared in the Second Book of Discipline (1578), the Westminster Confession (1643, ratified by statute 7th June 1690), and the Barrier Act (1697).

The Second Book of Discipline is referred to in the Claim, Declaration, and Protest of 1842 as one of the Church's authorised standards, and in the Act and Declaration of 1851 (which will be hereafter mentioned) as one of her earliest standards. It is a work of great authority. Speaking of Assemblies, it is laid down (Chapter VII., s. 8): "They have power also to abrogate and abolish all statutes and ordinances concerning ecclesiastical matters that are found noisome and unprofitable, and agree not with the time, or are abused by the people." This is a very large legislative power exercisable by General Assemblies of the whole Church, but not I should think by smaller assemblies, whose functions are more circumscribed.

The Westminster Confession is, next to the Holy Scriptures, the most authoritative document of all for members of the Scotch Church. It is plain from the language of this Confession that its framers laid no claim to infallibility for themselves and disclaimed infallibility for the Synods and Councils of the Church which should adopt that Confession (see Chapter XXXI., Article IV.). But although infallibility is denied them, great power is conferred upon them; for Synods and Councils are to determine controversies of faith and to make rules for public worship and government of the Church (see Chapter XXXI., Article III.). Their power is limited to ecclesiastical as distinguished from civil affairs (see Article V.). It is also declared in the Confession itself that the Holy Scriptures are the foundation of the doctrine contained in the Confession, and are to be the foundation of the doctrines of the Church which adopts it (see Chapter I.). In all controversies of religion the Church is finally to appeal unto the Holy Scriptures (Chapter I., Article VIII.).

Chapters I. and XXXI., when read together, appear to me to confer upon Synods or Councils the power of interpreting the Holy Scriptures and the various articles of the Confession when controversies arise as to their meaning; and, as infallibility is disclaimed, it follows that an interpretation put by a Synod or Council on Scripture or the Confession is not binding for all time, but may be modified, or even rejected and be replaced, by another interpretation adopted by a later Synod or Council, and declared by it to be in its judgment the true meaning of the Scriptures or Confession upon the matter in controversy.

I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used *bona fide* for the purposes for which they are conferred. If, therefore, a Synod or Council, under colour of exercising their authority, were to destroy the Church which they were appointed to preserve, or were to abrogate the doctrines which they were appointed to maintain, their acts would be *ultra vires* and invalid in point of law; and it would be the duty

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of every Court in the United Kingdom so to hold if the question ever involved a controversy as to civil rights and so arose for judicial decision. For all persons who are members of the Church of Scotland its General Assembly is the highest Council of the Church, and it is difficult to limit the powers conferred upon it by the foregoing documents except by an appeal to the implied condition to which I have referred.

I cannot agree with those who contend that the powers of the General Assembly as declared in these documents are unlimited; but I am not able myself to define the limits of its authority more accurately than above stated. It is probably impossible to draw a sharp line clearly dividing all acts of a General Assembly which are within its power from acts which are beyond it. But it does not follow that it is impossible, or, indeed difficult, to decide in the great majority of cases whether a particular act is within its power or beyond it. Great as the powers are, they are limited by what can be found in the Scriptures. The Church must be a Christian Church and a Reformed Protestant Church. So far all is plain. I should, myself, think that it must be a Presbyterian Church. But this question is disputable and happily does not arise.

That very extensive but not accurately defined powers, both as to doctrine and government, are vested in a General Assembly of the Scottish Church is apparent from the Act of Assembly of 1697, commonly called the Barrier Act. Extensive but undefined power is there unmistakably assumed and recognised; no limit is set to it; but very important machinery is provided for its future exercise to prevent hasty decrees. In that respect the Act is a restrictive Act, for unless the prescribed machinery is adopted, an Act of Assembly cannot become a "binding rule and constitution of the Church." But the restriction only affects procedure; the wide powers of the General Assembly are not curtailed. This Act is, in my opinion, clearly applicable to the General Assemblies of the Free Church. It was included in what was adopted when that Church was created.

If the case now before this House had to be decided on the documents to which I have already alluded, and without reference to any Acts of Parliament or other Acts of Assembly, I should hesitate long before I came to the conclusion that what the appellants mainly complain of was beyond the power of the General Assembly of the Free Church. Any interpretation of the Scripture or of the subordinate standards *bona fide* adopted by a General Assembly, and held by them better to express the doctrine intended to be expressed by the language used in the Confession itself, cannot, in my opinion, be treated as beyond their power, but is well within it.

But there are other documents which have to be considered, and especially the Model Trust Deed, prepared in 1844 under the instructions of the General Assembly of the Free Church and formally approved and adopted by it in 1851. It is therein recited that it was at all times an essential doctrine of the Church of Scotland that it should have a government in the hands of the Church officers, distinct from the civil magistrate or supreme power of the State, and that this government comprehends "the whole power of the Keys," which expression I understand includes those wide powers to which I have already referred in all matters touching the doctrine,

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worship, discipline, and government of the Church. Then it recites the secession from the Established Church and the formation of "the General Assembly of the Free Church of Scotland," and the claim of the Free Church to all the powers and privileges and the same internal government, jurisdiction, and discipline according to the true and original principles of the Church of Scotland before the separation. The Model Deed then gives a form of conveyance of property to trustees upon trust declared at great length, but which may be shortly summarised as trusts for the use as a place for religious worship by members of the Free Church. These trusts clearly contemplate the union of the Free Church with "other bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves," and provision is made for worship by such united bodies. The fourth trust is very important. It is to the effect that the trustees shall at all times be subject, in the management and control of the trust property, and in all matters and things connected therewith, to the regulation and direction of the General Assembly for the time being of the said body or united body of Christians. Provision is made for the event of a secession from the Church which will be found in the ninth trust.

These trusts are confined to the congregational property which is the subject of the second appeal: but no one suggests that as regards the constitution of the Free Church and the powers of the General Assembly there is any difference between one set of members and another. In my opinion the Model Trust Deed emphasizes and makes plain much that is obscure when the subordinate standards alone are looked at, especially when the legislation affecting them is borne in mind.

In the year 1844 trustees were appointed to hold any property which might be bequeathed or conveyed to them for the Free Church, and also such places of worship as might be erected on sites granted to trustees nominated by the General Assembly, and also such other places of worship as persons might wish to convey to them on the terms of the Model Trust Deed. A fresh appointment was made in 1871.

I pass on to consider what was done as regards the union of the Free Church with the United Presbyterian Church. Union with other Presbyterian Churches was apparently desired some fifty years ago; but in order to effect Union with the United Presbyterians several arrangements of importance had to be made, particularly with reference to the mutual eligibility of the ministers and other officers of the two bodies to Church offices, and to adjustment of the different views held by the two Churches respecting Predestination and respecting their relation to the State, and the duties of the State as regards religion. It took many years to settle these preliminary matters. In 1892 the General Assembly of the Free Church passed "The Declaratory Act anent Confession of Faith"; and although a small minority of members protested against it, I am quite unable to discover any valid ground for holding this Act to be one which a General Assembly of the Free Church had no power to pass. It no doubt relaxes the excessive stringency of certain articles of the Westminster Confession, if construed literally; but it imposes no new fetters, and in relaxing the old ones, and so rendering them more acceptable to many earnest Presby-

terians desirous of remaining in the Church or becoming members of it the General Assembly were honestly attempting to preserve the Free Church and its fundamental doctrines, and, in my opinion, there is no pretence for saying that they were false to their trust and were endeavouring to destroy any doctrines which it was their duty to preserve.

I can understand that an ordinary member of the Free Church brought up from childhood to regard the Confession as an inspired document to be construed literally and in the same sense for all time may think some of the doctrines set forth in this Act unorthodox: but that is not the question on which this appeal turns. The question is whether it is competent for the governing body of that Church, *i.e.*, the General Assembly complying with the conditions of the Barrier Act, to declare that the Confession, properly understood, does not require absolute uniformity of belief on the matters dealt with by the Declaratory Act. This is the great question at issue between the parties to this appeal, and I have come to the clear opinion that on this question the appellants are wrong. I come to this conclusion after a careful examination of the powers of the General Assembly as contained in the documents before referred to. These powers are, in my opinion, as fundamental in the constitution of the Free Church of Scotland, and as essential to its preservation, as any of the doctrines in the Confession or other subordinate standards.

The appellants made a great point of the alteration made by this Declaratory Act in the fundamental doctrine of the Free Church respecting the principle of Establishment, by which I understand is meant the duty of the State to promote religion, and especially the Presbyterian religion, as set forth in the Westminster Confession, and sanctioned by Parliament as already mentioned. Chapter XXIII., Article III., of the Confession declares what in the view of the Church of Scotland is the duty of the State. Its language is very general, and leaves the State to determine in what manner it will perform such duty. Some, at all events, of the founders of the Free Church attached great importance to this principle of Establishment which was not held by all Scotch Presbyterian Churches. But it does not follow that this principle was to be tenaciously adhered to for all time, and that no future General Assembly should have power to modify or relax it if owing to changes of opinion or other circumstances the General Assembly of the Free Church deliberately came to the conclusion that the preservation and healthy growth of the Free Church required the principle to be reconsidered.

I cannot come to the conclusion that the view taken in 1843 of the duty of the State was a fundamental doctrine admitting of no explanation or modification. Dr Chalmers' Address, adopted by the Free Church, shews that he and its then members would have strenuously opposed the change made, but it does not follow that he or they would have denied the power of a future General Assembly to make such change after due deliberation.

As I understand the matter, the Free Church can and does fulfil all her spiritual functions without any State aid, and the attempt to obtain aid from the State, whilst repudiating all State control, has proved a failure. This doctrine as to the duty of the State, whether best described as a

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political or a religious doctrine is a doctrine, which the General Assembly could, in my opinion, repeal or modify as might be expedient.

In 1900 the Act uniting the two Churches was passed by the Free Church of Scotland after complying with all the conditions of the Barrier Act. The Act was dated 31st October 1900, and the two Churches were then formed into one under the name of the United Free Church of Scotland, and its supreme governing body was designated the General Assembly of the United Free Church of Scotland. Having regard to the constitution of the Free Church, I cannot agree that this union could only be legally valid if assented to by all the members of the Free Church.

As part of this transaction the property held for the Free Church by its trustees was ordered to be conveyed to a new body of trustees for the United Free Church, and this was done; but a dissentient minority protested.

This transfer is complained of by the pursuers, and is sought to be set aside. But having regard to the trusts on which the property of the Free Church was held, and to the powers of its General Assembly, the pursuers have, in my opinion, completely failed to prove any breach of trust or misapplication of the property of the Church. The United Free Church is the Free Church lawfully enlarged; the individuals entitled to the use and enjoyment of the Church property are lawfully more numerous than before. The pursuers in the first appeal have not been unlawfully excluded from such use and enjoyment. There is no evidence that any person has been deprived of the use and enjoyment of any property held in trust for the Free Church or the United Free Church, or any congregation of either, except a few ministers represented by the appellants in the second appeal who repudiate the authority of the General Assembly of the Free Church to make the changes complained of, and who by their own conduct have deprived themselves of their right to the benefit of the trusts on which such property is held. Both appeals are based on the erroneous view that the Free Church had no freedom, but that it was bound hard and fast to certain doctrines expressed in language admitting for all time of only one meaning. I am quite unable so to regard it. The struggle for liberty was not so abortive as that.

In the course of the argument many statutes and decisions were referred to. Those which related to conflicts with the Established Church of Scotland are not so important for the present purpose as those which relate to disputes between members of non-established Churches. The decisions relating to the Established Church (namely, the *Auchterarder* case,[1] and other Scotch cases referred to in argument) would be all-important if your Lordships had to consider the validity of acts done by the General Assembly of the Established Church of Scotland; for that Church is governed not only by the Westminster Confession and Acts of Assembly, but also by statutory enactments which make reform in her doctrines, worship, discipline, and government difficult, if not impossible, without legislation. But the Free Church is emancipated from these fetters.

As formed in 1843 the Free Church was purely a voluntary religious

[1] 2 Robert. 25 (special report).

association, both Christian and Protestant, and believed by its founders to be divinely instituted, professing doctrines based on the Scriptures and the old subordinate standards, governing itself by certain rules, and providing a representative assembly of its own for explaining its doctrines and for preserving the association by making such changes in its worship, discipline, and government as might be found expedient after consulting the whole body, as required by the Barrier Act. A trust for the Free Church is, in my opinion, a trust for such persons as shall hold the doctrines and submit in ecclesiastical matters to the government and discipline adopted by the founders of the Free Church, with such modifications as may be made from time to time by the General Assembly of that Church, provided the conditions required by the Barrier Act are observed, and provided the Church is preserved as a Reformed Church with Presbyterian government.

There is no statutory or other law which makes such an association illegal or which compels it to accept the Westminster Confession, whether with or without modification. The founders of the Free Church did accept it, but only subject to the powers which they insisted were vested in the General Assembly of that Church. So long, therefore, as the General Assembly does not exceed those powers, or act contrary to some statutory or other law of Scotland, or commit any breach of trust as above explained, it is not the function of any civil Court to interfere with it. This I regard as settled by the decision of your Lordships' House in *Craigdallie* v. *Aikman*,[1] *Forbes* v. *Eden*,[2] and is in entire accordance with the general law of trusts applicable to such associations as the Free Church—see *Attorney-General* v. *Pearson*,[3] *Milligan* v. *Mitchell*,[4] *Long* v. *Bishop of Cape Town*.[5]

The distinction between an erroneous decision by a body having jurisdiction to deal with a particular subject-matter, and a decision by a body having no jurisdiction over the matter decided, is familiar to all lawyers, and must be steadily borne in mind in this case. In passing the Declaratory Act in 1892 and the Act of Union of 1900 I can discover nothing *ultra vires* or contrary to any law. Still less can I discover anything *ultra vires* or contrary to law in the interpretation put by the General Assembly of the Free Church on some of the articles in the Westminster Confession, or in the alterations made in the declarations and forms to be made and signed by the ministers and officers of the Church. It follows that, in my opinion, the transfer of property which is complained of (and which was simply consequential on the Acts of Assembly of 1892 and 1900) was neither *ultra vires* nor contrary to any law, and cannot therefore be successfully impeached.

The foregoing observations apply to both appeals; but the second appeal appears to me to present less difficulty than the first. I regret that any ministers should have been excluded from their offices; but the trusts declared by the Model Trust Deed are clear and explicit, and their validity

[1] 1 Dow, 1, 2 Bli. 529, 6 Pat. App. 618.
[2] L. R., 1 H. L., Sc. 568, 5 Macph. (H. L.) 36.
[3] (1817) 3 Mer. 353, 17 R. R. 100.
[4] (1837) 3 My. and Cr. 72, 45 R. R. 218.
[5] (1863) 1 Moo. P. C. (N. S.) 411, 461.

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cannot be questioned by those who have no title to the property to which it applies except under the provisions of that deed. There has been no breach of the trusts declared by the Model Trust Deed.

I might have contented myself with saying that I concurred in the decision of the Court of Session; but the question between the parties is of such great importance, and its solution requires a careful study of so many documents, statutes, and decisions, that I considered I should not be adequately discharging my duty to this House if I did not set forth, as clearly as I could, the reasons which have induced me to give my voice for the dismissal of both appeals with costs.

LORD ALVERSTONE.—Inasmuch as I am differing in a Scottish appeal from the judgment of the Lord Ordinary, affirmed unanimously by the Second Division of the Court of Session, I think it only right that I should state my reasons for the judgment which I am about to give.

The question raised by these appeals is whether funds invested in the names of trustees, and real property held on trust for behoof of the Free Church of Scotland, have been dealt with in a way which constitutes a breach of trust. Both classes of property are now being applied, or it is proposed to apply them, for the purposes of the United Free Church, being a body of Christians formed by a union, or attempted union, of a great majority of the ministers and elders of the Free Church of Scotland with the ministers and elders of the United Presbyterian Church of Scotland, and the point to be decided is whether, having regard to the purposes for which the money and property were originally subscribed, given, bequeathed, or conveyed, such application constitutes a breach of trust.

The union, or attempted union, was assented to and approved of by a very large majority of the ministers and elders and congregations of the Free Church; the actual numbers are not material, but, as I understand, all except some thirty of the ministers approved of the proposed union; but the dissenting minority represent a very considerable body of adherents to congregations of the Free Church who do not approve of, and some of whom have protested against, the proposed union.

The law applicable to funds which have been given for the purpose of a voluntary association such as the Free Church is well settled, and it is not necessary for me to do more than refer to the decision of your Lordships' House in *Craigdallie* v. *Aikman*[1] to shew that such funds, in the absence of express provision, must be applied for the benefit of those who adhere to the original principles of the founders. If the terms of the foundation of the trust provide for the case of schism the Courts will give effect to them, but if there be no such provision, the *cestuis que trust* are those who adhere to the fundamental principles upon which the association was founded.

The Free Church of Scotland was formed in the year 1843 by what is called "the Disruption," or, in other words, the secession from the Established Church of Scotland of a large body of the ministers of the Established Church, who renounced entirely the pecuniary benefits of their connection with the Establishment in maintenance of a protest which they had made

[1] 1 Dow, 1.

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against the interference by the civil Courts with rights which they considered to be the rights of the Church.

It is not necessary to trace the history of the Established Church down to 1843, or the history of the various secessions which had taken place before that date, but it is sufficient to say that those who founded the Free Church separated from the Established Church, not upon any question of doctrine, but solely upon the ground which I have just mentioned, and which ground is in no way inconsistent with the principle of Establishment.

The United Presbyterian Church was not then in existence; it was formed in the year 1847 by the union of two Churches which had separated from the Established Church many years before, and were known as the United Associated Synod and the Relief Church.

It is necessary to consider carefully what was the constitution of the Free Church in so far as it throws light upon the question raised for your Lordships' decision, namely, what were the trusts upon which the property in dispute in this action was held?

The first, and in fact the most important, question which arises on this part of the case may be stated as follows: It is maintained by the appellants and denied by the respondents that the principle of Church Establishment was adopted as a fundamental or essential principle of the Free Church of Scotland; and that its founders made that principle one of the main grounds for refusing to join other existing voluntary Churches. It cannot, I think, be doubted that this principle was regarded as being fundamental by the founders of the Free Church, and was put forward as one of the main inducements in the appeals for pecuniary aid, in response to which a very large proportion of the funds and property now held in trust for behoof of the Free Church was given. Upon this part of the case I might content myself with adopting the view which is expressed by the Lord Ordinary, and by more than one of the Judges of the Court of Session. Lord Low, in his judgment,[1] expressed himself as follows:—"There is no doubt that the founders of the Free Church, when they left the Established Church in 1843, did so declaring that they adhered to the principle of an Established Church, and that they seceded only because as the law then stood the Church did not possess that independence in what they regarded as matters spiritual which, in their view, was essential in order to give effect to the cardinal doctrine of the Headship of Christ." And later on:—"The Establishment principle (to use a convenient short phrase) was one which was regarded as of great importance by the Free Church at the commencement of its history, and naturally so, because, in the first place, it justified the action of those who had seceded by proclaiming that they were not schismatics, and, in the second place, the founders of the Church hoped that a change in the law might be effected which would enable them to return to the Establishment." And Lord Trayner says, in even more emphatic language[2]:—"The Free Church, from its constitution in 1843 down (at least) to its union with the United Presbyterian Church, professed the Establishment principle." And: "It was the feature of the Free Church

[1] 4 F., at p. 1093.

[2] 4 F., at p. 1113.

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(prior to the union) which distinguished it from all other Presbyterian Churches in Scotland, that it was the only Presbyterian Church not connected with the State which professed to hold the Establishment principle."

I am aware their Lordships in other parts of their judgments expressed the view that the principle either cannot be regarded as fundamental, or was one from which the General Assembly of the Free Church had power to depart; but I refer to these passages at present only for the purpose of shewing that, having regard to the views held by the founders of the Free Church with reference to the Establishment, their union with the two then existing Churches, which subsequently united to form the United Presbyterian Church, would not at that date, 1843, have been possible.

In view, however, of the great importance of the question, and inasmuch as opinions have been expressed that the principle of Establishment cannot be regarded as fundamental, I think it right, as briefly as possible, to examine the question for myself, and to state the reasons which have led me to the conclusion that it was regarded as a fundamental and essential principle of the Free Church at its foundation, for very many years afterwards, and, as I think, down to the time of the union with the United Presbyterian Church in 1900. Reliance was placed by the appellants upon the language of Article III. of Chapter XXIII. of the Westminster Confession, which is as follows:—"The civil magistrate may not assume to himself the administration of the Word and Sacraments or of the power of the Keys of the Kingdom of Heaven; yet he hath authority, and it is his duty to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call Synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God."

It was strongly urged by the respondents that that article does not enunciate the principle of Establishment or Endowment. As regards Endowment the observation is probably well founded, but even taking the article by itself, in my opinion it distinctly embodies the principle of Establishment. Whether this be so or not is not very material upon the point of view which I am at present considering; the more important question is, How was it regarded by the founders of the Free Church?

The first important document is that of 30th May 1842. This was a claim, declaration, and protest made by then ministers of the Established Church before their secession; it is therefore not to be expected that the references to Establishment would be very distinct, but a passage occurs which has not been quoted, and which is in the following words:—"And whereas this Church, highly valuing as she has ever done her connection on the terms contained in the statutes hereinbefore recited with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people must, nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as

she would deplore and deprecate such a result for herself and the nation—persevere."

This passage of the declaration which follows, and the concluding words of the Protest, shew that even in a document in which a claim was being made by members of an Established Church to spiritual independence they thought it right to point out the importance which the signatories attached to the principle of Establishment. The principle is, moreover, emphatically enunciated in the document entitled, "The Protest of the Commissioners to the General Assembly, on the 18th May 1843." This being the first Assembly of the then newly-formed Free Church, the words are of such importance that I think it right to quote them:—"And finally while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's word, and reserving to ourselves and our successors to strive by all lawful means as opportunity shall, in God's good providence, be offered, to secure the performance of this duty agreeably to the Scriptures and in implement of the statutes of the Kingdom of Scotland and the obligations of the Treaty of Union as understood by us and our ancestors, but acknowledging that we do not hold ourselves at liberty to retain the benefits of the Establishment while we cannot comply with the conditions now to be deemed thereto attached."

It is, in my opinion, significant and to be borne in mind, that this protest was one of the first official acts of the Free Church. As far as I know, there is no document or evidence which suggests that there was at the time of which I am speaking, namely, the year 1843, any doubt or difference of opinion as to that which was understood by the expression the Establishment principle; but it is sufficient for my purpose to quote two passages from the Pastoral Address of 30th May 1843, which was embodied in an Act of the Assembly of the Free Church, and to which the ministers were directed to call the attention of their people on 15th June 1843. These passages from that address state the principle as follows:—"It was ever held by the Established Church indeed that the Church and the State being equally ordinances of God, and having certain common objects connected with His glory and the social welfare, might and ought to unite in a joint acknowledgment of Christ, and in the employment of the means and resources belonging to them respectively for the advancement of His cause." And later:—"So upon the other hand the State held directly and exclusively from God, and was entitled and bound to exercise under its responsibility to Him alone its entire secular sovereignty, including therein whatever it was competent for or binding upon the State to do about sacred things or in relation to the Church, as, for example, endowing and establishing the Church and fixing the terms and conditions of that establishment."

These passages shew clearly what was understood by the founders of the Free Church as the Establishment principle.

I will not quote again the passage from Dr Chalmers' speech in 1843, to which such frequent reference was made, but it is impossible to read it without being satisfied that he at least made the principle of Establishment one of the fundamental principles of the Free Church, and that his view was adopted unanimously by the Assembly on 20th May, who directed that

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an account of the proceedings of the previous meeting should be sent to the ministers and friends, which account should contain Dr Chalmers' address as Moderator. It should be noted in passing that the Protest of 18th May 1843 was directed to be recorded at the commencement of the presbytery books, and I have not the slightest doubt that those documents to which I have referred were regarded by the ministers and members of the Church as formulating the essential principles upon which the Free Church was founded. It was a time of great excitement, and the attention of the Free Church ministers and their congregations and friends throughout the country would be closely directed to these important documents, and I doubt not that every line would be closely criticised and considered.

There is, moreover, a remarkable confirmation of this view in the language used in reply to the addresses received from Congregational Churches in other parts of the kingdom in the year 1843. I need scarcely point out that in replying to such addresses the elders of the Free Church would have no object in criticising, still less in traversing, any opinions which had been expressed in addresses of a friendly character transmitted to them, and this gives greater force to the language used in reply to such addresses, of which I would cite the two passages set out in the documents before us: "But you misapprehend the nature of the movement which we have made in supposing that we have in the least degree altered our views respecting the lawfulness and the desirableness of a right connection between Church and State" (Printed Papers, Appendix D, p. 21). "History and experience have convinced us that there is a form of alliance which is at once practicable and agreeable to Scripture and highly beneficial. We have renounced the temporal advantages of the Scottish Ecclesiastical Establishment, not in consequence of any alteration in our views on this subject, but because the Civil Courts had violated our constitution; and Parliament, under the guidance of an infatuated Government, had sanctioned that violation."

I pause here to notice an argument strongly urged before us on behalf of the respondents, and which appears to have had weight with the Lord Ordinary and the Judges of the Second Division, namely, that the passages in the documents leading up to the foundation of the Free Church, and in the preamble to the Act of 1846, to which I shall refer, were parenthetical and related to the action of third persons, namely, the civil magistrates, and not of the Church itself. So far from weakening the force of the declaration, couched in the terms in which it is, the fact, in my opinion, gives it additional weight. The separation was in no way promoted because the dissenting ministers objected to the principle of Establishment; that principle was not attacked by the claims of the Courts against which they had protested, and yet its recognition is considered of such great importance as to receive the prominent notice which I have quoted. Then with reference to the argument that it relates to the action of third parties, also strongly pressed upon us, I am unable to see how such an argument assists the respondents. It seems to me also to give additional weight to the firm assertion of the right and duty of Churches to support the State in the performance of its duty towards religion by the medium and through

the agency of an Established Church, which assertion the protesting ministers were making.

It seems to me, moreover, that a brief consideration of the Establishment principle as contrasted with the principle of Disestablishment is sufficient to shew its fundamental or essential character. The one seeks to enforce the paramount duty of the State in its official capacity to recognise religion, to maintain and support the Church; the other desires to see all connection between the State and the Church broken down and destroyed, and to prevent the State from exercising any control whatever over the Church in any capacity, and, of course, from endowing or assisting to maintain a church; and if, as I shall point out later, the United Presbyterian Church certainly considered any civil establishment of religion unscriptural and unjust, it is difficult to understand how such a distinction between the views held by two Churches can be regarded as otherwise than fundamental and essential.

Nor does it seem to me that the suggestion made by Lord Trayner that the different view taken on this question by the Free Church and the United Presbyterian is a matter of polity and not a matter of faith makes any substantial difference. In one sense the questions on which the Free Church separated from the Establishment were not matters of faith, but, in my opinion, the difference between the Free Church and the United Presbyterian was a difference, not on a mere matter of detail, but upon a fundamental principle.

For these reasons I have arrived at the conclusion that the founders of the Free Church regarded the Establishment principle, not only as one of the very greatest importance, but as fundamental and essential, and that at that date union between the Free Church and either of the Churches subsequently forming the United Presbyterian Church would have been out of the question.

If I am right in this view, its bearing on the question raised before us is of the greatest importance. It cannot, in my opinion, be questioned that the documents to which I have referred and the principles which they embody were the documents upon the basis of which the donors of a very large proportion of the trust funds, the application of which is in question in this case, made their gifts and donations, and upon the faith of which also the real property in question was conveyed.

This conclusion leads me to consider whether the history of the Free Church since 1843 and events since that date support the view that that property held for its behoof may without breach of trust be applied for the purposes of a Church which supports the principle of Disestablishment. I pass, therefore, to consider briefly the history of the Free Church upon this point from 1843 to 1900.

In the year 1846 we find the Church thinking it right to declare that she "firmly maintains the same scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended." I regard this as a distinct recognition of the Establishment principle, and in no way weakened by the words following, which disclaim intolerant or persecuting principles. Five years later—in the year 1851—in a formal Act and Declaration of the

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Assembly the principle of Establishment is again recognised as of the highest importance; the words used are: "Holding firmly to the last as she holds still, and through God's grace will ever hold, that it is the duty of civic rulers to recognise the truth of God according to His Word, and to promote and support the Kingdom of Christ without assuming any jurisdiction in it or any power over it, and deeply sensible, moreover, of the advantages resulting to the community at large, and especially to its most destitute portions, from the public endowment of pastoral charges among them."

Again, in the year 1853, the Church, in emphatic language, reaffirms the principle, calling special attention to that of Establishment: "That this Church maintains unaltered and uncompromised the principles set forth in the Claim, Declaration, and Protest of 1842, and the Protest of 1843, relative to the lawfulness and obligation of a Scriptural alliance between the Church of Christ and the State, and the conditions upon which such an alliance ought to be regulated."

In the year 1864, when the question of union between the Free Church and the United Presbyterian Church was actually under discussion, the committee of the Free Church stated, as one of its distinctive principles, that, as an act of homage to Christ, it is the duty of the civil magistrate, when necessary or expedient, to employ the national resources in aid of the Church; and again, in the year 1867, the principle is enunciated in even stronger language: "As an act of national homage to Christ the civil magistrate ought, when necessary and expedient, to afford aid from the national resources to the cause of Christ, provided always that in doing so, while reserving full control over his own gift, he abstain from all authoritative interference in the internal government of the Church."

Later, in the year 1873, when dealing with the question of eligibility of ministers, the General Assembly declared that it adhered to the great fundamental principle of the Church under two heads, the second of which was as follows: "Secondly, the prerogative of the Lord Jesus Christ as Head over all things to his Church, and supreme over nations and their rulers, who are consequently bound collectively and officially as well as individually and personally to own and honour His authority to further the interests of His holy religion."

These passages from the proceedings of the Free Church satisfy me that for a period of thirty years after the Free Church was founded the Establishment principle was regarded as fundamental, and I doubt not that during that period, and in reliance on that principle, a considerable part of the property in question was given and conveyed to trustees for behoof of the Free Church.

It was suggested by the respondents that the union of the Free Church with the Church known as the United Original Seceders in the year 1852, and with the Reformed Presbyterian Church in 1876, afforded arguments in support of the union with the United Presbyterian in the year 1900. I am wholly unable to follow that argument. I do not propose to trace the history of the two Churches with which the Free Church united beyond saying that, as far as I can gather from the papers, the Free Church, in uniting with them, in no way abandoned or altered any one of the principles

which it had professed in the year 1843, but, on the contrary, both the united Churches represented that they were in complete sympathy with the Free Church. As regards the United Original Seceders, it is only necessary to examine the representation and appeal made by the Synod of that Church in the year 1852 to see that their union with the Free Church was based upon and only consistent with the view that the Free Church still maintained the Establishment principle. In the case of the Reformed Presbyterian Church the statement in the Act of Union that the United Churches accept the preamble to Article XII. of the Free Church Assembly, 1846, which I have already cited, proves, in my opinion, that the maintenance of the Establishment principle was the basis of union between the Free Church and the Reformed Presbyterian.

The action of the Free Church in the years 1892 and 1894, though it must be considered in connection with the question of the powers of the General Assembly, has, in my opinion, very little, if any, bearing upon the point which I am at present discussing. In the first place, these acts were objected to; but I would point out that although the Act of 1892, which is undoubtedly of great importance upon the second branch of the case, has no direct bearing upon the question of Establishment, one of the main grounds of objection and protest was stated in the following terms (Appendix A, p. 134): "Because under the head which refers to intolerant and persecuting principles which is to take the place of the present preamble to the formula, all reference to the duties of nations and their rulers to true religion and the Church of Christ as therein set forth is wholly omitted."

It now becomes necessary to consider the position of the United Presbyterian Church in reference to the Establishment principle. The possibility of a union of the Free Church with other bodies of Christians was undoubtedly contemplated by its founders; two such unions have in fact taken place; it becomes therefore of importance to consider whether or not the United Presbyterian Church was a Church with which the Free Church could properly unite, and whether it would be a breach of trust to apply funds held in trust for behoof of the Free Church as originally constituted to the purposes of the united body, now the United Free Church. In my opinion this matter does not admit of serious doubt. I am aware it was argued by the respondents that the United Presbyterian Church between the years 1847 and 1900 might, without breach of trust, have united with the Establishment, or applied its funds in aid of Establishment, and it was contended by Mr Haldane that the United Free Church could do so without impropriety. Without referring to all the documents which, I think, negative this contention, I would call attention to the view held by the United Presbyterian Church, as stated in the report of 1864, which seems to me to be wholly inconsistent with the argument: "That inasmuch as the civil magistrate has no authority in spiritual things, and as the employment of force in such matters is opposed to the spirit and precepts of Christianity, it is not within his province to legislate as to what is true in religion; to prescribe a creed or form of worship to his subjects, or to endow the Church from national resources; that Jesus Christ as sole King and Head of His Church has enjoined upon His people to provide for

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maintaining and extending it by free-will offerings, and this being Christ's ordinance it excludes State aid for these purposes; and that adherence to it is the true safeguard of the Church's independence." And again in 1867: "That it is not competent to the civil magistrate to give legislative sanction to any creed in the way of setting up a civil establishment of religion, nor is it within his province to provide for the expense of the ministrations of religion out of the national resources; that Jesus Christ as sole King and Head of His Church has enjoined upon His people to provide for maintaining and extending it by free-will offerings; that this being the ordinance of Christ it excludes State aid for these purposes, and that adherence to it is the true safeguard of the Church's independence. Moreover, though uniformity of opinion with respect to civil establishment of religion is not a term of communion in the United Presbyterian Church, yet the views on this subject held and universally acted upon are opposed to these institutions."

Further, I am wholly unable to reconcile this argument with the statement proved in evidence, and published in 1897 on behalf of the United Presbyterian Church. In that year a tract, No. XXV., prepared by the committee of the United Presbyterian Church on the disestablishment and disendowment of the Established Churches of England and Scotland, was issued by the United Presbyterian Church and sent to all the ministers of the Free and Established Churches. In that tract not only is it stated that the United Presbyterian Church maintains as one of its most distinctive principles that it is not the province of the State to establish and endow the Christian Church, but that civil establishments of religion are unscriptural and unjust. In the face of these documents it seems to me impossible to adopt the contention of the respondents; but here, again, I should be justified in relying upon the opinion of their Lordships in the Scotch Court. In the course of his judgment Lord Low said (Appendix D, p. 58): "On the other hand it seems to me to be equally certain that the United Presbyterian Church never read the Confession of Faith as laying down that it is the right and duty of the civil magistrate to maintain and support an Established Church. There does not appear to be any material difference between the two Churches upon the point so far as their standards are concerned, but the view of the United Presbyterian Church as a whole has always been that it is not within the province of the civil magistrate to endow the Church out of public funds, and that the Church ought not to accept State aid, but ought to be maintained by the free-will offerings of its members." Lord Trayner, moreover, states in emphatic terms that the United Presbyterian Church had, throughout the whole period of existence, repudiated the Establishment principle.

With reference to the attitude of the United Free Church, and the possibility of its adopting a different view, the statements in the resolutions of the Assembly of the United Free Church, passed in the years 1901 and 1902, to the effect that the Establishment was objectionable on principle, and recording its testimony in favour of disestablishment of the Established Church of Scotland, which statements were not attempted to be qualified by the counsel for the respondents, are, in my opinion, conclusive against any such contention.

The only argument on this point remaining to be noticed is that which was founded upon the documents agreed to by the Assembly of the Free Church and the Synod of the United Presbyterian Church at the time of union.

These documents transfer and convey all the property and funds of the Free Church of Scotland to the united body; but it was said that the modified forms of questions formulated by the General Assembly of the United Free Church in the year 1900 were not inconsistent with the principle of Establishment, in so far as that was a fundamental principle of the Free Church, and that office-bearers were left free to hold their own individual views on this question.

If I am right in the view which I have endeavoured to express, that the principle of Establishment was regarded by the founders of the Free Church as a fundamental principle of that Church, and was so maintained for a period of more than thirty years after its foundation, the fact that the Free Church of Scotland, in uniting with a Church pledged to disestablishment principles, and regarding civil establishments of religion as unscriptural and unjust, had agreed to treat the matter as an open question, seems to me entirely beside the mark for the purposes of the present discussion. The respondents must justify not only a nominal union, but the claim to apply the trust funds to the purpose of the united body, and to dispossess, as they have attempted to do, the Free Church ministers who have declined to join the United Free Church from the possession of their manses and churches. Unless the respondents can make good their point that the application of the moneys for the purpose of the united body does not amount to a breach of trust, the fact that they agreed for the purpose of the union not to raise any question cannot afford a justification.

The only remaining point which requires notice upon this part of the case is the argument that the terms of the Model Trust Deed, which was settled by a committee of the Free Church and approved by the Assembly in 1844, justifies the transfer of the property to the united body. This argument is based mainly upon the first and fourth trusts, and incidentally upon the ninth trust. The object of this trust-deed was undoubtedly to ensure that the property should be held for the purposes of the Free Church as originally constituted. It proceeds upon a general outline of the history of the Established Church, the Disruption, and the subsequent formation of the Free Church. The first trust was, in my opinion, a provision not unnatural from a conveyancing point of view, that the trust should not cease in the event of the Free Church of Scotland uniting with themselves other bodies of Christians. It would in my judgment be contrary to every rule of law applicable to such a case to hold that it gave the Assembly of the Free Church power by mere union to divert the funds to a body which did not conform to the fundamental principles of the Free Church. Still less can the respondents rely upon the fourth trust, which was the natural sequence of the recital (Appendix A, pp. 66 and 67), as to the continuation of the form of Church government by Kirk Sessions, Presbyteries, Provincial Synods, and General Assemblies, and bestowed upon the General Assembly of the Free Church the same powers as those which had been enjoyed and claimed by the Assembly of the Established

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Church. The ninth clause not only affords no argument for the respondents, but incidentally supports the contention of the appellants. The majority who consented to the union with the United Presbyterian Church did not purport to carry out the object of the Protest of 18th May 1843 more faithfully than the appellants who are the minority. Clause 9 only contemplates an apportionment or division in the event of a section not less than one-third of the whole of the ordained ministers claiming to be carrying out the objects of the Protest more faithfully than the others. In my opinion, this accentuates the extreme importance attached by the Church at its foundation to the Protest of 18th May 1843, and would make it entirely *ultra vires* of a section of ministers, purporting to act under the ninth trust, to disregard the assertion of right and duty therein made, and to claim under this clause to associate itself with a body which was openly promoting disestablishment.

It is contended by the respondents—and this is really the foundation of the judgment of Lord Young—that the General Assembly had power to legislate in such matters, and to abandon the Establishment principle, even though and notwithstanding that it may have been one of the fundamental principles of the Free Church. This question has a bearing upon the second ground relied upon by the appellants, namely, that the Assembly of the Free Church had departed from the Westminster Confession and the standard of the Church, and had made changes in doctrine inconsistent with the fundamental principles of the Free Church. The powers of the Assembly of the Free Church were, in my opinion, no greater in relation to the fundamental principles upon which that Church was founded than were the powers of the Assembly of the Established Church. If I am right in the view which I have ventured to express, that paragraph 3 of Article XXIII. of the Westminster Confession, and the documents to which I have referred as shewing the fundamental principles upon which the Free Church was founded, did make—to adopt once more the language of the Act of 1873—the Establishment principle one of the great fundamental principles of the Church, I am wholly at a loss to understand upon what ground it can be said that the Assembly either of the Established Church or of the Free Church had the right to permit its ministers and elders to depart from that principle. I agree that the Barrier Act, upon which so much reliance was placed by the respondents, though it confers no new powers, recognises that the General Assembly possesses some powers of alteration with reference to doctrine, worship, discipline, and government, but such powers do not, in my opinion, include a power to subvert or destroy fundamental and essential principles of the Church.

I have now to say a few words upon the second point upon which reliance was placed by the appellants, to the effect that the Free Church, by its Acts of 1892 and 1894, and the Assembly of the United Free Church by their Acts of October 1900, with reference to the questions and formulæ to be used in the ordination and induction of ministers and office-bearers, have departed from the fundamental principle of the Free Church in the matter of doctrine, and particularly in relation to the doctrine of Predestination and free will as set forth in the Westminster Confession.

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For reasons which I will briefly state, had this been the only ground upon which exception could be taken to the action of the Assembly of the Free Church, I am not at present satisfied that it has acted in excess of its powers.

I do not wish to express a final opinion, as I do not consider it necessary for the purpose of determining the legal rights of the parties to these appeals; and further consideration might satisfy me that the objection by the appellants that the Assemblies of the Free Church and the United Free Church have released their ministers and office-bearers from adherence to the Westminster Confession, as such, has more weight than I am at present disposed to attach to it. On the other hand, the argument of the Dean of Faculty and Mr Haldane satisfied me that there are passages in the Westminster Confession and in other standards of the Church which might require such explanation and exposition as would fairly come within the words used in the Barrier Act, "alteration in doctrine." I do not feel myself competent, at anyrate upon the information at present before me, to express any final opinion upon such a point, and I do not therefore propose to base my judgment upon the second ground which was urged before us on behalf of the appellants.

It only remains to consider the position of the appellants and their rights as a minority of the ministers and elders of the Free Church representing congregations or portions of congregations who are not prepared to join the United Free Church. It is not contended that they have changed their principles; it is not suggested that they have departed from any fundamental or essential principle of the Free Church; it is not alleged that they are not faithfully carrying out the objects of the Protest of 18th May 1843. The respondents are threatening to attempt to eject them from their churches and manses, and to deprive them of any right to participate in any funds of the Church, simply on the ground that they decline to become members of the United Free Church. The decisions of the Court of Session in *Craigie* v. *Marshall*[1] and *Couper* v. *Burn*,[2] unless overruled by your Lordships' House, are wholly inconsistent, in my opinion, with any such right on the part of the respondents, and I am unable to support a judgment which would deprive the persons forming a minority of their rights simply upon the grounds that they are unwilling to become members of a body which has not only abandoned a fundamental principle of the Church to which they belong, but supports a principle essentially different from that on which that Church was founded.

For these reasons I am of opinion that the appeal should be allowed.

FIRST APPEAL.

"ORDERED and adjudged that the said interlocutors complained of in the said appeal be, and the same are hereby, reversed: And it is further ordered that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with a direction to declare (1) that the association or body of Christians calling themselves the United Free Church of Scotland has no right, title, or interest in any part of the

[1] 12 D. 523.

[2] 22 D. 120.

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whole lands, properties, sums of money, and others which stood vested, as at the 30th day of October 1900, in the Right Hon. John Campbell, Baron Overtoun, and others, as general trustees of the Free Church of Scotland; and (2) that the said appellants (pursuers) and those adhering to and lawfully associated with them, conform to the constitution of the Free Church of Scotland, are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them, and their successors, as constituting the true and lawful Free Church of Scotland, and that the defenders the said Right Hon. John Campbell, Baron Overtoun, and others, as general trustees aforesaid, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same (subject always to the trusts after mentioned) for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland, or its duly appointed Commission for the time being, and in particular, that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as general trustees by a General Assembly of the Free Church of Scotland, or its duly appointed Commission for the time being, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900; and to do therein as shall be just and consistent with this judgment and direction: And it is further ordered that the respondents do pay, or cause to be paid, to the said appellants the costs of the action in the Court of Session, and also the costs incurred in respect of the said appeal to this House, the amount of the said last-mentioned costs to be certified by the Clerk of the Parliaments: And it is also further ordered that unless the costs," &c.

SECOND APPEAL.

"ORDERED and adjudged that the interlocutors complained of be reversed; and the cause be remitted back to the Court below, with directions to assoilzie the defenders (appellants) from the conclusions of the action; and that the respondents do pay the costs in this House and in the Court below."

DEACON, GIBSON, MEDCALF, & MARRIOT—SIMPSON & MARWICK, W.S.—GRAHAMES, CURREY, & SPENS—COWAN & DALMAHOY, W.S.

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Clydebank Engineering and Shipbuilding Co., Limited, v. Don Jose Ramos Yzquierdo y Castaneda.

CLYDEBANK ENGINEERING AND SHIPBUILDING COMPANY, LIMITED (Defenders), Appellants.—*Lawson Walton, K.C.—Ure, K.C.—Rufus Isaacs, K.C.—John H. Tait—Felix Cassel.*

DON JOSE RAMOS YZQUIERDO Y CASTANEDA AND OTHERS (Pursuers), Respondents.—*Sol.-Gen. Dundas—R. L. Blackburn.*

*Contract—Penalty or Liquidate Damages.*—By two contracts dated respectively in June and December 1896 the Spanish Government contracted with a Clyde shipbuilding firm for the building of four torpedo boat destroyers at the price under one contract of £67,180, and under the other of £65,650 for each vessel, delivery to be within periods varying from six and a half to seven and three quarter months from the date of the contract. The contracts provided that "The penalty for late delivery shall be at the rate of £500 per week for each vessel." At the date of the contracts the Spanish Government was endeavouring to suppress the insurrection in Cuba, and feared the armed intervention of the United States. All the vessels having been delivered many months after the stipulated dates of delivery the Spanish Government brought an action against the shipbuilders for £500 for each week of late delivery of each vessel. The defenders pleaded that the sum of £500 stipulated in the contracts was penalty, not liquidate damages.

*Held* (*aff.* judgment of Second Division) that the sum of £500 a week was to be regarded as liquidate damages and not as penalty, and that the Spanish Government were entitled to the full sum of £500 a week as damages.

*Personal Objection—Waiver—Payment of price without reservation of claim of damages.—Circumstances* in which *held* (*aff.* judgment of Second Division) that payment, without reservation, of the last instalment of the price of a ship and acceptance of delivery by the purchaser after the date stipulated for delivery did not import a waiver by the purchaser of his right under a clause in the contract entitling him to a specified sum as damages for late delivery.

(ANTE, Dec. 10, 1901, 4 F. 319, rev. July 28, 1902, 4 F. (H. L.) 31.)
(In the Court of Session, June 17, 1903, 5 F. 1016.)

Ld. Chancellor (Halsbury). Lord Davey. Ld. Robertson.

The defenders, the Clydebank Engineering and Shipbuilding Company, Limited, and the Liquidators thereof, appealed.

LORD CHANCELLOR.—This is a case in which a party to an agreement has admittedly broken it, and an action was brought for the purpose of enforcing the payment of a sum of money which, by the agreement between the parties, was fixed as that which the defenders were to pay in the event that has happened.

Two objections have been made to the enforcement of that payment. The first objection is one which appears upon the face of the instrument itself, namely, that it is a penalty, and not, therefore, recoverable as a pactional arrangement of the amount of damages resulting from the breach of contract. It cannot, I think, be denied—indeed, I think it has been frankly admitted by the learned counsel—that not much reliance can be placed upon the mere use of certain words. Both in England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word "penalty" on the one side or "damages" on the other, would not be conclusive as to the rights of the parties. It is, I think, not denied now that the law is the same both in England and in Scotland. The different form of its administration gave rise doubtless to the Act of William III.

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(8 and 9 Will. III. c. 11), sec. 8, which, of course, is that upon which English lawyers rely when this question occurs; but that difference only arises from a difference in the mode of administering in this country the two branches of jurisprudence which we call law and equity, while the Scotch Judges had full jurisdiction in each of the Courts to administer justice, and in administering justice to administer it according to both branches of jurisprudence.

We come then to the question, What is the agreement here? and whether this sum of money is one which can be recovered as an agreed sum as damages, or whether, as has been contended, it is simply a penalty to be held over the other party *in terrorem*—whether it is, what I think gave the jurisdiction to the Courts in both countries to interfere at all in an agreement between the parties, unconscionable and extravagant, and one which no Court ought to allow to be enforced.

It is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon without reference to the particular facts and circumstances which are established in the individual case. I suppose it would be possible in the most ordinary case, where people know what is the thing to be done and what is agreed to be paid, to say whether the amount was unconscionable or not. For instance, if you agreed to build a house in a year, and agreed that if you did not build the house for £50, you were to pay a million of money as a penalty, the extravagance of that would be at once apparent. Between such an extreme case as I have supposed and other cases, a great deal must depend upon the nature of the transaction—the thing to be done, the loss likely to accrue to the person who is endeavouring to enforce the performance of the contract, and so forth. It is not necessary to enter into a minute disquisition upon that subject, because the thing speaks for itself. But, on the other hand, it is quite certain, and an established principle in both countries, that the parties may agree beforehand to say, "Such and such a sum shall be damages if I break my agreement." The very reason why the parties do in fact agree to such a stipulation is that sometimes, although undoubtedly there is damage and undoubtedly damages ought to be recovered, the nature of the damage is such that proof of it is extremely complex, difficult, and expensive. If I wanted an example of what might or might not be said and done in controversies upon damages, unless the parties had agreed beforehand, I could not have a better example than that which the learned counsel has been entertaining us with for the last half-hour in respect of the damage resulting to the Spanish Government by the withholding of these vessels beyond the stipulated period. Supposing there was no such bargain, and supposing the Spanish Government had to prove damages in the ordinary way without insisting upon the stipulated amount of them, just imagine what would have to be the cross-examination of every person connected with the Spanish Administration such as is suggested by the commentaries of the learned counsel: "You have so many thousand miles of coast-line to defend by your torpedo-boat destroyers; what would four torpedo-boat destroyers do for that purpose? How could you say you are damaged by their non-delivery? How many filibustering expeditions could you have stopped by the use of four torpedo-boat destroyers?"

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I need not pursue that topic. It is obvious on the face of it that the very thing intended to be provided against by this pactional amount of damages is to avoid that kind of minute and somewhat difficult and complex system of examination which would be necessary if you were to attempt to prove the damage. As I pointed out to the learned counsel during the course of his argument, in order to do that properly and to have any real effect upon any tribunal determining that question, one ought to have before one's mind the whole administration of the Spanish Navy—how they were going to use their torpedo-boat destroyers in one place rather than another, and what would be the relative speed of all the boats they possessed in relation to those which they were getting by this agreement. It would be absolutely idle and impossible to enter into a question of that sort unless you had some kind of agreement between the parties as to what was the real measure of damages which ought to be applied.

Then the other learned counsel suggests that you cannot have damages of this character, because really in the case of a warship it has no value at all. That is a strange and somewhat bold assertion. If it was an ordinary commercial vessel capable of being used for obtaining profits, I suppose there would not be very much difficulty in finding out what the ordinary use of a vessel of this size and capacity and so forth would be, what would be the hire of such a vessel, and what would therefore be the equivalent in money of not obtaining the use of that vessel according to the agreement during the period which had elapsed between the time of proper delivery and the time at which it was delivered in fact. But, says the learned counsel, you cannot apply that principle to the case of a warship, because a warship does not earn money. It is certainly a somewhat bold contention. I should have thought that the fact that a warship is a warship, her very existence as a warship capable of use for such and such a time would prove the fact of damage if the party was deprived of it, although the actual amount to be earned by it, and in that sense to be obtained by the payment of the price for it, might not be very easily ascertained—not so easily ascertained as if the vessel were used for commercial purposes and where its hire as a commercial vessel is ascertainable in money. But is that a reason for saying that you are not to have damages at all? It seems to me it is hopeless to make such a contention, and although that would not in itself be a very cogent argument, because the law might be so absurd, yet it would be a very startling proposition to say that you never could have agreed damages for the non-delivery of a ship of war although, under the very same words with exactly the same phraseology in the particular contract, you might have damages if it was a vessel used for commercial purposes; so that you would have to give a different construction to the very same words according to whether the thing agreed to be built was a warship or a ship intended for commercial purposes. I think it is only necessary to state the contention to shew that it is utterly unsound.

Then there comes another argument which, to my mind, is more startling still; the vessel was to be delivered at such and such a time; it was not delivered, but the fleet the Spanish Government had was sent out at such a time and the greater part of it was sunk, and, says the learned counsel, "If we had kept our contract and delivered these vessels they

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would have shared the fate of the other vessels belonging to the Spanish Government, and therefore in fact you have got your ships now, whereas if we had kept our contract they would have been at the bottom of the Atlantic." I confess, after some experience, I do not think I ever heard an argument of that sort before, and I do not think I shall often hear it again. Nothing could be more absurd than such a contention, which, if it were reduced to a compendious form such as one has in a marginal note, would certainly be a striking example of jurisprudence. I think I need say no more to shew how utterly absurd such a contention is. I pass on to the other question.

It seems to me, when one looks to see what was the nature of the transaction in this case, it is hopeless to contend that the parties only intended this as something *in terrorem*. Both parties recognised the fact of the importance of time; it is a case in which time is of the essence of the contract and so regarded by both parties, and the particular sum fixed upon as being the agreed amount of damages was suggested by the defendants themselves, and to say that that can be unconscionable or something which the parties ought not to insist upon, that it was a mere holding out something *in terrorem*, after looking at the correspondence between the parties, is, to my mind, not a very plausible suggestion. I have, therefore, come to the conclusion that the judgments of the Courts in Scotland are perfectly right in this respect, and I think there is no ground for the contention that this is not pactional damage agreed to between the parties—and for very excellent reason agreed to between the parties—at the time the contract was entered into.

Then there comes the further question as to waiver. That question, of course, assumes that these damages can be recovered, apart from the question of whether or not this vested right of action, which undoubtedly was a vested right of action, for the non-delivery of these boats within the limit of time, can be answered by saying that it has been released by waiver. I am not certain that I understand the application of the doctrine of waiver to such a question as we are now dealing with of the release of a right of action already vested; but, assuming we get over that difficulty, I do not feel as a matter of fact that there is any evidence upon which anybody could reasonably rely that there was an agreement assented to by both parties that these damages should be waived. The earlier part of this transaction and the correspondence between the parties I think is quite satisfactorily dealt with by the Lord Ordinary in his very lucid judgment, and it comes to this: that because for some time—I think I may say in aid of the defendants' argument some considerable time—this was not put forward or insisted upon, that, of itself, is to be absolute evidence of a waiver. I do not see it. I must say I never heard of a waiver, the issue upon which is undoubtedly upon the party who averred it, established by such a proposition. The mere fact of payment without deduction I think may be dealt with very shortly. Assuming a great desire to get these vessels, and assuming that the Spanish Government were in earnest—and I do not know why it can be suggested that they were not—to get these vessels with great urgency, it would to my mind have been a very extraordinary thing if they should have risked the delay which would have

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arisen from a controversy in respect of claims which the builders undoubtedly had, and if they had given, as it were, an excuse for the non-delivery of the ships by reason of those claims giving rise to the sort of argument which has lasted not a short time here, and which would have come up to this House long after the war between the American and the Spanish Governments had come to an end. Under those circumstances it appears to me a very natural thing that the claim was not insisted upon in the first instance; and with reference to the delay afterwards I cannot help having regard to the mode of Spanish administration; apart from any intention to waive, I can well imagine that for some time the question was allowed to hang over until the departments in London and in Madrid had ascertained their respective rights and the Spanish Government had made a claim. It is enough, however, to say that there is no evidence upon which any tribunal could reasonably act, even if there could be a waiver in point of law, as to which I venture to express considerable doubt; but, be that as it may, there is no evidence upon that, and I need not therefore express any opinion upon that subject.

I am entirely of opinion that the judgments of the Courts below are right, and I move your Lordships that this appeal be dismissed, with costs.

LORD DAVEY.—I am of the same opinion, and I can express the grounds upon which I have come to the same conclusion as my noble and learned friend on the Woolsack in a very few words.

As to the first question, it is, as my noble and learned friend has pointed out, a question, not of words or of forms of speech, but of substance and of things, namely, whether a clause like the one in question provides for liquidate damages or for a penalty strictly so called in the sense of punishment irrespective of the damage sustained.

Now, it appears to me that a very useful rule for guiding the Court in this matter has been laid down for us in this House by Lord Watson and Lord Herschell, L.C., and the other noble and learned Lords who took part in the decision of the case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.*[1] In that case Lord Watson said this: "When a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated in article 12 are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obligations, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties." Lord Herschell expressed himself in equally strong language when he said: "I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as

[1] June 29, 1886, 13 R. (H. L.) 98.

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a penalty only; and I see no sound reason or principle, or even convenience, for so holding."

I therefore conceive that it may be taken as an established principle in the law of Scotland that, if you find a sum of money made payable for the breach, not of an agreement generally, which might result in either a trifling or a serious breach, but a breach of one particular stipulation in an agreement, and when you find that the sum payable is proportioned to the amount, if I may so call it, or the rate of the non-performance of the agreement—for instance, if you find that it is so much per acre for ground which has been spoilt by mining operations, or if you find, as in the present case, that it is so much per week during the whole time for which the delivery of vessels beyond the contract time is delayed—then you infer that *prima facie* the parties intended the amount to be liquidate damages and not penalty. I say "*prima facie*" because it is always open to the parties to shew that the amount named in the clause is so exorbitant and extravagant that it could not possibly have been regarded as damages for any possible breach which was in the contemplation of the parties, and that is a reason for holding it to be a penalty and not liquidate damages notwithstanding the considerations to which I have alluded.

I confess I know of no other grounds—there may be grounds which may appear in future cases, but speaking from my present knowledge I am not aware of any other grounds—upon which a clause fixed under the conditions I have mentioned for breach of a particular stipulation in an agreement can be held to be a penalty and not liquidate damages. But in *Forrest & Barr* v. *Henderson & Co.*[1] the Lord President Inglis says this: "I hold it to be part of our law on this subject that, even where parties stipulate that a sum of this kind shall not be regarded as a penalty, but shall be taken as an estimate and ascertainment of the amount of damage to be sustained in a certain event, equity will interfere to prevent the claim being maintained to an exorbitant and unconscionable amount." My only criticism upon that sentence would be this—that I do not think that that is the right way of putting it. I think the fact of a claim being of an exorbitant or of an unconscionable amount as compared with any possible damages that could have been within the contemplation of the parties, is a reason for holding it not to be liquidate damages but a penalty. But that is only a difference of expression, and with the substance of the observation I entirely agree. But the Lord President adds this significant sentence: "But, of course, the question whether it is exorbitant or unconscionable is to be considered with reference to the point of time at which the stipulation is made between the parties." That is to say, you are to consider whether it is extravagant, exorbitant, or unconscionable (whatever word you like to select), at the time when the stipulation is made—that is to say, in regard to any possible amount of damages or any kind of damage which may be conceived to have been within the contemplation of the parties when they made the contract.

I hold it to be perfectly irrelevant and inadmissible for the purpose of

[1] 8 Macph. 187, at p. 193, 42 Scot. Jur. 89.

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shewing the clause to be extravagant, in the sense in which I use that word, to admit evidence, such as the learned counsel who has last addressed us has drawn our attention to, of the damages which were actually suffered by the Spanish Government. I agree that it was for the very purpose of excluding that kind of evidence that the parties determined to have the damages liquidate in this manner by naming a specific sum, and it appears to me that the learned counsel have been doing the very thing which the parties intended to prevent by the way in which they have framed their contract.

There is no evidence that this sum would be extravagant or unconscionable in the sense in which those words are used in the passage which I read from the Lord President's judgment in *Forrest & Barr* v. *Henderson & Co.*[1] I need not dwell upon that. I may, however, point out that the sum was suggested by the defenders themselves in their tender and was accepted by the Spanish Government, the other contracting party. I adopt, and it is unnecessary for me to repeat, the very lucid and clear terms in which that subject has been dealt with both by the Lord Ordinary and by the Inner-House.

Now, with regard to the other question, namely, as to the waiver of the right to this sum which the respondents have got judgment for, I can only say that no such waiver is proved to my satisfaction, nor indeed do I think there is more than the merest scintilla of evidence, if there be any at all, in favour of it.

What the appellants undertake to do is to prove the release of a vested right of action, and the way in which they attempt to do it is chiefly by drawing our attention to the fact that in March 1898, when the instalments were due on, I think, three of the vessels, the vessels having been delivered in the meantime, the Spanish Government paid the instalments without reserving any right to the liquidate damages. Of course the *onus* on this part of the case is upon the appellants. It may be that it would have been more prudent—it may even be that it would have been fairer—of the Spanish Government, in making the payment of the last instalments, to have reserved their right to make this claim; but it was not necessary for them to do so. There is no inconsistency between paying the instalments of the purchase-price and, after considering all the matters which were placed before them for their consideration by the defenders, making up their minds whether they would make this further claim or not. Indeed, they were almost bound to pay these instalments at once, because although it is quite true that, changing their minds, the shipbuilders had given delivery of the vessels, still as a matter of honour the Spanish Government were bound, and certainly the delivery was given in expectation that the payment would be made at an early date. I doubt whether it is even evidence of any intention to release this right of action in regard to these claims. It may very well be that the appellants thought, or rather hoped, that the matter was settled and that they would hear no more about it, but that of course would not amount to a release or waiver by the other party. The payments made in

[1] 8 Macph. 187, at p. 193, 42 Scot. Jur. 89.

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March 1898 were not a settlement, and they did not even purport to be a settlement, of all claims, because at the same time that the payments were made there were other claims which had been made and had to be settled for extras and other incidental expenses of that kind, so that there was not, and did not even purport to be, a settlement in March 1898. I see no grounds whatever for holding that there was any waiver of the claims which have been put forward in this action.

I adopt the very full and lucid language in which this part of the case has been dealt with in the judgment of the Lord Ordinary, with whose observations I entirely agree.

LORD ROBERTSON.—I agree that these judgments ought to be affirmed.

This clause sought to be enforced is not a general penalty clause, but a specific agreement that sums of money, graduated according to time, shall be paid as penalties for delays in delivering these vessels. Now, the Court can only refuse to enforce performance of this pecuniary obligation if it appears that the payments specified were—I am using the language of Lord Kyllachy—"merely stipulated *in terrorem*, and could not possibly have formed" "a genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation."

Now, all such agreements, whether the thing be called penalty or be called liquidate damage, are in intention and effect what Professor Bell calls "instruments of restraint," and in that sense penal. But the clear presence of this element does not in the least degree invalidate the stipulation. The question remains, Had the respondents no interest to protect by that clause, or was that interest palpably incommensurate with the sums agreed on? It seems to me that to put this question in the present instance is to answer it. Unless injury to a State is as matter of law inexpressible in money, Spain was or might be deeply interested in the early delivery of these ships and deeply injured by delay.

To my thinking, Lord Moncreiff has, in two sentences, admirably stated the case:—"The subject-matter of the contracts, and the purposes for which the torpedo-boat destroyers were required, make it extremely improbable that the Spanish Government ever intended or would have agreed that there should be inquiry into, and detailed proof of, damage resulting from delay in delivery. The loss sustained by a belligerent, or an intending belligerent, owing to a contractor's failure to furnish timeously warships or munitions of war, does not admit of precise proof or calculation; and it would be preposterous to expect that conflicting evidence of naval or military experts should be taken as to the probable effect on the suppression of the rebellion in Cuba or on the war with America of the defenders' delay in completing and delivering those torpedo-boat destroyers."

The appellants' counsel frankly maintained that the delay merely saved the Spanish Government so much expense, as vessels of war do not earn freight—an argument which would be equally applicable to the case of the vessels never being delivered at all, so that a total breach of the contract would be a positive good in itself. But, in truth, the only apparent difficulty in the present case arises from the magnitude and complexity of the interests involved and of the vicissitudes affecting them, and as the question

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is whether this stipulation of £500 a week is unconscionable or exorbitant, these considerations can hardly be considered a formidable difficulty in the way of the respondents.

On the question of waiver I must say I think the appellants' case completely fails; and this matter is very adequately dealt with by the Lord Ordinary.

APPEAL dismissed with costs.

ASHURST, MORRIS, CRISPS, & CO.—FORRESTER & DAVIDSON, W.S.—M'GRIGOR, DONALD, & CO., Glasgow—J. T. DAVIES—MACANDREW, WRIGHT, & MURRAY, W.S.

No. 3.

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FRANCISCO ROSSI (Pursuer), Appellant.—*Crabb Watt, K.C.*—*T. B. Morison*—*J. Crabb Watt.*

MAGISTRATES OF EDINBURGH (Defenders), Respondents.—*Cripps, K.C.*—*F. T. Cooper, K.C.*—*W. H. Beveridge.*

*Burgh—Magistrates—Powers—Ice-cream Vendor's Licence—Unauthorised Conditions—Ultra vires—"Lawful day"—Edinburgh Corporation Act*, 1900 (63 *and* 64 *Vict. cap. xxviii.*), *sec.* 80.—By sec. 80 of the Edinburgh Corporation Act, 1900, as amended by sec. 57 of the Edinburgh Corporation Order Confirmation Act, 1901, it is enacted, that any person selling ice-cream (except in a duly licensed hotel) without a licence from the Magistrates, "who are hereby empowered to grant the same," for the house, building, or premises where such ice-cream is kept for sale or sold, shall be liable to a penalty, provided that such licence shall run from the date of issue until the 15th May ensuing, and upon renewal, from the date of expiry of the licence so renewed to the 15th May succeeding, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice-cream under the provisions of the Act who shall . . . sell ice-cream except during the hours between" 8 A.M. and 11 P.M. "on any lawful day, or at such extended hour at night as the Magistrates may by special regulation, in particular cases and for reasons assigned, permit," shall be liable in a penalty. The statute did not provide a form of licence.

The Magistrates proposed that the licences to be issued by them to ice-cream vendors should contain the following conditions:—"1. That the said licencee shall not keep open said premises, or sell or permit the sale of ice-cream therein on Sunday, or on any other day set apart for public worship by lawful authority. 2. That the said licencee shall not keep open said premises, or sell or permit the sale of ice-cream therein before eight o'clock in the morning or after eleven o'clock at night. 3. That the said Magistrates, or any of them, may at any time suspend or revoke the licence."

In an action by an ice-cream vendor against the Magistrates for declarator that they were not entitled to issue, and that he was not bound to accept, a licence containing these conditions, in respect that the conditions were not authorised by the Act, *held* (*rev.* judgment of Second Division) that it was *ultra vires* of the Magistrates to insert the conditions in the licences issued by them.

(IN the Court of Session, Feb. 20, 1903, 5 F. 480.)

The pursuer appealed.

Ld. Chancellor (Halsbury). Lord Davey. Ld. Robertson.

LORD CHANCELLOR.—The question here may be reduced to a very short point, namely, whether the civic authorities have power to make these regulations which are complained of, because in substance they are regulations although they are contained in the form of a licence which they issue and which involves the power to make a regulation. Whether it is called

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a regulation or a bye-law it is a legislative power which, in my view, the Legislature has not confided to them.

It is idle to say that a great many of these things, as has been urged in the arguments which have been addressed to your Lordships, would be very desirable for the sake, it is said, of public order. I confess, for myself, I am wholly unable to understand what question of public order arises in the sale of ice-cream; but I pass that by, because I do not know what was the occasion of this legislation. We have had no opportunity of considering it; neither is there anything in the statute itself, nor has anything been put before us, to shew that which would have been undoubtedly a proper and legitimate source of information—what was the occasion and what was the evil aimed at to be remedied by the legislation which the Legislature has adopted. It is enough for me to say that I know nothing about it. I do not know what the evil aimed at was. I can give, therefore, no general view of what is the intention and purpose of the statute. I can only look at the statute itself and construe it, and when I construe the statute I find there is in the statute itself a plain prohibition with respect to certain things. The Magistrates, of course, are not only empowered but bound to give effect to legislation which has been passed; but when it is argued that because they are given the power to restrict, within certain hours, the sale of ice-cream, therefore they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice-cream shall be sold, it seems to me the argument entirely fails. What is sought to be done, whether directly by bye-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the Legislature. It is a restraint of a common right which all His Majesty's subjects have—the right to open their shops and to sell what they please subject to legislative restriction—and, if there is no legislative restriction which is appropriate to the particular thing in dispute, it seems to me it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the Legislature has imposed could be enlarged and applied to things and circumstances other than that which the Legislature has contemplated.

The result is, as it appears to me, that the form of this licence is entirely irregular, and when it is said that any Court can construe it so as not to infringe the liberty of the subject, and that they would simply withdraw the licence under certain circumstances, I think in the first place that is an untenable proposition. You have no right to allow to stand that which on its face would involve an undue restriction of the liberty of the subject on the ground that any Court afterwards would construe it so that it should not do so, because it would be *ultra vires* on the face of it. I think that would be wrong in itself, but it would be much more wrong to allow the subject to be called upon to take such a question from Court to Court, and ultimately to your Lordships' House, because they would not interfere with the language which the civic authority had used which, upon the face of it, involved an infringement upon the liberty of the subject.

I confess for my own part I have entertained no doubt from the commencement of this case that this was *ultra vires* on the part of the civic authority. The only doubt I have entertained has been whether this was

an appropriate form of remedy. I am told now—indeed, one of the learned Judges himself points out—that if the fact is, as was contended before him, that a form of licence involving, as I say, a prohibition of this sort was *ultra vires*, this is an appropriate form of remedy. Under those circumstances I can have no difficulty at all in advising your Lordships to allow this appeal, and to condemn the respondents in costs.

LORD DAVEY.—I certainly am not disposed to entertain the objection to the competency of this appeal, because looking at the judgments of the experienced Lord Ordinary and the Inner-House I do not see in any of the judgments delivered by those learned Judges, who, of course, must be assumed to know their own procedure, any objection to the competency of the action. Indeed, Lord Moncreiff says,—"If the pursuer had been able to shew that the Magistrates had exceeded their powers in this licence, he no doubt would have succeeded." I turn, therefore, to the substance of the argument of the learned counsel.

In the year 1900 the Town-Council or the Magistrates of Edinburgh thought fit to apply to the Legislature, and the Legislature passed an Act for the regulation of billiard-rooms and the sale of ice-cream. I must assume that there were circumstances connected with the trade of selling ice-cream in the city of Edinburgh which justified the intervention of the Legislature and made it right to impose special provisions on the sale of ice-cream which are not applicable to the sale of similar commodities. But, my Lords, every restriction and every regulation such as I find in the Act of 1900, repeated in the Provisional Order of 1901, is of course *pro tanto* a restraint upon the ordinary right of every British subject. It is in fact a restraint of trade, and I am of opinion that although the section of the Act and the Provisional Order in which I find such provisions ought to be construed fairly, and ought to be construed so as reasonably to effect the object which the Legislature must be presumed to have had in view, you ought not by implication to extend the restriction in restraint of that particular trade further than the Legislature has sanctioned, and still less ought you to give such a construction to clauses of that description as would impose a restraint, not only upon the exercise of the particular trade which is in question but also upon the exercise of other trades which are not in question.

Bearing that in mind, I confess I should have used the same words as the Lord Justice-Clerk used, though not in the same sense as that in which he used them. He says, "This is a very simple case"—and so far I agree with him; but I regret to say I cannot agree in the conclusion which he has come to; for I am of opinion that every one of the so-called conditions in the way of restricting the pursuer's trade goes beyond anything that is sanctioned by the Legislature in the Act or the Provisional Order. I need not read to your Lordships or refer at length to the section—it is the section of the Corporation Act of 1900 which is called clause 80, which re-enacts with some additions clauses 285-6 of the Edinburgh Police Act, 1879—but I will merely point out to your Lordships that it provides for a licence being granted for the premises in which ice-cream may be sold, and prohibits any unlicensed person from selling ice-cream except on premises so licensed. But the prohibition is merely to selling ice-cream upon those premises, and

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then the section imposes a penalty for that offence, and also for not writing or putting up upon his premises the words, "Licensed for the sale of ice-cream," and it provides that the licence shall run from the 15th day of May in one year to the 15th day of May following, "unless the same be sooner forfeited, revoked, or suspended." Then it prohibits the selling of ice-cream except during the hours between 8 o'clock in the morning and 11 o'clock at night "on any lawful day."

The first condition in the licence which I think is open to objection is that it not only prohibits the sale of ice-cream, but it also prohibits the licencee from keeping open his said premises for the sale of other goods. That I think is wholly unwarranted by the Act. There is nothing whatever there to prevent or prohibit the licencee's keeping open his premises during such hours as he may otherwise lawfully do so. The prohibition is against selling ice-cream, but there is no prohibition against keeping open his premises for other purposes. For example, I suppose it is quite possible that the sale of ice-cream may be combined with other branches of trade, and the effect of this proviso is to extend the prohibition as regards the hours and days when ice-cream may be sold to the sale of other commodities which may be lawfully sold on other days and at other times.

It is said that this is in the nature of a condition for giving effect to the provisions of the statute, but I am not prepared to say that you can do that. I am of opinion that you cannot under the guise of giving better effect to the provisions of a statute extend the statute to the prohibition or the restraint of trades which are not included in the statute. Although I quite feel the force of the argument used by Lord Trayner on this part of the case, the answer really is that which has been given by my noble and learned friend on the Woolsack—that it might have been a very reasonable provision for the Legislature to have prescribed and inserted in the statute, but the Legislature has not done so.

Then, the words in the statute are "on any lawful day," which I agree are ambiguous. The Town-Council have construed those words to mean on any day except Sunday or any other day set apart for public worship by lawful authority. Now, my Lords, Sunday no doubt is properly excluded, but as regards the further words, "or on any other day set apart for public worship by lawful authority," I do not know what is meant by "lawful authority." If it means that the Government or any other authority acting under the powers of an Act of Parliament prohibits the sale of ice-cream upon a certain day the prohibition will have effect; but if it does not do so I do not, I confess, agree that because a day other than Sunday is fixed for public worship by some authority it extends the restriction to such a day. That consideration derives still more force when it is considered that the prohibition is not only against the selling of ice-cream, but against the licencee keeping open his premises for other purposes.

The same observation applies to No. 2; and then we come to No. 3, which is: "That the magistrates, or any of them, may at any time suspend or revoke this licence." Now, I confess that I have not heard from the learned counsel, and I took the liberty of pressing the learned counsel on this point, of any power in the magistrates either to revoke or to suspend this licence. It is said that the words which I have read, "unless the same

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be sooner forfeited, revoked, or suspended," give the power. That construction of the Act of Parliament seems to me to be entirely contrary to principle. The utmost that you can say is that the words seem to assume that the corporation either have already, or may at some future time, acquire a power to forfeit, revoke, or suspend the licence. That it does not give the power seems to me plain from a consideration of the words, because the words are, as your Lordships will observe, "forfeited, revoked, or suspended." Now, "forfeited" has a clear and definite meaning when you are speaking of licences of this description. It means that if the licencee does or omits certain acts his licence will be forfeited. That is the plain meaning of it. Well, my Lords, you will look in vain in this statute or in this Provisional Order for anything that defines the conditions upon which the licence is to become forfeited. It is plain, then, that this clause does not make any provision for the licencee forfeiting his licence, and it is equally plain to my mind that it does not contain any power either to revoke or suspend the licence. I therefore agree with the motion which has been made by your Lordship that the interlocutors be reversed.

LORD ROBERTSON.—I am of the same opinion.

The first question is whether the proposed form of licence does or does not accurately state the restrictions imposed by the statute on dealers in ice-cream. It seems to me that it does not, and that it purports to impose on the dealers more restrictions than does the statute. I can find no warrant in the statute for forcing the dealer to close his premises at the hours during which he is forbidden to sell ice-cream, and I know of no principle upon which the Magistrates can be held entitled to eke out what they may consider a weak prohibition by imposing an additional one. The licence would compel a man who had a general baking or confectionery business to shut shop at the specified hours, merely because one (and it might be an unimportant) item of his business was ice-cream. If the Legislature should in the future come to estimate the importance of ice-cream higher than it seems to do at present, it may adopt the stringent measure proposed. But in the meantime the respondents must be content to keep pace with the Legislature.

I further think that the respondents, in the third condition, arrogate to the Magistrates a power not conferred on them.

As regards lawful days, I think Sundays are not, in the sense of the Act, lawful days, on the principle stated in this House in the case of *Phillips* v. *Innes*.[1] As regards the other days described in the proposed licence, I do not feel called on to discuss dubious questions about public fasts which have little or no practical importance, and shall only remark that it is quite out of place for a licensing body to put into the licence their gloss on the statute on such points, whether it be more or less probably correct. On the present point the respondents, I have no doubt with the best intentions, have gone out of their way to court discussion.

The next question is as to the form of action. Now, the substance of the matter is that the Magistrates have publicly threatened to impose and enforce on a lawful trade restrictions which are illegal. This being so, it

[1] 2 Sh. and M'L. 465, 6 Sco. R. R. 647.

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would be unfortunate if it were necessary that a lawful trade should be interrupted and harassed by actual prosecution. It seems to me that the action of declarator, which is peculiar to the Scotch system, exactly meets the case. It is quite a mistake to assume that this trader requires to postulate what he has not got, namely, a licence, in order to find himself a title to sue. His title is his trade, which the respondents avow that they intend to interfere with by refusing to give a trader a licence except upon terms more onerous than the law allows. In my opinion the appellant has a perfectly good title to have those restrictions declared illegal.

"ORDERED that the interlocutors appealed from be reversed: And declared that the Magistrates are not empowered to grant licences to ice-cream vendors for premises in the city of Edinburgh for the keeping for sale, or sale, of ice-cream, subject to any conditions or restrictions other than those specified in sec. 80 of the Edinburgh Corporation Act, 1900, as amended by the Edinburgh Corporation Order Confirmation Act, 1901, or in accordance therewith: And that the licence set out in condescendence 9 is not conform to the said statutes: That the cause be remitted to the Court of Session: And that the respondents do pay to the appellant the costs in the Court of Session and in respect of this appeal."

TRAILL, HOWELL, & PAGE—DONALDSON & NISBET, S.S.C.—A. & W. BEVERIDGE—THOMAS HUNTER, W.S.

No. 4.

Mar. 6, 1905. Grimond or Macintyre v. Grimond's Trustees.

MRS MARGARET ISABELLA GRIMOND OR MACINTYRE AND ANOTHER (A. D. Grimond's Next of Kin) (Pursuers), Appellants.—*Lord-Adv. Dickson—John Wilson, K.C.—J. Duncan Millar.*

JOSEPH BOWMAN GRIMOND AND ANOTHER (A. D. Grimond's Testamentary Trustees) (Defenders), Respondents.—*W. Campbell, K.C. —W. J. Cullen.*

*Succession—Trust—Uncertainty—"Charitable or Religious Institutions and Societies."*—A testator by his trust-disposition and settlement directed his trustees to divide a portion of the residue of his estate "to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select, and in such proportion to each or any as they may fix."

*Held* (*rev.* judgment of Second Division) that the bequest was void from uncertainty.

Ld. Chancellor (Halsbury). Lord Macnaghten. Lord James. Ld. Robertson.

(IN the Court of Session, Jan. 15, 1904, 6 F. 285.)

Alexander Dick Grimond, merchant and manufacturer in Dundee, died on 29th January 1903, leaving a trust-disposition and settlement, dated 12th November 1894, by which he, *inter alia*, directed his trustees to divide the residue of his estates into three equal parts. With regard to one of these parts he provided as follows:—"And with regard to one of the said parts or shares they shall divide, pay, and convey the same to and among such charitable or religious institutions and societies as I may direct, and in such proportions to each or any as I may fix by any writing, whether holograph or tested, or under my hand, and failing thereof in whole or in part, then as regards such whole or such part not disposed of by me, to and among such charitable or religious institutions and societies as my trustees, or

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the survivors or survivor of them, may select, and in such proportions to each or any as they may fix."

Mr Grimond did not leave any writing in regard to the institutions and societies which he desired to benefit.

In April 1903 Mrs Margaret Isabella Grimond or Macintyre and another, being two of Mr Grimond's next of kin, brought an action against his trustees concluding for declarator that the above quoted direction in regard to one-third of the residue of his estates was void and ineffectual on the ground of vagueness and uncertainty, and that that share of residue fell into intestacy.

The defenders pleaded that the direction regarding the one-third share of residue in question being valid and effectual, they should be assoilzied.

On 31st October 1903 the Lord Ordinary (Low) assoilzied the defenders.

On 15th January 1904 the Second Division (Lord Moncreiff dissenting) adhered to the Lord Ordinary's interlocutor.

The pursuers appealed.

LORD CHANCELLOR.—I do not think it is necessary to go through the course of the authorities. I think this question may be decided upon a very simple proposition. In my opinion the testator here has not given a class from which he allowed his trustees to select individually, but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow.

I confess I have not been able to entertain much doubt from the commencement of this argument that that is the condition of this will, and I think I am encouraged in the expression of that opinion by finding some variety of opinion among the learned Judges themselves, who nevertheless adhered to the decision of the Lord Ordinary. The Lord Ordinary says it is to be confined to religious societies in the sense of those that are Christian. I do not find that that view is adopted by any of the learned Judges on appeal, and what the particular limit is within which the persons designated, the trustees, are to select I am afraid I have not been able to discover.

It seems to me that the judgment of Lord Moncreiff really disposes of the question quite satisfactorily. I do not wish to add anything to his Lordship's view. It appears to me that he has satisfactorily answered the whole argument which has now been presented by the respondents. In the result I move your Lordships that the judgment appealed from be reversed, and a proper interlocutor made for the purpose of giving effect to the judgment prayed by the pursuers.

LORD MACNAGHTEN.—I concur.

LORD JAMES.—I concur, for the reasons which have been given by Lord Moncreiff in his judgment.

LORD ROBERTSON.—So do I.

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"ORDERED that the interlocutors, so far as appealed against, be reversed, and that the costs of this appeal be paid out of the one-third share of the residue of the testator's estate."

A. & W. BEVERIDGE—DUNCAN & BLACK, W.S.—JOHN KENNEDY, W.S.—W. & J. COOK, W.S.

No. 5.
April 11, 1905.
Dunbar Dunbar v. Dunbar Dunbar.

SIR F. C. MACKENZIE (Judicial Factor on Dunbar Dunbar's Marriage-Contract Trust-Estate) (Claimant), Appellant.—*Sol.-Gen. Salvesen—Constable.*

THE REV. JOHN ARCHIBALD DUNBAR DUNBAR (Claimant), Appellant.—*Sol.-Gen. Salvesen—Constable.*

WILLIAM ALLARDES AND OTHERS (Mrs Dunbar Dunbar's Testamentary Trustees) (Claimants), Respondents.—*Haldane, K.C.—Guthrie, K.C.—A. Moncrieff.*

*Marriage-Contract—Conquest—Wife's Acquirenda—Accumulations of income.*—By an antenuptial marriage-contract executed in 1848, the wife bound herself to convey to the trustees the whole funds and estate, real and personal, which she might thereafter "conquest and acquire by purchase, succession, or otherwise." The trustees were directed to pay the income of the trust-estate to the wife during her life, for her own separate benefit and use, exclusive of the *jus mariti*.

*Held* (*aff.* judgment of First Division) that the clause of conquest did not extend to estate which, as ascertained at the dissolution of the marriage, consisted of, or was purchased with, accumulations of the wife's income.

*Marriage-Contract—Legitim—Discharge—Married Women's Property (Scotland) Act*, 1881 (44 *and* 45 *Vict. cap.* 21), *secs.* 7 *and* 8.—An antenuptial marriage-contract, executed in 1848, declared that the provisions therein made for the child or children of the marriage should be in full satisfaction "of all bairns' part of gear, executry, and everything else which they could respectively claim or demand by and through the decease of" their mother. The mother having died in 1899, a son, who had taken his provision under the marriage-contract, claimed also, under the Married Women's Property Act, 1881, legitim from such part of his mother's moveable estate as did not fall under the marriage-contract, and which she had disposed of by will.

*Held* (*aff.* judgment of First Division) that the son's claim to legitim from his mother's estate was excluded by the above clause in the marriage-contract.

(IN the Court of Session, Dec. 4, 1902, 5 F. 191.)

Lord Macnaghten. Lord Davey. Ld. Robertson. Lord Lindley.

Captain Edward Dunbar and Miss Phœbe Dunbar, heiress of entail in possession of Sea Park, were married on 17th October 1848, having executed an antenuptial contract dated 13th October 1848.

The marriage was dissolved by the death of Captain Dunbar Dunbar on 10th January 1898, and Mrs Dunbar Dunbar died on 9th May 1899, leaving a trust-disposition and settlement. The only child of the marriage, who attained the age of twenty-one and survived his parents, was the Reverend John Archibald Dunbar Dunbar. He had the sole interest as fiar in the marriage-contract funds and estate.

Questions having arisen (1) as to what estate in the possession of Mrs Dunbar Dunbar at the time of her death fell under a conveyance of the wife's *acquirenda* in the marriage-contract, and (2) whether the son, who had taken his provisions under the marriage-contract, was entitled to legitim from his mother's moveable estate, a multiplepoinding was raised in 1900 by her son, as real raiser, in the name of her testamentary trustees as nominal raisers.

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The fund *in medio* was the wife's estate, heritable and moveable, in the hands of her testamentary trustees.

The judicial factor on the marriage-contract trust claimed the whole fund *in medio*, but subsequently only insisted in his claim to the extent of that part thereof which formed the estate of Mrs Dunbar Dunbar at the dissolution of her marriage. He maintained that the wife's savings from income, and property purchased therewith, were conquest falling under the marriage-contract. He pleaded that on a sound construction of the marriage-contract he was entitled to be preferred in terms of his claim.

The Reverend J. A. Dunbar Dunbar claimed one-half of the residue of the fund *in medio*, so far as the same was moveable, after satisfying the claims of the judicial factor, and pleaded, "In respect of his right of legitim the claimant is entitled to be preferred in terms of his claim."

The trustees under Mrs Dunbar Dunbar's settlement claimed the whole fund *in medio*, maintaining that no part of it fell within the conveyance to the marriage-contract trustees, and that the son's claim to legitim was excluded by the express terms of the marriage-contract.

The questions so raised depended on the following clauses in the marriage-contract :—"I, the said Miss Phœbe Dunbar, further in contemplation of the said intended marriage, do hereby dispone, assign, and convey to" the trustees "all and sundry lands and estate, heritable bonds, adjudications, and all other heritable subjects, of whatever kind or denomination, or wherever situated, presently pertaining to and belonging to me, or which I may acquire or succeed to during the subsistence of the said intended marriage, but excepting and reserving herefrom the foresaid estate of Sea Park, already settled under strict entail as aforesaid."—[Here followed special conveyances of the rents of Sea Park and various funds.] "And further, I, the said Miss Phœbe Dunbar, with consent of my said promised husband, and I, the said Edward Dunbar, Esquire, for myself, and we both with one consent, hereby bind and oblige ourselves to dispone, assign, convey, transfer, and make and set over to, and in favour of the said trustees and foresaids, All and Sundry lands heritages, and sums of money, funds, goods, and other estate, real and personal, which I, the said Miss Phœbe Dunbar, now have or at any time hereafter may conquest and acquire by purchase, succession, or otherwise, other than the heritages to be acquired and settled by the trustees and executors of the said John Dunbar, Esquire, as aforesaid, upon trust, in the terms and for the general purposes (that is, apart from the particular settlements of the furniture and others in the mansion-house of Sea Park, and of the fund forming part of the residue of the estate of the said John Dunbar, Esquire) of the said intended marriage, and of this settlement as after written . . . to pay to me, the said Miss Phœbe Dunbar, or to permit and empower me to receive the whole of the foresaid rents, interest, profits, and dividends, and whole annual income of the said estates, properties, moneys, or stocks, funds, and securities wherever secured or invested during all the days of my life for my own separate benefit and use, exclusive of the *jus mariti* and administration of my said promised husband or of any future husband, as aforesaid."

The provisions made in favour of the child or children of the marriage were declared to be "in full satisfaction to him, her, and them of all bairns' part of gear, executry, and everything else which they

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could respectively claim or demand by and through the decease of me, the said Miss Phœbe Dunbar, their mother, on any ground whatever."

By a minute of admissions lodged in process by the parties, it was admitted that the whole estate left by Mrs Dunbar Dunbar at her death (with certain exceptions immaterial to the questions now reported) was to be held to have been made from accumulations of income to which Mrs Dunbar Dunbar was entitled.

Thereafter, on 19th November 1901, the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, finds (1) that the provision of conquest does not extend to the funds and estate vested in the testamentary trustees of the late Mrs Dunbar Dunbar, which consisted of or were derived from the accumulation of income to which Mrs Dunbar Dunbar was entitled; (2) that said provision of conquest does not extend to accumulations after the dissolution of the marriage or to estate acquired after the dissolution of the marriage: . . . Repels the plea in law for the judicial factor, and for the Reverend John Archibald Dunbar Dunbar: . . . Appoints the cause to be enrolled for application of these findings."

The judicial factor and the Reverend J. A. Dunbar Dunbar reclaimed.

On 4th December 1902 the First Division adhered to the Lord Ordinary's interlocutor.

The judicial factor, Sir F. C. Mackenzie, and the Rev. J. A. Dunbar Dunbar appealed.

Lord Macnaghten.—The questions involved in this appeal depend upon the terms of an antenuptial contract, dated 13th October 1848, made in contemplation of a marriage then intended, and shortly afterwards solemnised, between Captain Edward Dunbar and Miss Phœbe Dunbar of Sea Park. Miss Phœbe Dunbar was heiress in possession of the entailed estate of Sea Park, and a lady of considerable means besides. The settlement effected by the contract was a settlement of property which belonged to her at the time, but it also contained a clause of conquest and *acquirenda*. Mrs Dunbar, who survived her husband, is now dead. In addition to the fortune which was hers at the date of the marriage, she became entitled to a life interest in a large sum of money under the will of a brother, who died in 1862. At her death she was possessed of personal estate of the value of more than £100,000, made up of savings or accumulations of income derived from her life interest under her brother's will and the interest of the funds specifically comprised in her marriage-settlement. By her will she left the moneys which she had thus accumulated away from the appellant, the Rev. John Archibald Dunbar Dunbar, who was the only surviving child of the marriage, but apparently, in her opinion, amply provided for otherwise.

It was contended on behalf of Mr John Archibald Dunbar Dunbar that these accumulations of income, as and when laid out on investments of a permanent character, or, at anyrate, as from Mrs Dunbar's death, became by virtue of the clause of conquest and *acquirenda* subject to the trusts of the settlement of 1848, and that consequently it was not competent for Mrs Dunbar to deal with them by will. That was the principal claim advanced on behalf of the appellant. There was also a claim to a property

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called the Glen of Rothes, and there was a claim to legitim under the Married Women's Property (Scotland) Act, 1881. On these three questions and on some minor points, which were not raised at your Lordships' Bar, the learned Judges in Scotland unanimously rejected the appellant's claim. Agreeing as I do in the result at which they have arrived, I will not trouble your Lordships by dealing with the case at any length.

As regards clauses in marriage-contracts providing for the settlement of after-acquired property, I quite agree that effect must be given to the intention of the parties apparent on the face of the contract construed fairly, although the result may seem to be whimsical or even unreasonable. But still there are some considerations which it is as well to bear in mind as aids to the construction of such clauses. These considerations may of course be excluded either designedly or accidentally by the language used, but unless they are so excluded they are, I think, of general, if not universal, application. One is that change of investment—mere alteration in the outward form of property—is not "acquisition" within the meaning of a provision of this sort. Another is that property which has reached its destination through the medium of the trust, or property which, in accordance with the declarations of the parties to the contract, comes to be at the absolute disposal of one of those parties, does not again fall under the operation of the trust unless there is a clear direction to that effect. In the present case I cannot find in the marriage-contract of 1848 any indication that money, which under or in accordance with the trust would come to the hands of Mrs Dunbar—money which was to be hers to hoard or spend, to waste or save, just as she pleased—was under any circumstances or in any event to be brought back under the operation of the trust and pass through the mill again. Such a result seems inconsistent with provisions carefully made to safeguard her separate use and enjoyment of the income which was originally her own. It is, I think, opposed to the whole scope of the instrument.

The clause in question is called a clause of conquest, and the word "conquest" occurs in it. But the word is used as a verb, and not as a substantive. So used, it has not apparently the strict technical meaning to be ascribed to it when used as a substantive. A clause of conquest, though perhaps a somewhat rude and rough form of provision for the issue of the marriage, is intelligible enough when the husband is the settlor; but according to the view expressed in this House in the case of *Diggens* v. *Gordon*[1] it is not, or at anyrate was not at the date of the contract now in question, properly speaking, applicable where the settlement is by the lady. In the case of a settlement on the part of the wife, the word "conquest" adds little or nothing to the force of the word "acquire" when used in conjunction with it. Here, I think, the word "acquire" is the governing word. The expression "conquest" is, as it seems to me, merely redundant and tautological.

An argument was founded on the expression "acquire by purchase." But there, again, I think that the words "by purchase, succession, or otherwise" add nothing to the force of the word "acquire," and that, whatever the meaning of the draftsman may have been, there must have been an

[1] May 20, 1867, 5 Macph. (H. L.) 75, 39 Scot. Jur. 434.

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"acquisition" properly so called in order to bring any subject within the operation of the clause. There must be something got from an external source.

As regards the lands of the Glen of Rothes and the question of legitim, I have nothing to add to the observations of the learned Judges in the Court below.

It only remains for me to move that the appeal be dismissed with costs.

LORD DAVEY.—The first and principal question on this appeal is whether certain investments of the savings made by the late Mrs Dunbar Dunbar from her separate income are bound by a clause of *acquirenda* in her marriage-contract. She was entitled to the income partly under the marriage-contract itself and partly under the will of her brother, who died during the subsistence of the marriage.

The marriage-contract is dated 13th October 1848, and after a conveyance by the lady of certain specified subjects, it contains a clause whereby Mrs Dunbar Dunbar, with the consent of her intended husband, and Captain Dunbar Dunbar for himself, obliged themselves to dispone, assign, convey, &c. to the trustees all real and personal estate which the lady then had or at any time thereafter might "conquest and acquire by purchase, succession, or otherwise." The first trust of the settled property other than the furniture, plate, and so forth in the mansion-house of Sea Park was to pay the annual income to the lady for her life for her separate use, exclusive of the *jus mariti* of her intended husband or any future husband.

Captain Dunbar Dunbar died on 10th January 1898, and Mrs Dunbar Dunbar died on 9th May 1899, leaving a son, the Rev. Archibald Dunbar Dunbar, the only issue of the marriage surviving.

It has been decided in Scotland that a life interest in income is *prima facie* not comprised in a clause of *acquirenda*: *Boyd's Trustees* v. *Boyd*.[1] And the same has been held in England: *Briggs* v. *White*;[2] or if it is expressly included, it follows the destination of the trust income: *Scholfield* v. *Spooner*.[3]

I was, I confess, rather surprised to hear it argued that, apart from any technical meaning to be attached to the word "conquest," the savings from a wife's separate income became subject to an ordinary *acquirenda* clause or covenant for settlement of after-acquired property. This proposition was said to be supported by Lord Eldon's opinion in *Lewis* v. *Madocks*[4] and the recent case of *In re Bendy*.[5] When *Lewis* v. *Madocks*[4] is examined, I do not think it can be cited as an authority for that purpose. There was a covenant by a husband to convey by deed or will all his personal estate to the use of himself and his intended wife, and the survivor, subject to the payment of a sum of money on the death of the survivor to the children of the marriage. Lord Eldon said during the argument that he could not adopt the construction that annual produce was properly acquired in the

[1] 4 R. 1082.
[2] (1848) 22 Beav. 176, n.
[3] (1884) L. R., 26 Ch. D. 94.
[4] 8 Ves. 149, 17 Ves. 48, 7 R. R. 10.
[5] L. R. [1895] 1 Ch. 109.

sense of the bond, but he added, except only to the extent "in which the husband himself might think proper to lay up that produce as capital"; and in the course of his judgment he said that certain sums must be considered as "personal estate," "capital, even if composed of savings."

The point, however, does not appear to have been necessary for the actual decision, and the case was a very special one. The weight of it as an authority is considerably diminished by Lord Eldon's remark when the case first came before him, in 8 Ves. at p. 156, that if the Court finds a solid subject of personal property they would attach it rather than render the covenant perfectly nugatory, though they did not know what to do with the argument shewing the absurdity of it. I entirely agree with the very clear and convincing judgment of Romer, L. J., in *Finlay* v. *Darling*,[1] and hold with him that savings from income not expressly included in a covenant for settlement of after-acquired property do not fall within the covenant, and the wife retains the control and power of disposing of such income. Romer, L. J.'s, opinion is supported by that of Buckley, J., in the recent case of *Clutterbuck's Settlement*.[2] The same point arose in Scotland in *Young's Trustees* v. *Young*;[3] but it was held to be not proved that the investments in question were made out of savings of the wife's income. There was, therefore, no decision. But it seems to have been assumed by some of the learned Judges that if it had been proved, the investments would have been outside the clause of *acquirenda*.

The point, therefore, is narrowed to the question whether the word "conquest" in the deed is used in a technical sense, and what is the effect if that be so. On this question the decision in the case of *Diggens* v. *Gordon*,[4] which was affirmed in this House, appears to me important. "The word 'conquest' used substantively," says Professor Bell, "comprehends whatever is acquired, whether heritable or moveable, during the marriage by industry, economy, purchase, or donation," and it may be assumed to bear an analogous, but perhaps more elastic, meaning when used as a verb. Properly speaking, conquest is applicable only to the husband, and cannot in any legitimate sense be applied to the wife, as explained by the Lord Justice-Clerk in *Diggens* v. *Gordon*.[4] This does not carry you very far, because it may yet be a technical word improperly applied, as distinguished from a word used in a non-technical sense. What is more important is that in a proper provision of conquest the title of the husband is not affected during the subsistence of the marriage or during his own life after its dissolution. He remains the unlimited fiar of his property, except that he cannot defeat the provision by a gratuitous disposition in fraud of his contract. In the marriage-contract now under consideration, on the contrary, the property is to be at once, on the accruer of the wife's title, conveyed to the trustees of the settlement, and to be placed in their management for the purposes of the settlement. In the judgments of the Lord Justice-Clerk and Lord Cowan in the Court of Session, and of Lord Cranworth and Lord Colonsay in this House in *Diggens* v. *Gordon*,[4] this circumstance was treated as conclusive that the word was not used in any

[1] L. R. [1897], 1 Ch. 719. [2] L. R. [1905], 1 Ch. 200. [3] 1892, 20 R. 22.
[4] 1865, 3 Macph. 609, aff. 1867, 5 Macph. (H. L.) 75, 39 Scot. Jur. 484.

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technical sense. I see no valid reason for not adopting those opinions in the present case.

In *Diggens* v. *Gordon*[1] the question was whether property which the wife took by succession during her coverture was bound by the clause. The words were "conquest or acquire," which certainly lent themselves to a distributive construction more easily than the words before your Lordships. It might have been said that the lady "acquired the property if she did not conquest it." That may be true. But it appears to me from a perusal of the judgments in the Court of Session and in this House that the decision was, in fact, based on the ground that the word conquest was not used in any technical sense, and it is a decision to that effect.

The appellants also placed reliance on the use of the word "purchase" in the clause under consideration, which they contended was meaningless if it was not intended to include property purchased by Mrs Dunbar Dunbar out of her income. Your Lordships were told that this word is found in the common form provision of conquest from which this clause was adapted by the draftsman. But what I wish to point out is that the word "purchase" is equally destitute of any real meaning in a proper provision of conquest. If the moneys laid out in the purchase were not already subject to the clause, the purchased property will not become so; and inversely the investment of moneys which are not the subject of conquest will not make them so. If a man has an estate before marriage and sells it during the coverture and buys another, or if he invests money coming to him from a succession in Consols, the new estate or the Consols will not (I presume) become "conquest"; and, on the other hand, if he accumulates his savings in a money-box or a bank, or in any of the traditional modes, the fund is (I presume) equally "conquest at the time of his death," though he has not laid it out in an investment. I am content to say with the Lord Ordinary that it is difficult to find any satisfactory meaning for this word, but I am unable to hold that it adds anything to the argument that savings from income were included in the provision under consideration.

I am, therefore, of opinion that the appeal fails on the first and principal point. The only other points argued by the appellants at your Lordships' bar were:—(1) as to the lands of Glen of Rothes, and (2) as to the Rev. Archibald Dunbar Dunbar's claim to legitim out of his late mother's estate. On the former I agree with the Lord President that there was sufficient consideration to support the agreement made between Mrs Dunbar Dunbar and her son as a family arrangement. In such cases the Court does not weigh the amount of consideration in golden scales, and there being no claim for reduction of the agreement, the Court is bound to give effect to it. I also agree with the Lord President that the claim for legitim is excluded by clause 7 of the marriage-contract, notwithstanding that the claim can only be made under the Act of 1881. The words of the clause are perfectly general, and are, I think, intended to exclude every claim which the children of the marriage might otherwise make through the death of their mother at the time when that event happened.

[1] 5 Macph. (H. L.) 75.

I am of opinion that the appeal fails altogether, and should be dismissed with costs.

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LORD ROBERTSON.—I have grave doubts of the judgment under review. But the Court below was a very strong one, each of the learned Judges being singularly well equipped in this region of the law of Scotland. Accordingly, I do not dissent from the motion that the appeal be dismissed.

LORD LINDLEY.—In 1848, upon the marriage of Captain Dunbar and Miss Phœbe Dunbar, property of hers, and land which she might afterwards acquire, was vested in trustees upon certain trusts, which included a trust for her sole and separate use for her life; and by the settlement it was provided that all the property, real or personal, which she then had or should at any time thereafter "conquest and acquire by purchase, succession, or otherwise" (with a specified exception) should be conveyed or assigned to the trustees of the settlement, to be held by them on the trusts therein declared. The husband died in January 1898, and his wife died in the following year. The main question before your Lordships is whether property purchased by the wife with income paid to her during her marriage, and to which she was entitled for her separate use, became on her death subject to the dispositions of her will, or whether it became vested in the trustees of the settlement for the benefit of a child of the marriage. The Court of Session has decided this question in favour of the persons claiming under her will, and against the trustees of the settlement.

Any other decision appears to me entirely inconsistent with the trust for the separate use of the wife during her life. By virtue of this trust the income which became payable to her became her own property absolutely, and the trustees had no claim to it as against her. She was at perfect liberty to spend that income if she chose, or to save it and invest it in Government or other stocks or securities, or in the purchase of land. As long as she retained it, or any investment or property bought with it, she could dispose of it, or what was bought with it, as she thought proper by act *inter vivos*, or by will.

The conveyance of after-acquired land did not comprise land bought by her with the income to which she was entitled for life for her separate use under that settlement. The subsequent provision for settling after-acquired property must, in my opinion, be construed in like manner so as to preserve her rights under the trust for her separate use, and not so as to destroy those rights or any of them. Wide as the provision is, it cannot possibly include the income which it is the duty of the trustees to pay over to her; and why, if that is so, they should be able to follow the income and claim what she may have purchased with it passes my comprehension. As a matter of principle I concur entirely with the view taken by Romer, L. J., in *Finlay* v. *Darling*,[1] in which a similar point arose on an English settlement.

But the law of Scotland may, of course, be different; and it was strenuously contended by counsel for the appellants that the use of the word conquest (which has a technical meaning in Scottish law) shewed that property bought

[1] L. R. [1897], 1 Ch. 719.

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by the lady out of her savings, and held by her at her death, could not be disposed of by her by her will, but became subject to the trusts of the settlement, and counsel cited a number of Scotch decisions in support of that contention.

The word conquest in this settlement has to be applied to the property of the wife and to property which, under the settlement, belonged to her for her separate use. Moreover, the word conquest does not occur alone; the phrase is, "conquest and acquire by purchase, succession, or otherwise." The whole phrase includes every mode of acquisition, and points to some future acquisition by which her property was increased before it became subject to the trusts of the settlement; in other words, the phrase points to some property in addition to that to which the lady was entitled at the date of the settlement, and in addition to any property to which she was entitled under the settlement itself. Any other construction deprives her of the right to dispose of her own property under the trust for her separate use. If any confirmation of this view is required, it is, I think, to be found in the clause in the settlement by which Captain Dunbar renounced all claims to property which his wife might acquire during the subsistence of the marriage, whether or not such acquisitions were settled on the trusts of the settlement. This points to the possibility of her acquiring property which was not to be brought into settlement, and would include such as she might purchase with her own separate income. But I do not myself attach importance to this clause.

As regards the Scotch decisions, I can discover no case in which it has been held that property purchased by a wife with money belonging to her for her separate use under her marriage-settlement falls within a clause in it binding her to bring her after-acquired property into the same settlement. The nearest authority on the point is *Young's Trustees* v. *Young*,[1] and that somewhat supports the opposite view; but it cannot be regarded as a decision in favour of the respondents. In the absence of any authority settling the question in favour of the appellants, and thinking that their contention is wrong on principle, I have come to the conclusion that their appeal on the main point ought to be dismissed.

As regards the Glen of Rothes property, I also have arrived at the conclusion that the appellants are wrong. This property was acquired by the wife in exchange for part of the Sea Park property which belonged to her and her son, and was expressly excluded from the settlement. The exchange was the result of a family arrangement to which her son was a party, and in my opinion the terms of this arrangement were such as to exclude any claim by the son to this Glen of Rothes property.

There remains the claim of the son to legitim, *i.e.*, half of his mother's unsettled personal property. His claim is based upon the fact that he acquired this right under a statute passed after the settlement was made, namely, 44 and 45 Vict. cap. 21. But the settlement contains a clause to the effect that the provision made by it for the children of the marriage shall be in full satisfaction of all "bairns' part of gear, executry, and everything else which they could respectively claim or demand by and through

[1] 20 R. 22.

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the decease of their mother on any ground whatever." These words are so wide as, in my opinion, to exclude the children of the marriage from all claims foreseen and unforeseen to any share of their mother's personalty except under the settlement.

In my opinion the decision appealed from was correct on all points, and the appeal ought to be dismissed, with costs.

ORDERED that the appeal be dismissed, with costs.

MARTIN & LESLIE—THOMAS HENDERSON, W.S.—GELLATLY & SON—STUART & STUART, W.S.

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Salvesen & Co. v. Rederi Aktiebolaget Nordstjernan.

CHR. SALVESEN & COMPANY (Defenders), Appellants.—*Lord-Adv. Dickson—Salvesen, K.C.—C. D. Murray.*
REDERI AKTIEBOLAGET NORDSTJERNAN AND OTHERS (Pursuers), Respondents.—*Scrutton, K.C.—John G. Spens.*

*Agent and Principal—Misrepresentation by agent to principal that contract concluded—Shipbroker—Measure of Damages.*—A shipbroker who had been employed by a foreign shipowner to find a cargo for his vessel, in the expectation of completing a contract with a coal merchant (for whom he did not act as agent) informed his principal that he had completed a contract on certain terms. No contract was completed, and the principal raised an action of damages against his agent for the profit he would have gained if the contract had been completed.

*Held* (*alt.* judgment of Second Division) that the pursuer was entitled to the actual damage he had sustained by being led to believe that a contract had been completed, but had no claim for loss of profit.

(IN the Court of Session, Jan. 16, 1903, reported 6 F. 64.)
The defenders appealed.

Ld. Chancellor (Halsbury). Lord Davey. Ld. Robertson.

LORD CHANCELLOR.—The proposition of law laid down by the Exchequer Chambers in *Collen* v. *Wright*,[1] must, I think, notwithstanding the protest made by Cockburn, C. J., be held to be law. But one must see what that proposition is, and how far it is applicable to the case before your Lordships. The proposition is this—that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorised to act as such agent is answerable to the person who so contracts for any damage which he may sustain by reason of the assertion of authority being untrue. This is the authority upon which the Court below have given damages, but it really has no application to the facts in proof here.

A firm applies to a shipbroker in Scotland to obtain freights for a vessel of theirs. The shipbroker, in consequence, opens a negotiation with Messrs Ireland, who state certain terms which they will accept, one of which is what the appellants' principals will not agree to. The appellants nevertheless untruly report that the bargain is complete, whereas the bargain, in fact, went off altogether. Now, I quite agree that, if in consequence of their misstatement the respondents changed their position and suffered damage, the appellants would be liable for any actual damage arising from the acting on that erroneous statement, and it is no answer to say that the

[1] 7 E. and B. 301, 8 E. and B. 647.

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appellants *bona fide* expected to get over the one outstanding term by which the bargain went off: but it appears to me there is an absolute failure to make out any such damages as are claimed, though I think £33 odd has been justly suggested as enough to cover all actual damage sustained, and for that the respondents ought to sustain their judgment.

But I think that the respondents in applying the doctrine of *Collen* v. *Wright*,[1] and treating the appellants as having held themselves out as the agents of Messrs Ireland, and clothed with their authority to make a contract, are seeking to get, and the Court below have given them as damages, the profits they would have made if Messrs Ireland had in fact authorised the appellants to act as their agents, and had in truth made that bargain. But, in fact, they did nothing of the sort; they were endeavouring to get a bargain from Messrs Ireland, and having failed to overcome Messrs Ireland's objections, they are in the position of not having got the bargain they represented they had.

There is no evidence of any loss sustained by reason of relying on the untrue statement, and I think the original judgment cannot be supported.

I therefore move that the judgment be reduced to £33 odd, and the appellants ought to get the costs of this appeal.

Lord Davey.—It is not necessary for the purpose of this decision to have recourse to the doctrine of *Collen* v. *Wright*.[1] The appellants, the shipbrokers, were undoubtedly agents of the respondents for the purpose of finding a charter for their ship. But I am not satisfied on the evidence that the appellants were employed by Messrs Ireland & Son to find a ship for their requirements. It appears to me that the negotiations were carried on between the appellants as agents for the respondents with Irelands as principals acting on their own behalf. No doubt the appellants were intermediaries between the two firms, but that always is so where the agent of one party is negotiating with the other party. Wherever a person misrepresents a fact relative to a third party, he, in a sense, impliedly represents that he is authorised to make the statement. But I do not think that he is thereby asserting that he is clothed with an authority or fills a particular character within the meaning of the doctrine of *Collen* v. *Wright*[1] as explained in subsequent cases, including the recent case of *Starkey* v. *Bank of England*[2] in this House, or that the doctrine ought to be extended to such a case as that now before your Lordships.

But the appellants were guilty of a breach of their duty to the respondents, their principals, in giving them incorrect information as to their business, and are liable in damages for such a breach of duty. The measure of damages in such a case has recently been discussed in the Court of Appeal in England in the case of *Cassaboglou* v. *Gibbs*.[3] It was there determined that the measure of damages was the loss actually sustained by the principal in consequence of the misrepresentation, and that it did not include the anticipated profit which he might have made if the representation had been true. I am of opinion that the proper measure of damages in the present

[1] 7 E. and B. 301, 8 E. and B. 647.
[2] [1903] A. C. 114.
[3] 11 Q. B. D. 797.

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case is the same as in the case I have referred to. There is no evidence that the respondents lost any opportunity of profitably employing their ship owing to their belief that a charter had been arranged with Ireland & Son, and I am of opinion than they cannot, therefore, recover anything in respect of the profits which they might have derived if their relief had been well founded. With regard to the expenses of the abortive action against Ireland & Son, the question is whether they were reasonably incurred. On this point the letters which passed between the respondents' solicitors and the appellants on 27th and 28th February and 1st March are important, and I think the respondents are entitled to recover these expenses subject to taxation. The only other head of damage claimed is a general charge for telegrams and trouble and inconvenience. I think the sum of £33, 1s. 3d. which has been awarded by the Court below will be an ample compensation and solatium to the respondents on this head.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be varied by the substitution of the sum of £33, 1s. 3d. for the sum of £450, and *quoad ultra* it should be affirmed; and that the respondents should pay the costs of this appeal.

LORD ROBERTSON.—In the view which I take of it this case is one of great simplicity both in fact and in law.

A foreign shipowner (the respondents' firm) employs a Leith shipbroker (the appellants) on the usual terms of remuneration to find freight for a steamship. The appellants take the business in hand and report that they have concluded a bargain. In fact no bargain had been concluded; differences, which the appellants, too sanguine, had hoped to get rid of existed and proved invincible; and three days after the news of the bargain the respondents learned that the thing was off.

That the appellants, by making this misstatement, acted in violation of their duty as agents for the respondents admits of no doubt; and the respondents have a good claim of damages for whatever loss has been caused them. If, for example, acting on the faith of the alleged contract, the respondents had incurred expense, or if, misled into inaction, they had missed other chances for the ship, these and the like would be heads of damage.

The facts in the present case are not of this kind. The respondents, in furtherance of their theory of their case, have been at pains to prove that at this particular time no other advantageous freights were to be had, and, when informed that the bargain was off, they made no efforts to look for them. They found employment for the steamer in a quarter where it was easily to be had (under a current contract) although at a low rate, 5s. per ton.

The claim of the respondents is for the difference between this rate and 7s. 6d. per ton, the rate in the bargain which was not concluded; and their theory is that they are entitled to take the appellants at their word, and demand from them fulfilment of the charter or damages. To this the short answer is that the appellants (who dealt with Ireland at arm's length) did not in point of fact assume to act for the alleged charterers at all, and they purported to report the agreement of the charterers as matter of fact.

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The central and crucial fact in the case is that the appellants did not represent to the respondents that they acted for Irelands. The case is therefore not within the scope of *Collen* v. *Wright*.[1]

The practical result is that in my opinion the main part of the claim of damages is untenable. But I think that the respondents are entitled to something for certain damage which they have proved, to wit, trouble, outlays on telegrams, and the like; and in the Court of Session this has been fixed at £33, 1s. 3d. They have been also held entitled to the expenses incurred by them in the action against Messrs Ireland down to the closing of the record, and I think that they are entitled to this; but this limitation of those expenses to the period before closing the record is not specified in the interlocutor of the Lord Ordinary, although it is in his judgment, and it should, perhaps, therefore, be now declared.

"ORDERED AND ADJUDGED, that the said interlocutor of the 16th day of January 1903, complained of, and the said interlocutor of the Lord Ordinary of the 16th day of April 1902, also complained of in the said appeal, be, and the same are hereby, varied by striking out the figures '£450,' and inserting in lieu thereof the figures '£33, 1s. 3d.,' and by adding after the word 'record' occurring in the said interlocutor of the 16th day of April 1902, the words 'but down to the closing of the record in that action only,' and that, subject to the said variation, the said interlocutors be, and the same are hereby, affirmed: Further ordered, that the said cause be remitted back to the Court of Session in Scotland, with a direction to do therein as shall be just and consistent with this judgment and variation: And it is further ordered, that the respondents do pay, or cause to be paid, to the said appellants the costs incurred in respect of the said appeal to this House."

BOTTERELL & ROCHE—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—HOLLAMS, SONS, COWARD, & HAWKSLEY—J. & J. ROSS, W.S.

No. 7.

June 4, 1905. Bain v. Assets Co.

WILLIAM BAIN AND OTHERS (Bain's Trustees) (Defenders), Appellants.—*Haldane, K.C.—John H. Tait.*
ASSETS COMPANY (Pursuers), Respondents.—*Clyde, K.C.—Leadbetter—F. C. Thomson.*

Watt v. Assets Co.

JOHN WATT AND OTHERS (Phillips' Trustees) (Defenders), Appellants.—*Haldane, K.C.—Ure, K.C.—William Hunter.*
ASSETS COMPANY (Pursuers), Respondents.—*Clyde, K.C.—Leadbetter—F. C. Thomson.*

*Discharge on Compromise—Discharge conditional on truth, accuracy, and completeness of statement of assets—Written statement incomplete—Presumption of full disclosure—Mora—Fraud—Reduction.*—The City of Glasgow Bank went into liquidation in 1878, under the supervision of the Court, and in 1879, Bain, one of the contributories, settled with the liquidators and was discharged by them of his liabilities to the bank on payment of a sum of money, being the value of his property as disclosed in a written state, which he solemnly declared to be true and correct to the best of his knowledge and belief. The state was submitted by him to the liquidators in answer to certain printed queries addressed to him by them, one of which was,—

[1] 7 E. and B. 301, 8 E. and B. 647.

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"What property do you possess, and what is its nature and value to the best of your knowledge and belief?" The discharge, which followed on a compromise approved by the Court, bore to be "on the basis, and on condition of the truth, accuracy, and completeness" of the said state.

In 1901 the Assets Company, Limited, who were in right of the whole assets of the Bank, raised against Bain's trustees an action of reduction of the interlocutor approving of the compromise and of the discharge by the liquidators, on the ground that two promissory-notes granted in Bain's favour by his sons previous to his discharge were not disclosed in the state of his affairs upon which the discharge proceeded.

A majority of the Second Division, with three consulted Judges, after a proof, held that the discharge fell to be reduced.

In an appeal *held* (*rev.* the judgment) (1) that it was not a condition of the discharge that the contributory's disclosure of his assets should be in writing, (2) that as twenty years had elapsed since the date of the discharge the *onus* lay upon the pursuers of proving that Bain had not made a full disclosure of his assets either in writing or orally, (3) that the pursuers had failed to discharge this *onus*, and that defenders were entitled to absolvitor.

*Observed (per* the Lord Chancellor) that an unintentional and non-fraudulent inaccuracy in the disclosure would not invalidate the discharge.

An appeal in a similar action raised by the Assets Company against Watt and Others (Phillips' Trustees) was disposed of in the same way.

(COURT OF SESSION Reports, 6 F. 676, 692, 754.)

Ld. Chancellor (Halsbury). Lord Macnaghten. Lord Davey. Lord James. Ld. Robertson.

1. *Assets Co.* v. *Bain and Others* (*Bain's Trustees*).

In the liquidation of the City of Glasgow Bank the liquidators in 1879 entered into a compromise with Mr William Bain one of the contributories. Mr Bain died in November 1882.

In June 1901 the Assets Company (which had acquired the assets of the bank in 1882), raised an action against Mr Bain's testamentary trustees, concluding for reduction of Mr Bain's discharge by the liquidators of the bank, and for payment by them as trustees of £63,000 of calls, on the ground that the deceased Mr Bain had not made a full disclosure of his assets to the liquidators, and in particular had failed to disclose two promissory-notes granted in his favour by his sons.

After a proof the Lord Ordinary (Kyllachy) assoilzied the defenders from the conclusions of the summons.

On 18th March 1904 the Second Division, with three consulted Judges, by a majority recalled the Lord Ordinary's interlocutor, and granted decree of reduction as concluded for, and *quoad ultra* remitted to the Lord Ordinary to proceed with the case.—See Court of Session report, 6 F. 692.

The defenders appealed.

2. *Assets Co. v. Watt and Others* (*Phillips' Trustees*).

This was a similar action against John Watt and others, the testamentary trustees of the late Alexander Phillips, who died in 1881. In this case the alleged non-disclosure related to shares in certain shipping companies.

The interlocutors of the Lord Ordinary (Kyllachy) and of the Second Division, with three consulted Judges, were similar to those in the case of Bain's Trustees.—See Court of Session report, 6 F. 754.

The defenders appealed.

The House of Lords, after hearing counsel in each appeal on the facts disclosed in the evidence, but without calling for argument on the pleas of (1) Title to sue, and (2) Competency of suing discharged trustees, which had been argued in the Court of Session, delivered judgment,—

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LORD CHANCELLOR.—These appeals arise on two independent cases, but I think they are open to the same observations, and although they may in some comparatively immaterial particulars differ from each other, the substance of the matter to be discussed is a matter which is common to both. I confess I am of opinion that these appeals ought to succeed.

I agree with the learned Lord Ordinary, and to some extent with Lord Kinnear also, although in the result he differed, and with the other learned Judges who gave judgment in favour of the appellants. It appears to me that the matter rests, not upon any question of technical law, but upon broad common sense, and especially upon these two principles—that at this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done, and that the persons who are now insisting upon these rights have lain asleep upon their rights so long that as a matter of fact we know that witnesses have perished, and the opportunities which might have been had if the question had been earlier raised have passed away. We are asked at a distance, in the one case of twenty years, and in the other case of twenty-two years, to rip up a transaction which had apparently been completely disposed of.

The question arises in this way: Those who are appearing as litigants in this case, the pursuers, are asking to have undone a release, a compromise, which has now been in existence for twenty years; and they ask it upon grounds which seem to me to be unsound for more reasons than one. In the first place, I wish to say that I do not concur with the view which has found favour with some of the learned Judges below, that this compromise, and the release which has been executed in pursuance of that compromise, must be so construed that nothing but that which is contained in the written document itself can be applied to as explaining or affecting the legal effect of the document. If I understand the argument rightly, it comes to this: You have in this document made it part of your bargain that you shall disclose all your effects. I want to introduce into that, as part of the legal effect of the instrument, not only that you must disclose, but that you must disclose *in writing*, and in *this* writing, all your effects. The questions have been propounded for the purpose of getting written answers to those questions. The questions are intended to ransack your whole estate; and if you do not disclose all your estate, nay, further, if you do not disclose it by written answers to these written interrogatories, it must be part of the condition of this release that the release thereupon becomes void. It seems to me that that is an unsound view of this document for more reasons than one, particularly for the reason which one of the learned Judges points out, that the statement on which the release is granted is made to the best knowledge and belief of the person executing the document that such is the state of his affairs. Unless something much more definite were placed in the document to make the accuracy of the statement therein a part of the contract, as is done in some policies of insurance, so that any inaccuracy should avoid the instrument executed, I decline to put into that document either by express words or by implication something which is not there. The statement appears to be made according to the knowledge and belief of the person who is making the declaration, and therefore, if according to the belief of the person who made it this was the

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true and accurate state of affairs, even though it should turn out to be inaccurate, I construe that document as making it a perfectly good release notwithstanding an inaccuracy, an unintentional and non-fraudulent inaccuracy, which afterwards might be discovered in it.

Therefore I differ entirely from the view that the disclosure must either be in writing or must be in the particular document in writing. If a disclosure was made at the time to those who were entitled to put the questions and take the answers, even though it was made verbally, I am of opinion that that would be enough to make the release a perfectly good release.

With regard to Lord President Inglis' judgment,[1] it was said that his observations were *obiter*. I am not quite certain that I concur in that view, though I notice one of the learned counsel said he submitted it was *obiter*. When a learned Judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative, and when he distinguishes the case before him by pointing out that there was no fraud, and, therefore, the fraud imputed did not exist, I very much doubt whether that is one of those things which can be described as a mere *obiter dictum*. It is part of the law which is guiding his judgment, and part of the law he is bound to expound in the judgment he is pronouncing. So far, therefore, I am bound to say that the two propositions of law which appear to have supported the judgment of the Court below I am unable to concur in; on the contrary, I wish to express my entire dissent.

With regard to the facts upon which the question then turns, I do not think any very elaborate exposition is required. There are two things which are indicated here as points upon which disclosure was withheld: in the one case certain shares, and in the other case two promissory-notes are alleged, and must, in order to make the case insisted upon by the pursuers, be alleged to have been withheld, and in truth a false statement made in respect to them.

With regard to the question of the shares, to my mind, assuming I am right in the view I have taken that a verbal statement is sufficient, it only requires to be stated in a very few simple sentences to point out how extremely unreasonable at all events is the suggestion that the mere non-statement of these shares ought of itself, at this distance of time, to set aside the release. A number of shares undoubtedly existed. If they were valueless, I should have thought it was not at all an unlikely thing to happen (I am speaking now of ordinary inferences of fact from the facts in proof rather than any presumption of law one way or the other), that those who were charged with the administration of the affairs of the Glasgow Bank on its insolvency would have been very shy of taking up these absolutely useless shares and encumbering their statement of affairs with them. And what were these shares? These shares were shares of a shipping company which from its commencement had made losses, whose ships, according to the evidence, were unfitted for the services for which they were intended, and as to which there was no reasonable expectation that they would make a commercial success. To my mind it was not an

[1] See Liquidators of the City of Glasgow Bank v. Assets Co., 10 R. 676, at p. 678.

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unreasonable suggestion that these shares were not considered of any value, and were not put down in the list. It is said,—"But at all events these were shares that might become of value." I do not think anybody believed that they would become of value. Therefore, at all events at this distance of time, I am not going to assume that they were thought to be of value at a time when I should think nobody supposed they were of value.

Then it is said that they were kept back—that he "kept them dark": I think that was the phrase used by one of the learned counsel. I do not understand quite what that referred to. If this gentleman, who was equally with the other a person of character and position, had intended to keep back the existence of those shares as part of his assets, there are very familiar modes by which he could have done that without exposing himself to risk. When he was getting together a good deal of money, both from friends and others and himself, and buying his discharge, as it were, from the liability, he might have adopted various devices—one is so familiar with this sort of device that it becomes hardly necessary to state it—he might have conveyed every one of these shares to somebody or another who would have no responsibility, and have had a secret trust if he had any thought of their being of value. Instead of that, from the time he makes this statement until the time of his death, eighteen months afterwards, the shares are allowed to remain in his own name, capable of being ascertained, and capable of being known to be his; and yet I am to assume that he was either fraudulent, or at all events endeavouring not to do what he had agreed to do—namely, to give up his whole estate notwithstanding the effort that he was making to free himself from liability. If he was fraudulent, is it conceivable that he would have allowed this to remain after him as a perpetual drag upon whatever he did leave behind him, and so give the opportunity of detection and of avoiding the effect of what he was doing?

Then it is said, and said with great force, But he died eighteen months afterwards, and then facts were exhibited which could not be concealed and must be known as to the state of his affairs. He left behind him a considerable sum—that is, considerable having regard to what he had been doing, that is to say, making a compromise. Then why was not that at once made the subject of inquiry after his death within eighteen months of his compromise? I think it is not necessary for me to pursue this line of observation. One of the learned Judges, I think, has not exaggerated the state of facts when he points out the number of deaths that have intervened, and the impossibility at this distance of time of disentangling what could have been very easily disentangled and ascertained if an earlier investigation had taken place.

I do not propose to differentiate Watt's appeal from the case of Mr Bain, although to some extent there is a difference between them. All I shall say about either of them is that at this distance of time I shall make every intendment in favour of that having been honestly done which purported to be done. I think I should expect some evidence to be produced contradicting that state of things rather than insist on evidence in its support at this distance of time, and with the loss of evidence that undoubtedly has occurred from the delay that has taken place. I should be content to rest my judgment on the language of the Lord Ordinary himself, in which, on

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both occasions, he has pointed out, I think with great force and accuracy, the result that ought to follow from the absence of evidence which has been the fault of those who are the pursuers here—that is to say, they have lain by upon their supposed rights all this time, during which time witnesses have died and the means of explanation have disappeared also to an extent which, to my mind, renders it impossible, or at all events extremely inexpedient as a matter of law and administration, to allow these things to be ripped up at this distance of time, when both the opportunities of explanation have gone by and when witnesses have passed away.

Under these circumstances I move your Lordships that both these appeals be allowed; that the judgment of the Lord Ordinary be restored; and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN.—I concur. I think the judgment of the Lord Ordinary is perfectly sound, and I think it ought to be restored.

LORD DAVEY.—I also agree.

The case has been so copiously considered in the Court of Session in the numerous judgments, to which I have given my best attention, that I think I should not be justified in saying more than that I agree with Lord Kyllachy, Lord Young, and Lord Moncreiff.

I only wish to add this, that in coming to this conclusion I am not treating *mora* or delay as a plea in law. I do not think it is a plea in law; but I think the lapse of time is a circumstance which ought to be taken into account and ought largely to influence our estimate of and the conclusion we come to upon the facts of the case.

LORD JAMES.—I also concur.

LORD ROBERTSON.—I entirely agree in the general principles stated by the Lord Chancellor as applicable to an action of this nature, brought after this lapse of time. For a more detailed examination of the facts of the case I would refer to the judgment of Lord Kyllachy in each case, entirely concurring as I do with all that his Lordship has said.

"IN the case of Watt and others, Ordered that the interlocutor appealed from be reversed, that the interlocutor of Lord Kyllachy of June 13, 1903, be restored, and that the respondents do pay to the appellants the costs both here and below."

In Bain's appeal, the same order.

FAITHFULL & OWEN—J. & J. GALLETLY, S.S.C.—DAVIDSON & SYME, W.S.—ARTHUR E. BAKER—J. & D. SMITH CLARK, W.S.—RENSHAW, KEKEWICH, & SMITH—J. & J. ROSS, W.S.—ARTHUR E. BAKER—J. & D. SMITH CLARK, W.S.

No. 8.

July 28, 1905.
Watson v. M'Ewan.

SIR PATRICK H. WATSON (Defender), Appellant.—*Campbell, K.C.—Younger, K.C.*

MRS J. P. JONES OR M'EWAN (Pursuer), Respondent.—*Haldane, K.C.—C. D. Murray.*

*Reparation—Slander—Privilege—Privilege of witness in precognition.—Held (rev.* judgment of Second Division) that the privilege of a witness in giving evidence extends to statements made by a person on precognition with a view to his giving evidence.

No. 8. (In the Court of Session, A B v. C D, November 18, 1904, reported in the present volume, p. 72.)

July 28, 1905. Watson v. M'Ewan. The defender appealed.

The pursuer presented a cross appeal against the disallowance of the first issue.

Ld. Chancellor (Halsbury). Lord James. Ld. Robertson.

Lord Chancellor.—When one examines these two appeals,* I think it is impossible to say that any different question arises in the one from that which arises in the other. The same judgment is applicable to both.

When one examines with care the different allegations made in the condescendences and the answers, I do not think any question arises as to the confidential nature of the employment between patient and medical man. I do not propose to express any opinion upon what would be the legal determination of that question if it arose. It may be that it raises very serious and difficult questions, and I certainly am not disposed to express an opinion either way in respect of questions which upon other grounds have no difficulty at all in their solution. The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to the immunity of a witness for evidence given in a Court of justice, it is too late to argue that as if it were doubtful. By complete authority, including the authority of this House, it has been decided that the privilege of a witness, the immunity from responsibility in an action when evidence has been given by him in a Court of justice, is too well established now to be shaken. Practically I may say that in my view it is absolutely unarguable—it is settled law and cannot be doubted. The remedy against a witness who has given evidence which is false and injurious to another is to indict him for perjury; but for very obvious reasons, the conduct of legal procedure by Courts of justice, with the necessity of compelling witnesses to attend, involves as one of the necessities of the administration of justice the immunity of witnesses from actions being brought against them in respect of evidence they have given. So far the matter, I think, is too plain for argument.

But then comes the question which, so far as I know, has been raised for the first time in this case. The ingenious suggestion has been made that although it is true that a witness is protected from an action in respect of evidence actually given in a Court of justice, yet no such protection exists in respect of his attendance before the solicitor at what is called apparently in Scottish law his precognition—what we call the interview between the intended witness and the solicitor who takes from him what we call the proof—that is to say, reduces to writing the evidence which the witness is about to give. One very serious element of difficulty which those who insist upon such a liability have to meet is manifest—namely, that in the whole course of the diligent inquiry that the learned counsel on both sides have made into this matter they have not found that any such liability has ever been sought to be established before. So far as I know personally in my experience no such question has ever arisen. The learned Judges who

* One of the appeals was in an action of damages for slander raised by Mr Jones, the pursuer's father, against the defender, but it is not necessary to refer to it further.

have allowed these issues have done so apparently for the first time in this case.

It appears to me that the privilege which surrounds the evidence actually given in a Court of justice necessarily involves the same privilege in the case of making a statement to a solicitor and other persons who are engaged in the conduct of proceedings in Courts of justice when what is intended to be stated in a Court of justice is narrated to them—that is, to the solicitor or Writer to the Signet. If it were otherwise, I think what one of the learned counsel has with great cogency pointed out would apply—that from time to time in these various efforts which have been made to make actual witnesses responsible in the shape of an action against them for the evidence they have given, the difficulty in the way of those who were bringing the action would have been removed at once by saying, "I do not bring the action against you for what you said in the witness-box, but I bring the action against you for what you told the solicitor you were about to say in the witness-box." If that could be done the object for which the privilege exists is gone, because then no witness could be called; no one would know whether what he was going to say was relevant to the question in debate between the parties. A witness would only have to say, "I shall not tell you anything; I may have an action brought against me to-morrow if I do; therefore I shall not give you any information at all." It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove. It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony.

The hardship to which I refer is this: That although when a witness does give evidence which is wilfully false you can indict him for perjury; on the other hand, if he makes the same statement, not upon oath, to a person taking down the evidence he is prepared to give, it seems to be very difficult to devise anything that would bring him to justice for that false statement. The answer, of course, dealing with it as a matter of convenience and indeed of necessity for the administration of justice, I suppose, is this: Unless he does give evidence in a Court of justice, in which case he can be indicted for perjury if his evidence is wilfully false, nobody knows anything about it—it slumbers, I suppose, in the office of the solicitor, and nobody hears or cares anything about it. Practically, I think that would be the answer. But whether that be a good answer or not, what seems to me to be an overwhelming consideration in the determination of this case is that a witness must be protected for his preliminary statement or he has no protection at all, and that there is that protection established is, as I have already said, beyond all possibility of doubt.

Now, the reason why I think that this is the only question that arises is this: It is true that the gentleman sued is an eminent medical man, and that there is a mixture of the points both in the condescendences and in the answers which has rather tended to confusion; but if one comes to

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look with care at the different forms of procedure one sees that everything that passed, everything that is alleged to have passed, passed between the defender and those who were engaged in the legal business. The communication complained of was no communication to strangers—to persons outside the litigation. The communication such as it is was made to the counsel and to the solicitor who was taking down the evidence. Under those circumstances it seems to me that it comes within the whole mischief of the supposed liability of a witness for what he had stated. I do not care whether he is what is called a volunteer or not; if he is a person engaged in the administration of justice, on whichever side he is called his duty is to tell the truth and the whole truth. If he tells the truth and the whole truth, it matters not on whose behalf he is called as a witness; in respect of what he swears as a witness he is protected—that cannot be denied—and when he is being examined for the purpose of being a witness he is bound to tell the whole truth according to his views, otherwise the precognition, the examination to ascertain what he will prove in the witness-box, would be worth nothing.

Under those circumstances, my Lords, it appears to me that there is but one point in this case, namely, whether the preliminary examination of a witness by a solicitor is within the same privilege as that which he would have if he had said the same thing in his sworn testimony in Court. I think the privilege is the same, and for that reason I think these judgments ought to be reversed, and I move accordingly.

LORD JAMES.—I concur in the result which has been arrived at, and for the reasons which have been expressed by my noble and learned friend on the Woolsack.

LORD ROBERTSON.—So do I.

*Campbell, K.C.*—I understand your Lordships to intend that we should get the costs of the appeal.

LORD CHANCELLOR.—Yes. I think in this case the proper order is to remit to the Court of Session to dismiss the action with costs; and in the cross appeal we dismiss the appeal with costs, and the order will be the same in the case of *Watson* v. *Jones*.

"ORDERED AND ADJUDGED, that the interlocutors in part complained of in the original and cross appeals be, and the same are hereby, discharged, and that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with a direction to dismiss the action and to find the appellant in the original appeal (defender below) entitled to expenses in the Court of Session: And it is further ordered that the said cross appeal be, and the same is hereby, dismissed this House: And it is further ordered that the respondent in the original appeal (pursuer below) do pay, or cause to be paid, to the said appellant (defender below) the costs incurred by him in respect of the said original and cross appeals to this House."

A. & W. BEVERIDGE—J. P. WATSON, W.S.—NEISH, HOWELL, & HALDANE—DRUMMOND & REID, W.S.

No. 9.

MUSSELBURGH REAL ESTATE COMPANY (Defenders), Appellants.—*Lord-Adv. Dickson—S. C. Rankine.*

PROVOST, MAGISTRATES, &C. OF MUSSELBURGH (Fisherrow Harbour Commissioners) (Pursuers), Respondents.—*Sol.-Gen. Salvesen—Haldane, K.C.—Francis Watt.*

July 31, 1905.
Musselburgh Real Estate Co. v. Magistrates of Musselburgh.

*Harbour—Boundary—Foreshore—Rights of owners of foreshore included in harbour—Statute—Construction—Musselburgh Harbour Act*, 1840 (3 *Vict. cap. lxxiii.*), *secs.* 2, 49, 76.—The Musselburgh Harbour Act, 1840, sec. 2, enacts that the word "harbour" shall be understood to mean the "Harbour of Fisherrow," and shall include the whole precincts thereof as after specified.

Sec. 76 enacts that for the purposes of this Act, and for no other purpose whatever, the said harbour shall be deemed to extend "along the shore" from the M. Burn on the west to the R. Burn on the east, and to seaward to the extent of one hundred yards beyond low-water mark opposite the shore between the aforesaid burns. The distance between the two burns was about two miles.

Sec. 49 makes it unlawful for "any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones," except with the authority of the Harbour Commissioners.

In an action by the Harbour Commissioners against persons claiming to be the proprietors of part of the foreshore between the two burns, *held* (*aff.* judgment of Second Division) (1) that the harbour and its precincts included the whole foreshore between the two burns, rejecting a plea for the defenders that the words "along the shore" in sec. 76 of the Act excluded the foreshore; and (2) that the defenders, although owners of part of the foreshore, were not entitled to remove sand from their part without the authority of the Harbour Commissioners.

(IN the Court of Session, Jan. 23, 1903, 5 F. 387.)

The Musselburgh Real Estate Company appealed.

Ld. Chancellor (Halsbury.)
Lord Ashbourne.
Ld. Robertson.

LORD CHANCELLOR.—In this case I confess I have not been able to entertain any doubt that the judgment of the Court below is right, and ought to be affirmed.

It appears to me that the provisions of the statute are too plain to raise any ambiguity. If one thinks that the words "the precincts" require exposition, they are, in my opinion, explained by the statute itself. It is clear from what has been said that the statute does draw a distinction between two different areas—one is the harbour and the other is the precincts—and while it prohibits any person "to throw any ballast, dirt, ashes, rubbish, shingle, sand, stones, and other things into the said harbour, or to do any other act, matter, or thing to prejudice or injure the same or any part thereof," it also, as a separate part of the section, and distinguishing between the harbour and what it then deals with, prohibits any person "to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones for ballast or any other purpose except from such place or places as shall from time to time be appointed for that purpose under the authority of the said Commissioners."

It is said by the statute itself that the precincts are defined in the statute. Now, unless the limits of a mile on each side of the harbour are the precincts referred to, there is no such definition as the statute itself alleges to exist in it, the inference from which is that those must be the precincts.

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It is manifest also, I think, when one looks at the language of the statute, that whether or not the framers of the statute were right in their view, it was intended to prohibit, except with the permission of the commissioners, to whom discretion was entrusted, anybody—"any person," to use the language of the statute—taking away sand, gravel, shingle, or stones from somewhere other than the harbour itself, and if it had been intended only to protect what I have described as the immediate vicinity of the harbour, it was easy to say so, or to say, "so near the harbour as shall be injurious to its foundations" or what not; instead of which the statute uses the word "precincts," which it professes to define, and makes those precincts extend for a mile on each side of the harbour. It seems to me that in order to construe it as the learned Lord Advocate would have it construed, you must read into the statute words which are not there; and indeed he has not denied that that is so. That is the first objection, and it appears to me to be a very cogent one, to construing the section as he suggests, that you must introduce words which are not there.

Now, it is said, and I think justly said, that it is contrary to the policy of Parliament to take away rights—to give anything in the nature of property to others without giving compensation for it. But I think, on the other hand, it must be frankly admitted that where you are dealing with public necessities and public security, Parliament does sometimes do that. As it has been pointed out, it does it with respect to roads, and I think it does it with respect to harbours also. This is one of those provisions which must be construed in connection with the particular subject-matter with which Parliament was then dealing. It might well be that in the view of Parliament, although the giving of these rights, not a proprietary right at all, but a right to prohibit something which in their view would interfere with the harbour, might to some extent restrain the complete liberty of the proprietors in respect of the use of that which was their own property, and prevent the proprietor of the shore taking away his sand, yet, on the other hand, the construction and maintenance of the harbour would in itself be an advantage to the adjoining proprietors. One cannot doubt that it would add to the value of their adjacent land; and it might well be that, in view of that additional value and the advantage conferred upon their land, Parliament would take away, not absolutely their property, but the right of taking sand from any part within these two miles. But even that right is not absolutely taken away, for discretion is confided to the commissioners, so that they may permit sand to be taken if they think right. Parliament has confided a discretion to them in the view that, as they are the persons who are interested in the maintenance of the harbour, nothing would be permitted by them which would interfere with the security which that harbour is intended to afford to all vessels frequenting that port.

Therefore it seems to me that the only thing we have to do with is the construction of the 49th section. I do not understand why we should extend our inquiries to a wider field than that mere question. Neither the pleadings nor indeed the facts as they are put before us in this case appear to me to raise any other question than these: First, What are the precincts? The answer to that I have already given—namely, those that are indicated by the statute. If they are not those, there are none other, and yet the

statute says there are precincts indicated in the statute. Secondly, when the question of public advantage is considered, it seems to me to displace the argument—I admit a very cogent one very often—that no compensation is provided for the proprietors. That objection is answered, as I endeavoured to answer it, by saying that Parliament may have considered the advantage conferred as equivalent to the disadvantage enforced upon them. But really the whole truth, in my view, is that the statute is plain and unambiguous, and I cannot and will not introduce words into the statute which are not there. I must read the statute according to its plain and simple meaning, and, so construing it, I think the judgment of the Court of Session is right, and I move your Lordships, therefore, that the interlocutors be affirmed and the appeal dismissed with costs.

LORD ASHBOURNE.—I concur entirely with the views which have been expressed by my noble and learned friend on the Woolsack.

The case has been very fully and very ingeniously argued, and our attention has been directed to every syllable of the statute which has the slightest relevancy to the subject-matter, and also the bye-laws have been prayed in aid, and we have been asked to consider them. It is quite right that our attention should have been so directed to these matters; but after all the entire question comes back to what is the construction of sec. 49. If the question had been argued at even greater length than it was, legitimately, presented to us, it would always come back to that question. The bye-laws can give no substantial assistance here in arriving at any conclusion in respect of the matter before us. They may shew the opinions from time to time held as to how the discretion should be exercised by those who were responsible for making those bye-laws, but the bye-laws get their authority from, and their origin must be found in, sec. 49; if they are suggested to be incomplete, the answer must always be given, "We will try again under the power and discretion as vested in us by sec. 49."

When one comes to sec. 49, one finds that it is about as clear a section as was ever framed by the Legislature. It is absolutely distinct and unqualified in all its terms. If one is not to place upon sec. 49 the meaning which was placed upon it by the Lord Ordinary in his clear and well-considered judgment, it is only by praying in aid the possible introduction of other topics, other considerations, and other words. Of course that is not a legitimate way of interpreting any Act of Parliament. I therefore set aside the bye-laws as throwing no substantial light, giving no assistance to us, in construing sec. 49, and I look entirely to the construction that is to be given to the clear words of the section, the one important section, that has to be construed upon the present occasion.

The Act was passed as far back as the year 1840; its sections shew that notices must have been given to the parties concerned that there were plans and books of reference which it is stated comprised actually the name of one of the Lord Advocate's clients. There are no people now to tell us exactly what occurred on that occasion, but I assume that the passing of the Act of Parliament was a matter of very common knowledge, and that the parties interested in it had every opportunity of considering and knowing and being thoroughly acquainted with all that was being done. That

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being so, the Act of Parliament was passed, comprising in its terms the section which has been so often referred to. Every person interested had every possible opportunity, I assume, of considering the bearings and the possible constructions which might be given to the operations under that section. That being so, the presentation of the case to us by the Lord Advocate and his learned and very able junior colleague is this: that no matter how clear, no matter how unqualified it may be, it is to be read as excluding, by the introduction of words which are not found there, a class of persons who are to be regarded as private owners; their contention is that it must be so read that it will not interfere with or in the slightest degree disturb any of the discretion that might be exercised by a private owner. On the other hand this must be borne in mind—that, as has been pointed out to us upon the other side with great force, the statute is clear and unqualified—that it does not suggest the possibility of the introduction in the construction of any words or meaning which are not to be found upon the face of it. I think there is immense weight in the words quoted to-day from the judgment of Bowen, L.-J., in the case of the *London and North-Western Railway Co.* v. *Evans.*[1] Here we find words which are clear and distinct. We find that the Legislature, knowing what it was doing, thought proper to introduce those words—they are not words which expropriate—they are words which give a discretionary power of control and management in the exercise of what we must conceive to be the honest discretion of honest and capable administrators. That was done, not for a private or personal purpose, but for a public purpose which we must assume to have been worthy of being protected by words as clear and unqualified as those we find in sec. 49 of this Act.

For those reasons I entirely concur in the conclusion announced by my noble and learned friend on the Woolsack.

Lord Robertson.—I agree in the judgment which has been proposed, and also in all that has been said.

Interlocutors appealed from affirmed, and the appeal dismissed with costs.

H. S. M. Grover—Beveridge, Sutherland, & Smith, S.S.C.—Pritchard & Sons—M'Gregor & Purves, W.S.

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Aug. 4, 1905. Lord Advocate v. Earl of Moray's Trustees.

Lord Advocate (on behalf of Commissioners of Inland Revenue) (Pursuer), Appellant.—*Att.-Gen. Finlay—Lord-Adv. Dickson—A. J. Young.*

Anna, Countess of Moray, and Another (the Earl of Moray's Trustees) (Defenders), Respondents.—*Clyde, K.C.—J. R. N. Macphail.*

*Revenue—Estate-Duty—Entail—Property passing on death of heir of entail—"Competent to dispose"—Estate-duty paid by deceased heir of entail and not charged on entailed estates—Finance Act*, 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 2, *subsec.* (1) (*a*), *sec.* 9, *subsecs.* (2), (3), (5), *and* (6), *sec.* 22, *subsec.* (2) (*a*) (*c*).—The Finance Act, 1894, enacts:—Sec. 9, subsec. (1). "The estate-duty on an estate . . . shall be a first charge on the property in respect of which duty is leviable."

[1] L. R. [1893] 1 Ch. 16.

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Subsec. (2). "On an application . . . the Commissioners shall grant a certificate of the estate-duty paid in respect of the property. . . ."

Subsec. (3). ". . . The certificate of the Commissioners shall be conclusive evidence that the amount of duty named therein is a first charge on the lands. . . ."

Subsec. (5). "A person required to pay the estate-duty in respect of any property shall . . . have power to raise the amount of such duty . . . by the sale or mortgage of or a terminable charge on that property."

Subsec. (6). "A person having a limited interest in any property, who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

Sec. 2, subsec. (1). "Property passing on the death of the deceased shall be deemed to include . . . (*a*) Property of which the deceased was at the time of his death competent to dispose."

Sec. 22, subsec. (2) (*c*). "Money which a person has a general power to charge on property shall be deemed to be property of which he has power to dispose."

An heir of entail who had paid estate-duty due on the death of his predecessor died without having applied for a certificate or taken any steps to charge the sum so paid on the entailed estate.

The Crown having claimed estate-duty on the sum so paid from his trustees, *held* (*rev.* judgment of First Division) that under sec. 9, subsec. 6, the heir of entail, being a person having a limited interest who had paid the estate-duty, had by the statute the same charge on the estate as if he held a mortgage over the estate for the amount of the duty, and that the charge being a vested transmissible interest belonging to the deceased at the time of his death, his trustees were liable for the duty.

(In the Court of Session, Feb. 2, 1904, 6 F. 347.)

The Lord Advocate appealed.

Ld. Chancellor (Halsbury). Lord Macnaghten. Lord Davey. Lord James. Ld. Robertson. Ld. Dunedin.

Lord Chancellor.—This case turns upon the 6th subsection of sec. 9 of the Finance Act, 1894. As I understand it, the question is whether a sum of £37,740, which had been paid by the late Earl of Moray in respect of estate-duty, formed a transmissible interest, so that the Crown could claim duty upon it.

Two questions of a very different character appear to me to arise: one is whether the heir of entail, as the Earl was, is a limited owner within the meaning of the 6th subsection. I do not think it necessary to discuss that question at length, inasmuch as I understand that that point has been decided in Scotland, and I see no reason to question the propriety of the decision.

The other question appears to arise in respect of the appropriateness of the mode and manner by which the statute is to be effective in Scotland. Now to my mind the objection is of a character that would apparently displace the authority of the Legislature in respect of the technology of one part of the United Kingdom. I quite admit that for a time I certainly was very much impressed by Mr Clyde's argument that, apparently by common consent among those who are familiar with Scottish forms of conveyancing, the language of the statute is absolutely inappropriate. I think one learned Judge even goes so far as to say that it is unmeaning. I cannot quite concur in that, because, although it may be very inappropriate language, I do not think anyone can really doubt what the meaning of the

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statute is; and if, although inappropriate language is used, it is known what the meaning of the Legislature is, that meaning must be obeyed in whatever form it may be necessary to adapt the practice of conveyancers to the particular thing that is to be done.

Now, the question here is whether this is a charge or can be made a charge upon the estate in respect of which the late Earl did pay £37,740. I observe that those familiar with the subject are able to point out modes by which the thing can be effected although the language by which it is directed is absolutely inappropriate to Scottish conveyancing. To my mind the whole question has been expounded with great precision and accuracy by my noble and learned friend Lord Dunedin, whose judgment I am about to read. It is quite clear that whether you call it a charge, or by whatever word you choose to signify it, the thing meant is obvious enough, and the justice of it, if there be justice in it, is manifest enough. A limited owner having to pay for something which is not entirely his own, the Legislature has thought it right that there should be a charge upon the estate in respect of which he has paid it for such and such an amount. That is an intelligible proposition. If it could be said that one person is paying upon the property of another person, I cannot help thinking that the injustice, if there be injustice, is inherent in the nature of the statute, and does not arise from the construction which is to be placed upon it. One mode of illustrating and manifesting that, I think, is this—that if the question arose in England no lawyer would entertain any doubt that it could be properly effected; and is any difference to be made because it is in another part of the United Kingdom to which the Act equally applies, and because the language of conveyancers in that part of the Kingdom must be admitted to be absolutely inappropriate to the thing that is to be done? As regards the substance of the matter, when one looks through the mere technology and sees what is intended to be done, the thing is obvious enough.

Under these circumstances it appears to me that the enactment of the Legislature must be obeyed, and that the judgment of the Court below ought, therefore, to be reversed.

Lord Macnaghten.—I am not at all insensible to the grave difficulties which have been pointed out so forcibly by the learned Judges in Scotland. But I cannot think that those difficulties are insuperable. It must be borne in mind that the Act which your Lordships are now called upon to construe in its application to Scotland applies equally to the whole of the United Kingdom. It is a taxing Act. It must be presumed to have been the intention of Parliament to make the incidence of the taxation the same in Scotland as in England and Ireland, and to extend the same measure of relief, such as it is, to limited owners called upon to discharge a burthen on the inheritance wherever the property burthened may be situated.

Your Lordships may remember that much the same sort of question arose in *Lord Saltoun's* case,[1] which was referred to in this House not long ago in *Special Commissioners for Income-Tax* v. *Pemsel*.[2] In *Lord Saltoun's* case[1] the Succession-Duty Act, 1853, came under consideration, and it

[1] (1860) 3 Macq. 659.

[2] [1891] A. C. 531.

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was held by this House, reversing the judgment of the Court of Session, that an extrinsic technicality—a technical rule of Scotch feudal conveyancing—must be disregarded when its effect would be to produce inequality. I may, perhaps, be permitted to remind your Lordships of a passage in the judgment of Lord Cranworth in that case, in which his Lordship, speaking of the decision then about to be pronounced, used these words,—"This decision, though it would do violence to some of the best-established doctrines of Scotch law if the present question were one of conveyancing, may yet be well admitted in the construction of an Act intended to impose corresponding duties on succession happening under two different systems of law."

With these remarks I would ask your Lordships' attention to the language of the enactment which your Lordships have to apply to the case under consideration. The Finance Act, 1894, sec. 9, subsec. 6, declares that "a person having a limited interest in any property who pays the estate-duty in respect of that property shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him." He has, therefore, a statutory charge upon the property of the same effect and validity as if the charge had been created by a mortgage duly executed by a person or persons capable of creating such a charge. As applied to England and English land, the enactment is too clear for argument. The charge arises automatically. A person who is declared by statute to be entitled to a charge on doing a certain act gets the charge on doing the act by virtue of the statute. Nothing more is required to be said or done to perfect his security.

Now, one has to apply this provision to land in Scotland, in respect of which the owner, being a limited owner, has paid the duty. The Courts in Scotland hold, and as it seems to me rightly hold, that an heir of entail in the position of the late Lord Moray is a limited owner. If the land in respect of which the duty was paid had been in England or Ireland, he would undoubtedly have had a charge for the amount paid. Why should he be at a disadvantage because the land in respect of which the duty is paid is situated in Scotland? The notion of charging Scottish property in this way may perhaps (to use Lord Cranworth's language) "do violence to some of the best-established doctrines of Scotch law." But still Parliament is omnipotent. The Courts in Scotland must give effect to the statute. I have no doubt that those Courts, on a proper application, could find some means of perfecting the security by a declaration duly recorded, or perhaps in some more appropriate way.

I need say nothing further upon this point, because I have had the advantage of reading the judgment of my noble and learned friend Lord Dunedin, and, if I may say so with all respect, I agree in it entirely.

I think the Crown is entitled to judgment, and the appeal ought to be allowed.

Lord Davey.—I hope that I have fully appreciated the views taken of this case by the learned Judges in the Court of Session, and so powerfully put before us by Mr Clyde in his argument for the respondents. The reasons given by the learned Judges for their judgment undoubtedly oblige

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your Lordships to consider this case with some anxiety. I find myself, however, unable to agree in the conclusion arrived at and expressed in the interlocutors under appeal.

The question in this appeal is whether the late Lord Moray at the time of his death had a vested transmissible interest in the sum of £37,740, paid by him for instalments of the estate-duty which had become payable by him to the Crown on the family settled estate to which he had succeeded as heir of entail in 1895. And the answer to the question depends primarily on the right construction of sec. 9, subsec. 6, of the Finance Act, 1894. By subsec. 1 of that section the estate-duty is made a first charge on the property in respect of which the duty is leviable. By subsec. 5 a person required to pay the estate-duty is empowered to raise the amount of such duty and any interest and expenses by sale or mortgage of the property, or any part thereof. Subsec. 6 is in the following words: "A person having a limited interest in any property, who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him."

It has been argued that an heir of entail, though under a strict entail, is not a person having a limited interest in the entailed estate. The contrary has been decided in the case of *Laurie*.[1] It is true he is in law a fiar, subject, however, to the fetters on his power of disposition. It is true also that means have been provided by the Legislature by which he can free himself from the fetters under certain onerous conditions, but so long as they remain, he has, in my opinion, only a limited interest within the meaning of the Act.

On the construction of the 6th section two general observations may be made. First, the section applies to England and Scotland alike, and should, I presume, receive the same construction on both sides of the Tweed. And I think that the same principle applies as was laid down in this House with regard to the Succession-Duty Act—*Lord Braybrooke* v. *Attorney-General*[2] —that the Act is not to be construed according to the technicalities of the law of England or Scotland, but according to the popular use of the language employed. Secondly, it should be pointed out that the words "charge" (in this connection) and "mortgage" are not technical words in England any more than in Scotland. As regards this subject-matter, a charge in popular language is a burden on land, or the right to have a sum of money with which the estate is burdened raised out of it. A mortgage is but a security for money lent.

As to the meaning of the words in subsec. 6, apart from any technical difficulties of application, I should have thought there could not be any difference of opinion. They appear to me to mean that the limited owner who has paid the duty is put in the same position as if he had lent the money for the purpose on the security of a mortgage of the estate to himself. And I think the subsection gives him all the rights of the holder of a valid and effectual security on the property. To construe the words as meaning only that he may give himself such a charge seems to me at variance with

[1] (1898) 25 R. 636.

[2] (1860) 9 H. L. C. 150.

the plain meaning of the language used, and to give no effect to the words at the end of the section which the Legislature has used for the purpose of defining the nature of the charge to which the limited owner has become entitled on payment.

It humbly appears to me irrelevant to discuss whether such a charge or burden could be created by one individual in favour of another without prescribed formalities. This charge is created by the Legislature, and similar charges have been created by other taxing Acts. It does not appear to me a sufficient answer to say that the charge in the Succession-Duty Act is in favour of the Crown. It makes no difference in the discussion of the means of effectuating the charge whether the holder of the charge is the Crown or a subject. What the rights of the holder of a valid security are it is not necessary for me to say.

Nor are your Lordships required in the present case to say by what means the intention of the Legislature may be effected. It would be for the Court of Session to determine whether it would give effect to the statutory charge by adjudication, or by the appointment of a judicial factor to receive the rents and profits, or by directing the sale of the property and ordaining the persons in whom it is vested to convey, or in some other way. But I have no doubt of the competence as well as the duty of the Court of Session when the question arises to give effect to what I am constrained to hold is the plain meaning of the statute. And I am fortified in so thinking by the judgment of my noble and learned friend Lord Dunedin, which I have had the opportunity of perusing.

I am therefore of opinion that the late Earl had at the time of his death a transmissible title to a sum of £37,740 to be raised out of the entailed estate. It is said that by the dispositions of his will he released his right in that sum to his successors in the estate. I express no opinion whether he did so or not. But, assuming that he did, it makes no difference to the right of the Crown to duty whether the sum in question passed to one person or another.

I am therefore of opinion that the appeal of the Crown should be allowed.

Lord James.—I concur with the three judgments which have been submitted to your Lordships.

Lord Robertson.—I agree with the judgment of the Court of Session. I had prepared a reasoned opinion, but your Lordships have decided the case, and I should be only occupying time unnecessarily if I read it.

Lord Dunedin (read by the Lord Chancellor).—The facts in this case are simple and undisputed. The late Edmund, Earl of Moray, succeeded as institute of entail in possession to large landed estates in Scotland in the year 1895. Under the provisions of the Finance Act, 1894, he was liable to pay estate and settlement estate-duty in respect of the estates. He chose to avail himself of the option given by sec. 6, subsec. 8, of that Act to pay by means of sixteen half-yearly instalments. He died in June 1901, having at that time paid eleven of the said instalments, amounting to £37,740, out of his own funds. This action is now raised by the Crown against the

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defenders, who are the trustees and executors of the said Edmund, Earl of Moray, under a trust-disposition and settlement conveying his property to them, and asks for estate-duty and legacy-duty on the said sum of £37,740. The learned Judges of the First Division of the Court of Session have assoilzied the defenders in respect that in their view the late Earl took no steps during his life to make the £37,740 a charge on the landed estate in favour of himself and his executors, and that, he not having done so, no right to do so passed to his executors.

I am not able to agree with their view, which seems to me not to give proper effect to the provisions of the Finance Act, and is further, I think, not consistent with the judgment of the same Division in the case of *Laurie*[1] to which I shall presently advert.

The question, I think, is solved by the 9th section of the Act. Before I examine the terms of the section, it may be well to make some general observations on the principle of construction which a Scottish Court is obliged and bound to apply to such a statute. The Finance Act of 1894 is an imperial statute applying to England and Scotland alike. It is useless not to recognise the fact that such statutes are usually framed by draftsmen but little conversant with the forms and requirements of conveyancing in Scotland, and that the phraseology which they employ is apt to be directed by the law of England, with which they are familiar.

In such circumstances the Scottish Court must do its best to give effect to the meaning of the statute, not by treating English law terms as unmeaning symbols, but as terms which, although not terms of art in Scotland, may be taken as words of ordinary popular signification, and as such are capable of application to the Scottish system.

It is true that the defect of expression is sought in some cases—and this is one of them—to be remedied by the provisions of an application clause. But an application clause is an aid to interpretation, not a code, and accordingly if it is defective the Court is not thereby absolved from the duty otherwise cast upon it. I have thought this observation necessary, especially in view of what the Lord Ordinary has here said in his judgment about upsetting the fundamental rules of conveyancing. If the meaning of the statute is clear, then the Court must try and square the rules of conveyancing with that meaning as best it can, and nothing short of sheer impossibility will warrant it coming to the conclusion that a provision which professes to be imperial is denied in Scotland the effect which it has in England. I am far, however, from suggesting that these principles have been hitherto ignored by the Court of Session. On the contrary, they have applied them, as I shall presently shew, to this very section in the case of *Laurie*.[1] And, further, they have consistently done so in all cases other than those of entail which involve settlement-duty. There is no definition of settled property in the application clause (sec. 23). And if we turn to the general definition clause (sec. 22) we find in (*h*) and (*i*) a definition which as a term of art is utterly meaningless to a Scottish conveyancer, but which the Court has had no difficulty in applying as popular phraseology to the forms of Scottish conveyancing.

[1] 25 R. 636.

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I proceed to examine the provisions of sec. 9. The 6th subsection of that section is in these terms:—"A person having a limited interest in any property, who pays the estate-duty in respect of that property, shall be entitled to the like charge as if the estate-duty in respect of that property had been raised by means of a mortgage to him." I do not understand it to be seriously doubted that an heir of entail answers to the description of a person having a limited interest. His interest, although that of a fiar, is that of a fiar limited by the prohibitive, resolutive, and irritant clauses of the title under which he holds—and it was so held by the First Division in the case of *Laurie*.[1] That being so, the only point remaining is, What is the meaning of the words "entitled to a charge"? Does this mean that he is in right of a charge; or does it mean that he is in the position to do something which will create a charge, but that until that something is done there is no charge in his favour?

I think the first alternative is the just view. In the first place, I arrive at that result viewing the matter as one of mere construction of the words used. To say that a person is entitled to a charge "as if the duty had been raised by a mortgage in his favour," seems to me clearly to denote an actual charge and not a faculty to make one. So far from agreeing with the Lord Ordinary, who thinks the words analogous to the words used in the Entail Statutes dealing with the power to charge improvement expenditure, I think they are in direct contrast to them; and the same may be said of the words authorising the charge of widows' and children's provisions. These will be found respectively in the 18th and 21st sections of the Rutherfurd Act,[2] and the words are:—"It shall be lawful for the heir of entail in possession to charge." Under such a form of expression it obviously was a *res meræ facultatis*. Under the present the natural inference is, I think, the other way.

In the second place, I am assured by those of your Lordships, who are more conversant than I am with the rules of English conveyancing, that there could be no doubt that the words used would create an actual charge on English land. *Prima facie*, therefore, I think it follows that the same result should be reached in Scotland.

This brings me to the last point on which really the judgment of the Court below turns. Is this question of a "charge" without any provision for its entering the records so repugnant to the law of Scotland as to exclude, so far as Scotland is concerned, the construction which the words would otherwise suggest?

The first and most obvious consideration is that the very same thing is done by the 1st subsection of the same 9th section as regards the whole duty in a question with the Crown.

I do not find that the learned Judges suggest that the charge effectuated by the 1st subsection is a bad charge. I am not overlooking the fact that the words are slightly different—"shall be a charge" instead of "is entitled to a charge." The difference is accounted for by the fact that the nominative in the first sentence is a thing, and in the second a person. But the point, be it remembered, is not, for the moment, construction—it is feasibility. A

[1] 25 R. 636.

[2] (1848) 11 and 12 Vict. c. 36.

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charge which does not enter the records is, in view of our Scottish system, very inconvenient; but inconvenience is not impossibility. And I do not wonder that the Judges did not express doubts as to the validity of the charge effected by subsection 1, because it is only the echo of the 42d section of the Succession-Duty Act. It is every day practice, in the investigations preparatory to preparing the conveyance following upon a minute or other bargain of sale, to ask for the succession-duty accounts in order to be satisfied that this unrecorded yet possible burden does not affect the lands; and if authority for this statement be needed, it will be found in the instructions to the prudent conveyancer given at p. 721 of the late Mr Montgomery Bell's standard work on Conveyancing, where, after pointing out the possible existence of terce and courtesy (both burdens which do not enter the records), he specially adverts to the burden created by the Succession-Duty Act.

But further, I think, the point is in truth necessarily decided by the case of *Laurie*,[1] if that case is closely examined. In that case an entail proprietor in possession had paid the estate-duty, and he presented a petition to the Court for authority to charge the estate with a bond and disposition for the amount. In his petition as first presented he founded on the Finance Act alone, and the petition was reported against as incompetent by the reporter appointed by the Court, on the ground that the application clause 23 (18) did not apply, being limited to persons in whom the estate was *not* vested, and that the statute gave no other warrant for executing a bond and disposition in security.

The petitioner then amended his petition by founding on the 11th section of the Entail Amendment Act of 1868. That section—I paraphrase it for brevity's sake—enacts that when there are entailer's debts or other debts, or sums of money which might lawfully be made chargeable by adjudication or otherwise on the fee of the estate, the Court may on the application of the heir in possession authorise bonds and dispositions in security for the amount to be placed on the estate. Upon this amendment the Court granted the prayer of the petition—the case having been reported by Lord Pearson to the First Division. The point is put clearly and in a single sentence by the Lord Ordinary, when, after quoting the 11th section of the Entail Act as above, he says: "The question is whether the statutory charge held by the petitioner (*i.e.*, in virtue of the 9th section of the Finance Act) is a debt falling within that category. The reporter is of opinion that it is, and I agree with him." This is affirmed by Lord Adam, who gave the judgment of the Inner-House, and who says:[2] "It may be that the Entail Statutes did not contemplate a debt of this nature, but I am of opinion with the Lord Ordinary that it falls within the description of debts specified by the statute, that the petitioner is creditor in a debt which may be lawfully made chargeable upon the fee of the entailed estate, and therefore that the petition is competent and ought to be granted."

I confess I am utterly unable to reconcile this with the view now taken by the same learned Judge, that the debt itself is a *res meræ facultatis*. The only warrant for putting in force the 11th section of the Entail Act was the existence of an actual debt, not a facultative power of creating a

[1] 25 R. 636.

[2] 25 R. 636, at p. 642.

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debt. In other words, *Laurie's* case[1] in terms decides that an heir of entail who pays the estate-duty is, in virtue of the provisions of the Finance Act, in the position to lead an adjudication. But an adjudication, which is a common law remedy, can only proceed on actual as distinguished from contingent debt.

Accordingly as I think *Laurie*[1] was well decided, it, in my judgment, rules the present case.

I cannot help adding that I think that much of the difficulty experienced by the learned Judges in the Court below arises from their not having for the moment sufficiently distinguished between the question of whether a thing *is* a charge, and whether that charge is so perfected according to the forms of conveyancing as to make a marketable security good against all possible competitors. It is in this latter matter that the Scottish system of the records is so important. But the law of Scotland is not strange to rights which are truly consummated, not *res mere facultatis*, but which yet are not perfected as regards security. A personal title to land is a familiar example. I do not say that the charge here is of that class. What I have said about the Succession-Duty Act points the other way. But for the determination of this case it would be sufficient if the right was of that class, and the whole of the remarks as to the impossibility of a charge which did not enter the records would be beside the mark.

I think there is no room for doubt that the terms of the application clause are defective, with the result that Lord Moray's trustees have in the present case an uncomfortable security. They cannot avail themselves of the procedure in *Laurie's* case,[1] because they are not heirs of entail in possession, who alone can invoke the aid of the 11th section of the 1868 Act. But they have the benefit of *Laurie's*[1] judgment in so far as it finds that they, as in right of all the assets of Earl Edmund, are creditors in a debt which may be made to affect the fee by adjudication. Adjudication is not nearly such a complete or comfortable remedy to a creditor as the right of sale under a bond and disposition in security. But it is a remedy, and a remedy, apart from the authority of *Laurie's* case,[1] clearly, I think, available. I pressed Mr Clyde to say why it was not, and the only answer I understood him to give was that there was no personal debtor in the debt. But that is no answer at all; for, although such proceedings are in modern times rare owing to the practical disappearance of the cumbrous forms of security, adjudication in old days was one of the recognised modes of making effectual a real burden or *debitum fundi* where also there is no personal debtor in the debt (Stair, iv. 51, 11).

The result of these views is that in my judgment there is no such impossibility in the law of Scotland in holding that a "charge" can be created on land by the words of a statute without executive provisions for enabling it to enter the record, as to force me to withhold from the words what I think is their natural construction.

I am dispensed from considering the alternative view pled. On the whole matter, I am of opinion that the appeal should be allowed, and judgment given for the Crown.

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[1] 25 R. 636.

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*Macphail* (for the respondents).—May I submit, on behalf of the respondents here, that this is not a case in which costs ought to be given against them. Apart from the circumstance that this is really a test case raised by the Crown, the conclusion of the summons is for an account, and when that account is delivered the question as to the marketability of this asset of Lord Moray's will still have to be discussed, and it may turn out that it has not got a marketable value, in which case no duty would fall to be paid. In that view the Crown would have got a valuable judgment with regard to the future; but as far as the respondents here are concerned, they would be simply in the same position as if they had succeeded in resisting this appeal. Therefore I respectfully submit that either no costs should be awarded against the respondents here, or the question of costs should be reserved until it appears what the Crown gets by way of duty. It may get none.

*Lord-Adv. Dickson* (for the Crown, appellant).—The summons here is in the usual form in which these summonses are brought, namely, calling upon the parties who are liable to pay the duty to lodge an account. The defenders here objected to lodge an account, and therefore the question considered in the Court below and by your Lordships was whether such an account should be lodged, and your Lordships have so decided. The Crown were found liable in costs in the Court below, and I see no reason why the same rule should not apply here as in the Court below.

LORD CHANCELLOR.—I think so.

ORDERED AND ADJUDGED, that the order appealed from be reversed; and that the respondents do pay to the appellant the costs both here and in the Court below.

Sir F. C. GORE, Solicitor (English) Inland Revenue—PHILIP J. HAMILTON GRIERSON, Solicitor (Scottish) Inland Revenue—JOHN KENNEDY, W.S.—MELVILLE & LINDESAY, W.S.

No. 11.

Aug. 4, 1905. Ardan Steamship Co., Limited, v. Weir & Co.

THE ARDAN STEAMSHIP COMPANY, LIMITED (Pursuers), Appellants.—*Carver, K.C.—Bailhache—James Clark.*

ANDREW WEIR AND COMPANY (Defenders), Respondents.—*T. E. Scrutton, K.C.—Ure, K.C.*

*Ship—Charter-party—Damages for detention—Charterers' obligation to have cargo ready—Custom of Port.*—Under a charter-party dated 30th May 1900, which did not fix the time within which the ship was to be loaded, the s.s. "Ardandearg" was bound to proceed to Newcastle, New South Wales, and there load a cargo of Australian coals "in the usual and customary manner, as ordered by the charterers, which they bind themselves to ship (except in the event of riot, strikes, &c. . . . or any other accidents or causes beyond the control of the charterers, which may delay her loading)." By the custom of the port of Newcastle, of which both parties were aware, a loading berth could not be procured until a coaling order from a colliery was produced. These coaling orders were issued in regular turn. There were no facilities for storing coal at the harbour.

The charterers ordered a cargo of coal from the Lambton Colliery, in the neighbourhood of Newcastle, ten days after the ship was chartered. On 14th July when the "Ardandearg" arrived, two other ships having coaling orders from the same colliery had arrived before her. In consequence of the colliery having only an output of 350 tons per day, the loading of these ships was not completed till 13th August. The "Ardandearg," having then

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obtained a colliery order and a berth, completed her loading on 23d August and sailed the following day.

*Held* (*rev.* judgment of First Division) that the charterers were liable in damages to the shipowners for the detention of the ship, on the ground that there was an absolute obligation on the charterers to have a cargo ready when the "Ardandearg" arrived, and that no facts had been proved to qualify that obligation.

(IN the Court of Session, Jan. 10, 1904, 6 F. 294.)
The pursuers appealed.

Ld. Chancellor (Halsbury).
Lord Davey.
Lord James.
Ld. Robertson.

LORD CHANCELLOR.—This is an action upon a charter-party. The vessel "Ardandearg" was chartered "to proceed to such loading berth as the freighters may name at Newcastle, New South Wales, and after being in loading berth as ordered, to load, in the usual and customary manner, a full and complete cargo of Australian coals, as ordered by charterers, which they bind themselves to ship." Then follow certain exceptions which do not become relevant to this case.

Now, the "Ardandearg" arrived at her destination on 14th July 1900, and was then ready to load her cargo. If the respondents had provided cargo at that date the vessel could have been loaded, and for that purpose would have at once obtained a loading berth. There was no cargo ready for her, however, until 13th August, and even then not enough. She had twice to be moved from her berth under a very reasonable regulation at the port, that a vessel should not be permitted to occupy a berth when not loading, and as there was no coal for her, she had, as I say, twice to be moved, and her loading was only completed by 23d August. Under these circumstances the plaintiffs brought an action for the loss and damage they had sustained in respect of the detention of the "Ardandearg."

Now, it cannot be denied that the merchant is under an absolute obligation to furnish the stipulated cargo, and I do not understand upon what theory the First Division of the Court of Session overruled the judgment of the Lord Ordinary. With great respect to their Lordships, I may say generally that I think there has been some confusion between the supply of a cargo and the obligation to load, and the qualifications thereof.

I am very sorry if any observations of mine or of the late Lord Herschell have been supposed to throw any doubt upon so well-recognised a principle of commercial law as that a merchant is under an absolute obligation to supply the cargo. The case which is supposed to have created the doubt is *Little* v. *Stevenson & Company*,[1] and the passage referred to is at p. 116, beginning: "The proposition of law" (that I disputed) was "that a merchant must be always ready with his cargo at all times and in all places, and under all circumstances to take advantage of any such contingency, if it should arise." The passage itself should be referred to, and Lord Herschell's, which is at p. 118, three lines from the bottom: "It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there

[1] [1896] A. C. 108, 23 R. (H. L.) 12.

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might be, in short, that was an obligation always resting upon the shipper." I thought then, and I think still, that, to use Lord Herschell's language, such an obligation on the shipper would be most unreasonable.

But what relevancy had such a case to the case before your Lordships? The controversy turns, as the Lord Ordinary finds, upon the true construction of the charter-party in view of the facts as proved.

I also agree with the Lord Ordinary that delay in the loading is one thing, and the failure to provide a cargo to load is another and a very different thing. He found as a fact that the failure of the defenders to perform their primary duty of providing a cargo was the cause of the delay.

I am not quite certain that I understand the second ground upon which it is contended that the ship was liable for delay in arriving at her chartered port. It seems to me that under the circumstances detailed by the master it was quite reasonable for him to do what he did. But, of course, however reasonable, if it were a breach of contract the reasonableness of the master's conduct would be no answer. But I fail to discover where is the contract of which it is a breach. She arrived before the cancelling clause, and I am unable to follow the argument which is supposed to establish her responsibility.

I think it is quite immaterial to discuss cases in which it is either proved or assumed that there are particular circumstances known to both the parties, and with reference to what they may be supposed to contract, which may affect both the providing and the loading of the cargo. It is enough to say that no such question arises here, and I am of opinion that the judgment of the Lord Ordinary ought to be restored, and the judgment of the First Division reversed.

Lord Davey.—I am of opinion that the decision of the Lord Ordinary in this case was correct; and I am so well satisfied with the reasons for his opinion given by his Lordship that I should be content simply to express my agreement, were it not that we are differing from an unanimous judgment of the Inner-House.

Lord Pearson has held that the delay complained of was caused, not by the exceptional congestion of shipping, but by the failure of the defenders (the present respondents) to perform their primary duty of providing a cargo, and that there are no clauses in the charter-party which on a sound construction will excuse the respondents for the delay.

In the case of *Postlethwaite* v. *Freeland*,[1] Lord Blackburn, in advising this House, said: "I am not aware of any case contradicting the doctrine that in the absence of something to qualify it the undertaking of the merchant to furnish a cargo is absolute." It has been argued that this doctrine was departed from, and the obligations of the shipper or charterer to have his cargo ready were expressed in a less absolute form in some observations of the Lord Chancellor and Lord Herschell in *Little* v. *Stevenson*.[2] I do not understand that to be so. I think that what was there laid down must be read with regard to the facts of that case, and that all that was meant

[1] 5 App. Cas. 599, 619.

[2] 23 R. (H. L.) 12.

was that the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties.

There is nothing to be found in the charter-party in the present case which, in my opinion, should be held to qualify this absolute obligation of the respondents. The exception of riot, &c., "and other causes beyond the control of the charterers which may delay her loading," in my opinion, applies only to the process of loading the cargo when ready, and not to delay in providing the cargo. It has frequently been laid down, and may be taken to be established law, that the mere existence of circumstances beyond the control of the shipper, which make it impracticable for him to have his cargo ready, will not relieve him from paying damages for breach of his obligation—*Adams* v. *Royal Mail Steam Packet Co.*[1] and *Ford* v. *Cotesworth.*[2]

In *Gardiner* v. *Macfarlane*[3] the circumstances were very similar to those in the present case. The Lord Ordinary (Lord Low) there says[4]:—"I am of opinion that difficulty in obtaining a cargo on account of the output at the colliery which the charterers had selected being restricted is a matter with which the shipowners are not concerned, and that the consequences of any delay arising therefrom must fall on the charterers." I think this is a correct statement of the law, and is applicable to the present case. It has, however, been held that where the cargo is to be provided from a particular place, and the charter has been made in view of circumstances by which, as both parties know, the procuring of a cargo from that place may be delayed, the charterer is excused, and in that case the known causes of delay may be taken into account in considering whether the cargo was furnished within reasonable time—*Harris* v. *Dreesman.*[5]

I think that the opinion of the Lord President was founded on some such consideration. His Lordship thought there were circumstances in this case known to both parties which prevented the obligation of the charterers possessing the absolute character alleged. The learned Judge referred to the evidence on cross-examination of Mr Clark, a member of the firm who were managing owners of the vessel and effected the charter-party with the respondents for this voyage. Mr Clark appears to have had some previous experience with regard to sailing ships loading cargoes of coal at Newcastle; but he did not know with what colliery the respondents would make arrangements, and, in fact, he did not know the various collieries at Newcastle, and only knew some of them by name. But even if he must be taken to have known the usual and customary manner or the conditions of loading at the port, that is not the point. The complaint here is, not of delay in loading, but of delay in procuring the cargo. The respondents, it should be added, do not appear themselves to have been aware, when they effected the charter, of any difficulty there might be in procuring the cargo at the colliery they selected.

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[1] (1858) 5 C. B. (N. S.) 492.
[2] (1868) L. R. 4 Q. B. 127, 134.
[3] 20 R. 414.
[4] 20 R. 414, at p. 421, n.
[5] (1854) 23 L. J. (Ex.) 210.

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It is proved by the evidence of the berthing master at Newcastle that he could have given a berth to the "Ardandearg" on 14th July 1900, the day following her arrival in the port, if coal had been ready for her. But it appears that by a very reasonable regulation of the port a vessel is not allowed to occupy a loading berth until she has received a loading order from the colliery. I am not sure that I clearly understand the argument which the respondents found upon this regulation. It seems to be argued that the ship was not ready to be loaded until the cargo was ready for her, and therefore, I suppose, the cargo was provided as soon as she was ready for it, which looks like an argument in a circle. Putting what is in truth the same argument in another way, it is also said that by the regulation "the turn of the colliery" became incorporated in and formed part of "the turn of the port," and therefore that the delay took place from the practice of the port, over which the respondents had no control, and which they had no power to displace, for the benefit of this particular ship. This, I think, is the main ground of Lord Kinnear's opinion.

But, however the argument is put, I cannot accede to it. It appears to me that it is only putting the old question in another way. By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it was the default of the respondents in not providing the cargo when the ship was ready to go on the berth to receive it. It is said that the respondents did nothing unreasonable. Be it so. But through their misfortune (it may be) they have failed to perform their contract with the shipowners. In short, the respondents have not satisfied my mind that it was any part of their contract with the appellants that the latter should await the turn of the colliery or take the risk of the cargo not being ready. And I am of opinion that, in accordance with the authorities which were cited in the course of the argument, the respondents are liable to pay damages to the appellants for the detention of the ship.

I am, therefore, of opinion that the interlocutor of the Inner-House should be reversed, and the interlocutor of the Lord Ordinary restored, with costs here and below.

Lord James.—I concur in the judgment submitted to the House.

Lord Robertson.—I concur.

"Ordered and adjudged, that the said interlocutor of the First Division of the 19th day of January 1904, complained of in the appeal, be reversed, and that the interlocutor of the Lord Ordinary (Lord Pearson) of the 2d day of April 1903 be restored: And it is further ordered, that the said cause be, and the same is hereby, remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment: And it is further ordered, that the respondents do pay to the appellants the costs of the action in the Court of Session, and also the costs incurred by them in respect of the appeal to this House."

Lowless & Co.—J. & J. Ross, W.S.—Thomas Cooper & Co.—Campbell Faill, S.S.C.

No. 12.

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STRÖMS BRUKS AKTIE BOLAG, AND MANDATARIES (Pursuers), Appellants.—*Hamilton, K.C.—Roberton Christie.*
JOHN AND PETER HUTCHISON (Defenders), Respondents.—*Lord-Adv. Dickson—Bailhache.*

*Ship—Charter-party—Failure to provide ship—Measure of damage.*—Manufacturers of wood pulp at Stocka, Sweden, in January 1900 entered into a charter-party with a British shipowner for the carriage of two cargoes of wood pulp from Stocka to Cardiff, the first to be lifted at Stocka "May (f.o.w.) (first open water), and the second in August/September, owners' option." The ordinary length of the voyage was twenty-two days.

In an action by the charterers against the shipowner for damages for an admitted breach of the contract by the failure of the shipowner to send a ship to Stocka for the second cargo before the last day of September, it was proved that the shipment was intended by the charterers for delivery at Cardiff in implement of a contract of sale between the charterers and Owen, Cardiff, which set forth as the "mode and place of delivery—c.i.f., Cardiff. Time of delivery—in two cargoes, first open water, and August/September 1900." The delivery of the first cargo was duly made, but on 29th September Owen having ascertained that the ship for the second cargo could not sail from Stocka before 12th October, bought in against the charterers the remainder of the wood pulp contracted to be delivered. The charterers paid Owen the loss he had thus sustained, and claimed this sum from the shipowner as the damage sustained by them.

The First Division, construing the obligation in the contract of sale, to deliver c.i.f. Cardiff August/September, to import an obligation to make actual delivery of the cargo at Cardiff before the end of September, held that as by the charter-party the ship was not bound to load at Stocka before the end of September the charterers' failure to deliver the goods at Cardiff by that date was not due to non-implement of the charter-party.

In an appeal by the charterers, *held* (*rev.* the judgment) that when the charterers ascertained that the ship could not leave Stocka before 12th October they were entitled to buy in, or to allow their purchaser to buy in, other goods to replace those which could not be delivered in terms of the charter-party; and that the measure of damages for the shipowner's breach of contract was the extra cost thus occasioned.

*Opinions* that the words in the contract of sale,—"Mode and place of delivery—c.i.f., Cardiff. Time of delivery—in two cargoes, first open water and August/September 1900"—imported an obligation to ship, not to deliver at Cardiff both at first open water, and in August or September.

(IN the Court of Session, Jan. 26, 1904, 6 F. 486.)
The pursuers appealed.

Lord Macnaghten.
Lord Davey.
Lord James.
Ld. Robertson.

LORD MACNAGHTEN.—The appellants, who were pursuers in the action, are a Swedish firm carrying on business as manufacturers of wood pulp at Stocka. They claim damages from the respondents, shipowners at Glasgow, for breach of a contract of carriage.

The contract was dated 20th January 1900. By it the respondents agreed to carry 900-1000 tons (charterers' option) of wood pulp to Cardiff. The cargo was to be lifted in two shipments, one in May f.o.w., the second in August/September (owners' option). The ship was to have liberty to call at any port or ports in any order, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. The owners were to wire shippers of the cargo, Ströms Bruks, Stocka, six days' notice of readiness, also ship's departure from last port.

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This contract, it seems, was made by the appellants with the view of enabling them to fulfil a contract, dated 4th December 1899, for the sale and delivery of 900-1000 tons of wood pulp to Thomas Owen & Company, Limited, of Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note "Mode and place of delivery" were the words "C.i.f., Penarth Dock, Cardiff," and against the note "Time of delivery" the words "in two cargoes, first open water, and August/September 1900."

The first shipment—a shipment of 500 tons—was made in due course and accepted. The respondents failed to perform their obligations with regard to the second shipment. The breach is not disputed. The only question is what damages, if any, are recoverable under the circumstances of the case.

On 24th September 1900—that is, six days before the end of the month—it became evident that the respondents, who had given no "notice of readiness" or of "ship's departure from last port," were not in a position to fulfil their contract, and consequently that the appellants would not be in a position to fulfil their contract with Thomas Owen & Company by means of the shipment which the respondents had contracted to deliver.

In these circumstances Thomas Owen & Company, who were entitled to claim 400 tons more, bought in against the appellants in several parcels 367 tons of wood pulp for consumption at their works. There seems to be no market for wood pulp at Cardiff. They were, therefore, compelled to purchase, as best they could, in Manchester, Liverpool, and London, and to pay in addition the cost of carriage. It is not disputed that Thomas Owen & Company acted reasonably, and that the pulp required could not have been bought at less cost.

Thomas Owen & Company made a claim against the appellants for £830, 18s. 5d. in respect of the 367 tons which they had bought in. The appellants, as they were bound to do, paid them the amount of their claim. Then the appellants claimed over against the respondents. Their claim was for £715, 8s. 2d. They brought into account the £830, 18s. 5d. which they had to pay Thomas Owen & Company, and also £9, 9s. 9d. for extra freight on the balance of 33 tons which Thomas Owen & Company accepted at a later date, making up the full 400 tons to which they were entitled. On the other hand, the appellants, unnecessarily as it appears, gave credit for £125 as profit on the 100 tons which the respondents were bound to carry, but which the appellants were not bound to deliver. The respondents, however, refused to make compensation for their breach of contract, and then this action was brought.

In the first place, the respondents contended that by the terms of the charter-party damages for breach of contract were limited to the estimated amount of freight on quantity not shipped. Both Courts have rejected this contention, treating the question as settled by authority. On this point I have nothing to add to what was said by the Lord Ordinary and by Lord M'Laren in the Court of Session.

The question as to the measure of damages gave rise to a serious difference of opinion. The Lord Ordinary held the appellants entitled to recover the amount of their claim with costs. In the Court of Session they were only awarded £50 as nominal damages, and ordered to pay substantially

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the whole costs of the action. The decision proceeded on the ground that in the view of the Court the appellants' contract with the respondents did not happen to coincide exactly with their contract with Thomas Owen & Company. The loss which they sustained was, therefore, it was said, due to their own fault. The true cause of their inability "to make delivery in terms of their contract was that they had not taken the shipowners bound to deliver the cargo within the time prescribed in their contract with Messrs Owen & Company." Lord Kinnear, indeed, went so far as to say that "the one loss had nothing to do with the other."

The learned counsel for the appellants in his opening address referred to the case of *Dunlop* v. *Higgins*,[1] and contended that, according to the law of Scotland as explained by Lord Cottenham, a party disappointed by a breach of contract was entitled to compensation on a more liberal scale than would be allowed by the law of England. The case of *Dunlop* v. *Higgins*[1] was decided in 1848. Whatever may have been the state of the law at that date, I do not think that the learned counsel succeeded in persuading your Lordships that there is any difference in the law of the two countries at the present time on such a question as that under consideration. The view enunciated by Lord Cottenham is certainly not law in England. Whenever that view has been referred to by counsel as a guide in an English case, it has been unfavourably criticised, and notably by Willes and Crompton, JJ.[2] So far as I could gather from the learned counsel who addressed the House in the present case, *Dunlop* v. *Higgins*[1] has rarely, if ever, been cited as an authority in Scotland.

For the decision of the question before your Lordships, it will be enough, I think, to appeal to the rules as to the measure of damages which have been accepted in Scotland as well as in England, asking your Lordships' attention to the position of the litigant parties and the claim which has actually been made.

Your Lordships will observe that this is not a case like many in the books where a carrier is bound to accept the goods, and some unforeseen accident by land or sea has prevented due delivery. It is a case where persons free to contract or not to contract have deliberately made a bargain and deliberately broken it for their own convenience, alleging only by way of excuse that they did not think the consequences would be so serious, and rather blaming the party they have disappointed for not keeping them up to the mark. True it is, they said, you made pressing inquiries as to the fulfilment of the contract, but that means nothing. You "merely requested us to hurry the boat, which is a very ordinary request." Then your Lordships will observe that, although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen & Co., they must have known, as every business man in their position would know, that in all probability the goods were being despatched to England in order to fulfil some contract either actually in existence at the time or in immediate contemplation, so that a breach of their contract with the manu-

[1] 1 H. L. C. 381, 1 Bell's App. 197.

[2] Borries v. Hutchinson, (1865) 18 C. B. (N. S.) 452; Williams v. Reynolds, (1865) 6 B. and S. 502.

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facturers in Sweden might cause a breach of contract with some manufacturer or merchant in England, and lead to a claim of damages by him against the shippers of the goods. The respondents, therefore, were certainly not justified in assuming that in the discharge of their obligations punctuality was a matter of little moment.

Now, if the respondents had given timely notice of their inability or unwillingness to perform their contract, the appellants might possibly have secured other means of transport. In that case the measure of damages would probably have been just what was claimed in the case of the thirty-three tons—merely the difference in freight. But at the time when the appellants received notice of the contract having been broken, it would not have been possible for them to get a ship to go to Stocka so as to reach that port by the end of September. "Practically speaking," says Mr Mackintosh, an independent witness who had considerable experience with shipping business in Baltic ports, "it was quite impossible in those days." So the rule laid down in *Rice* v. *Baxendale*[1] must be applied. That rule is this: "Setting aside all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner": *per* Blackburn, J., *O'Hanlan* v. *Great Western Railway Co.*[2] The appellants' claim is made on that footing. All they want is to be protected against loss. Their claim is simply for the extra cost of supplying at the stipulated time and at the agreed place of delivery goods as nearly as possible of the same description and quality as those which the respondents had undertaken to deliver. They do not claim profits. They do not even make any claim for the warehousing and insurance of the goods left on their hands, or for diminution in the value of those goods by reason of the subsequent fall in the market. They actually concede to the respondents the profit on the extra 100 tons, to which, as far as I can see, the respondents can have no possible claim.

In the Court of Session the respondents advanced with success a most ingenious argument. They said, "We have now discovered the exact terms of your contract with Thomas Owen & Co. Those terms did not correspond precisely with the terms of your contract with us. We might have fufilled our contract to the very letter, and still you might have been left in the lurch as regards your contract with Thomas Owen & Co. We might have put off shipping your wood pulp to the very last day in September, and then we might have gone about picking up cargo at various ports in any order we pleased, and thus without deviating from our voyage, as under certain circumstances we were at liberty to do, it might have been rather late in the year before your wood pulp would have been delivered at Cardiff. You have claimed special damages; you have not proved the special damage you allege, and you have not pleaded general damage. So, though we have not thought it worth our while to appeal against the liberal award which has been made in your favour under the head of nominal damages, you are really entitled to nothing at all."

It seems to me that this argument is founded on an inaccurate use, or perhaps I should say a less accurate application, of the terms "special

[1] (1861) 7 H. and N. 96. [2] (1865) 6 B. and S. 484, 491.

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damage" and "general damage." That division of damages is more appropriate, I think, in cases of tort than in cases of contract. "General damages," as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proved strictly. In cases of contract, special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now, the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case. No doubt they are claiming over against the respondents the damages they have had to pay to Thomas Owen & Co. But if there had been no contract at all between the appellants and Thomas Owen & Co., and Thomas Owen & Co. had made a similar contract with some third person who failed to perform his bargain, and Thomas Owen & Co. had bought in against that third person just as they did against the appellants, their purchases would have been the best evidence possible of the measure of damages resulting from the respondents' breach of contract.

I am unable to see what difference it can make whether you claim damages generally and shew that an award of general damages would include and cover a special loss from which you seek relief, or whether you seek compensation for a special loss and shew that the loss would be more than covered or compensated by an award of general damages.

I do not think there is any substance in the respondents' argument.

I prefer to rest my judgment on this broad ground. But I am not satisfied that the appellants have not claimed damages in general terms, if it be necessary for them to do so. The first plea in law seems to be a claim to general damages, and certainly no authority was cited to shew that in such a case as this the Court would refuse to assist the pursuer. Nor am I satisfied that the contract with Thomas Owen & Co. does not correspond exactly with the contract of carriage. There was evidence to the effect that according to mercantile usage the contract with Thomas Owen & Co. being a c.i.f. contract would be satisfied by the delivery of the goods on board ship at Stocka at any time in September. The delivery of the second shipment would thus correspond with the delivery of the first shipment, which was to be "first open water." Certainly, Thomas Owen & Co. seem to have taken that view at first, for on 5th September 1900, they write from Cardiff: "As you are aware the balance of the Ströms sulphite is to be shipped in August/September, and we shall therefore be glad if you will kindly tell us when we may expect the steamer to arrive here." Moreover, their manager in his examination admitted that they would have been satisfied with the shipment if it had been despatched from Stocka before the end of September. I doubt, however, whether the Court could decide that question in this action, and at anyrate I do not think that the Court ought to be astute in defeating an honest claim in favour of persons who have wilfully disregarded their obligations.

I think that the appeal should be allowed, and the judgment of the Lord

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Ordinary restored, with costs here and below, and I move your Lordships accordingly.

LORD DAVEY.—The only question on this appeal is the amount of damages payable by the respondents for an admitted breach of contract. The conclusion which I have formed from a consideration of the cases cited at the Bar is that in recent years, at anyrate, the English decisions as to the measure of damages have been followed by the Scottish Courts, but with some elasticity in the application of them; and, if I may respectfully say so, I think it is of great importance that in commercial cases there should be uniformity in the administration of the law.

The learned Judges in the Inner-House agree with the Lord Ordinary in thinking that the respondents, when they entered into the contract of affreightment with the appellants, must be presumed to have contemplated that the appellants were shipping the goods in performance of a contract limited as to time of delivery. And having regard to the evidence as to the character of this pulp business, I see no reason to differ from this conclusion. But the learned Judges differ widely from the Lord Ordinary in holding that the loss for which damages are claimed in the pleadings was not consequent on the respondents' failure to fulfil their contract. If, however, the Lord Ordinary has put the right construction on the contract of the appellants with their purchasers in Cardiff it is not disputed that he is right in his conclusion. The difficulty arises from a cause of which your Lordships have had frequent experience in commercial contracts, namely, the use of a printed form which is not exactly adapted to the particular case without making the necessary alterations. The material words of the contract are—"Mode and place of delivery" (in print), "C.i.f., Penarth Dock, Cardiff" (in writing). "Time of delivery" (in print), "In two cargoes, first open water, and August/September 1900" (in writing). Lord M'Laren says that he is unable to see how these words as regards the second delivery can mean anything but delivery at Cardiff before the end of September. But it is admitted that the words "first open water" mean by a shipment then made, *i.e.*, when the port of shipment is first free from ice, and it is equally easy to say with the Lord Ordinary that the words "August/September" must refer also to a shipment made in either of those months, or (in other words) that the time of delivery is defined by the date of shipment and not by the date of arrival. On the whole, I prefer the construction put upon the words by the Lord Ordinary, and I think that construction is aided by the fact of the contract being "c.i.f." with its recognised legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight, as explained by Lord Blackburn in *Ireland* v. *Livingston*.[1] But I think that Mr Hamilton perhaps put his argument too high in treating this consideration as conclusive.

But, I agree with my noble and learned friend Lord Macnaghten that on any view of the contract the interlocutor of the Lord Ordinary should have

[1] (1871) L. R., 5 Eng. and Ir. App. 395, 406.

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been sustained. The learned Judges have not laid down any particular measure of damages, for in the view which they have taken—that the failure of the appellants to fulfil their contract with Messrs Owen was not the consequence of the default of the respondents, as alleged in the condescendence—Lord M'Laren held there was no evidence of any other damages, and gave £50 as an estimated sum for any inconvenience the appellants have been put to, and this was acquiesced in by Lord Kinnear with some misgivings. I cannot agree that there is no evidence upon which the Court could act. I am of opinion that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. There was evidence that it was practically impossible to obtain another vessel to take the goods from Stocka at that time of year, and I think, therefore, that the appellants were justified in buying or (which is the same thing for this purpose) allowing their purchasers to buy in as soon as it was apparent (as it was before the end of September) that the respondents could not perform their contract. And I think that the actual purchases made might properly be taken as evidence of the cost of replacing the goods in Cardiff in the middle of the month of October. On the other hand, the appellants had no other buyers ready to take their 400 tons of pulp, and there was evidence that it would have been a speculative and very risky thing to send that quantity to Cardiff or elsewhere for sale without having secured a purchaser, and that prices subsequently fell. I think, therefore, there was evidence upon which the Court might, without any injustice to the respondents, have found the value of the goods in Sweden with freight and insurance would not exceed the price in Messrs Owen's contract. I am not, therefore, disposed to disagree with the alternative view taken by the Lord Ordinary if his construction of the appellants' contract with the purchasers be not adopted. I should add that I am less impressed by the pleading difficulty than I might have been had I not found that neither the Lord Ordinary nor the Inner-House considered themselves precluded from giving the pursuers damages other than those arising directly out of the contract with Messrs Owen.

On these grounds I am of opinion that the interlocutor of the Inner-House should be reversed, and that of the Lord Ordinary restored, with costs here and below.

Lord James.—I agree with the judgment submitted to the House by my noble and learned friend Lord Macnaghten.

Lord Robertson.—I concur.

"Ordered that the interlocutor appealed from be reversed, and that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants the costs both here and below."

Rollit & Sons & Burroughs—James F. Mackay, W.S.—Holman, Birdwood, & Co.—J. & J. Ross, W.S.

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# HOUSE OF LORDS.

## COMMITTEE FOR PRIVILEGES.

### *In re* LORD KINROSS.

*House of Lords—Practice—Peer appearing as counsel in Appeal Cases. —Resolved that* according to the present practice there is no reason why a Peer should not be heard as counsel on an appeal at the Bar of the House of Lords; but that this resolution is not intended to apply to the appearing of barristers who are Peers before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case.

Ld. Chancellor (Halsbury). The Chairman of Committees (The Earl of Onslow). Earl Spencer. Viscount Cross. Viscount Knutsford. Lord Ashbourne. Lord Macnaghten. Lord James. Ld. Robertson.

THIS was an application by Lord Kinross, a member of the Scottish Bar, to be allowed to appear as counsel on appeals to the House sitting as a Court of Appeal.

The Committee for Privileges was summoned to consider the application.

LORD CHANCELLOR.—I think it right to mention the circumstances under which I have asked that your Lordships should give us your assistance. The son of the late Lord Justice-General of Scotland has been called to the Bar and is a practising barrister. There is a case coming before your Lordships' House in which he is desirous, and his client is desirous, that he should appear and represent him as counsel at the Bar of your Lordships' House. I did not think it was very desirable that without an appeal to your Lordships' Committee we, who are a comparatively small number practically constituting the Court of Appeal, should decide the question as to hearing him for ourselves, because although practically those who are sitting for that purpose are merely a Court of Appeal, theoretically it is your Lordships' House. Therefore I have asked your Lordships' assistance in determining what answer should be returned to the noble Lord who desires to appear as counsel.

I do not conceal that I am myself strongly of opinion that he ought to be allowed to appear. I think the theoretic view that he is a member of your Lordships' House and so a member of the tribunal is not one which ought to prevail in practice. The House when sitting on appeals is confined to the legal members of the House of Lords, including the Lords of Appeal who are appointed for that purpose. A Court of Appeal has been specially constituted, before which no appeal can be entertained unless three of those members are present. Theoretically I can imagine that a good many things might be said against the view which I entertain; but it seems to me that practically the question is not one which ought to create much difficulty. I do not see why a Peer should be precluded from appearing before the final Court of Appeal.

Two things strike one at once with reference to the general question. In the first place, Lord Coleridge, who is a member of this House, is continually practising before the Courts, and therefore it may be assumed that there is nothing in the position of an advocate before the Courts to prevent a Peer from practising at the Bar. Then the question arises, is there anything to exclude him from appearing also before the highest Court of

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Appeal? Whatever may be said about that now, there is no doubt that in earlier times there was not a strong partition between the Bench and the Bar. If anything is to be said about the traditions of the Bar, my impression derived from the old reports is that in the times of our early legal history a man was one day an advocate and the next day a judge. In fact, when you use the old reports for the purpose of authority, it is difficult, without making some sort of antiquarian inquiry, to ascertain whether or not the words you quote are words of authority coming from one of the Judges, or whether they are merely the argument of counsel which may have been uttered the day before in his capacity as counsel, and not as a Judge at all. From time to time they went from the Bench to the Bar and from the Bar to the Bench during all those years. And then I may refer to the present state of things in the Privy Council. We have a distinguished member of the House of Commons and of the Bar—Mr Asquith—who is also a member of the Privy Council, practising before the Privy Council. It may be said that he is not a member of the Judicial Committee of the Privy Council. That is true; but it would be strange if that circumstance were to affect the question whether or not he ought to be heard as an advocate before the tribunal. I propose to move, with a view to starting the discussion—That according to the practice of the highest Court of Appeal, the House of Lords, there is no reason why a Peer should not be heard as an advocate to argue questions of law before your Lordships' House.

LORD JAMES.—As one of the older members of your Lordships' Committee, I should like to say, with very great deference, that I entirely differ from the view that has been presented by my noble and learned friend, and I trust your Lordships will consider well before you accept this motion. I am not for a moment suggesting that a Peer should not practise as a barrister in the Courts of law. Until the case of Lord Coleridge occurred the question had never arisen; but it appears to me that the course taken by the noble and learned Lord was perfectly justifiable. If I may say so respectfully, I think the more the members of this House associate themselves with the profession the better. In my opinion Lord Coleridge was well within his right in practising at the Bar. But that is not the question now before your Lordships. The question is, whether a man who is a member of a tribunal can practise before that tribunal. If we accept this motion, that Lord Kinross should be allowed to practise at the Bar of the House, I cannot understand how we can refuse him the right to appear before committees of the House also. I cannot see any distinction, and the very important question arises whether we shall not by giving this permission be encouraging the House of Commons to determine that its members may practise before the committees of that House. There is a very thin partition between practising before committees of the House and before the House generally. What is there to prevent a Peer who practises before the House itself from practising before one of its committees? And let me refer to a recent case. Three or four years ago we had a Peer on his trial for a felony. If this permission is granted, what will there be to prevent a Peer from being heard as an advocate at the Bar and then coming

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in and taking part in the decision of the very case in which he has been an advocate?

We must not forget that when we are sitting to hear appeals we are sitting as the House of Lords. According to the theory of the Constitution we are the House of Lords, determining the question as such, and whether we sit as a limited number of legal Peers to hear appeals in civil causes, or as a judicial tribunal to determine the guilt or innocence of one of our Peers, we are in any case the highest Court of law in the land. My noble and learned friend's motion involves this, in principle at least, that a member of this House may appear before the House and argue before it, with a right afterwards to take part in the decision. I say that would be a scandal. We have some analogy to guide us upon the principle as to whether a member of a tribunal can practise before it or not. As your Lordships are aware, there was a time when the House of Commons decided upon election petitions by its own committees, but in the year 1868 the determining of those petitions was placed in the hands of the Judges. Then because that tribunal (the Judges) reported to the House of Commons, those who had the care of the interests both of Parliament and the Bar in their hands had to consider whether a barrister who was also a member of Parliament had a right to appear before that tribunal. If I recollect rightly, the determination of that question was chiefly in the hands of Sir John Coleridge and Sir John Karslake, and a few months later, in the spring of 1869, I was a party to it. We determined that no member of the House of Commons should appear before an election Judge, because the election Judge had to report to the House, and therefore the barrister practising before him would be practising before the same tribunal of which he was a member. I may remind my noble and learned friend, who was engaged in nearly all the election petitions until he took his seat in the House of Commons in 1876, that that rule was fully accepted. Some members of the House gave up appearing on a considerable number of petitions, and we maintained the principle that a member of the House of Commons should not practise before the tribunal which would have to report to the House.

One word as to the analogy which my noble and learned friend has spoken of in respect to the Privy Council in the case of Mr Asquith. The rule of conduct was that a barrister should not practise before the Judicial Committee if he became an ordinary Privy Councillor. Sir John Karslake, for one, entertained this view. Acting upon that rule in 1885, when I had the honour of being made a Privy Councillor, I refused to appear before the Judicial Committee because I could not bring myself to practise before that tribunal, although there was a strong partition between the general body of Privy Councillors and the members of the Judicial Committee. That was formerly accepted and acted upon as the proper rule which should guide those who practised before the Privy Council until very recently, and although my friend Mr Asquith has a right to do what he has done—and I have not a right or a desire to criticise him in the least—still there can be no doubt that that right was not acted upon, and had never been acted upon by anyone except Mr Asquith, in the long period which had elapsed before he chose to take that course. For the reasons I

have given I am very strongly against breaking down this barrier, which in my opinion rightly exists, preventing any member of a tribunal from practising before it. Although I dare say this motion might not in fact have a wide operation, I feel bound to express my opinion against it in the interests both of the dignity of this House and of the members of the Bar who practise before it.

LORD ASHBOURNE.—I must say the inclination of my mind is not in accord with my noble and learned friend Lord James. Nor am I impressed with his arguments, although I recognise their interest and the great fairness with which he has presented them. My noble and learned friend has used an expression to the effect that members of your Lordships' House are members of the tribunal that hears appeals, and indeed he has referred to that fact more than once. It is true only in a historical and remote sense, for in all the years that any of your Lordships now present recall no Peer not learned in the law according to the technical description has attempted to take any part in a decision of your Lordships' House in legal matters. I venture to say that if, when an appeal was being heard in your Lordships' House upon a point of law, any member of the House not learned in the law sought to take part in the proceedings, those who were specially responsible for the legal business of your Lordships' House would feel compelled to animadvert very strongly upon it, if not to adjourn the hearing of the case. I can hardly imagine a step more inconvenient, more entirely opposed to constitutional usage, than for any member, who had not held one of the qualifying offices which would justify him in taking part in hearing appeals, to come here and seek to discuss the important questions of law which are from time to time coming before your Lordships' House. I admit, of course, that the House of Lords is the House of Lords for all purposes, and every member of it is a Peer of Parliament entitled to be present on every occasion when it sits, but I cannot but think it is putting a technical point into undue prominence when you speak of every Peer as being a member of your Lordships' House for the decision of important legal questions.

Then my noble and learned friend says this would be only introductory to wider claims, and if a Peer were permitted to come and appear for a client at your Lordships' bar it would be competent for him then to appear for a client before a committee of the House. I am disposed strongly to question that. No doubt if he were selected by the Lord Chairman of Committees as a member of a committee of your Lordships' House he would be entitled to sit upon that committee. But this is not a matter of technicality, it is a matter of substance. If he sought to appear on behalf of a client before a committee, he might be a member of that committee or a member, if not of that particular committee, of another committee in another room, there being no technical bar against his sitting on a committee. I see therefore a great difference, a vital difference, between practising in your Lordships' House and appearing before a committee, when he might have sat on that very committee or on another committee the day before in another room.

Then my noble and learned friend refers to an assumed analogy

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between what is sought on the present occasion and the action of the House of Commons in reference to election petitions. I was not myself able to follow that. It is quite true that for purposes deemed wise by Parliament the hearing of election petitions was transferred to the Judges, but the report comes back to the House of Commons, and therefore every member of that House has a right, and if there was a call of the House it would be his duty, to be present at whatever proceeding might take place in reference to that report.

I do not think the analogies and reasons mentioned by the Lord Chancellor have been displaced by what has been said by my noble and learned friend Lord James in his very interesting remarks. The practice of the Privy Council is, I think, important, and has a significant bearing on the present discussion. My noble and learned friend says that when he was made a member of the Privy Council he did not practise before that tribunal, although we all know that he was a very leading and distinguished member of the Bar. But we are aware that a very distinguished and prominent member of the Bar, also a Privy Councillor, now practises there, and no doubt to the assistance of the tribunal and the advantage of his clients. Therefore we find that the existing practice of the Judicial Committee of the Privy Council is not to question the right of the Privy Councillor to appear and argue for his clients in cases in which he may be instructed. I think that is a matter of very considerable importance when we are considering analogies.

My noble and learned friend the Lord Chancellor has mentioned the fact of Peers practising in other Courts. I think that is a matter of considerable importance. Assuming that he is entitled to be regarded as a member of the House of Lords, and therefore technically within the description of one who could hear appeals, is it not a step in the argument to find that he is allowed without question to discuss and to take part in cases which have come before tribunals lower than that of your Lordships' House? This is a new question; it has never been presented before for decision as regards the Bar of this House or its committees. I admit that there is something in what my noble and learned friend Lord James has said—there are certainly considerations to be weighed on both sides; but I must say that the balance in my own mind is in favour of what has been said by my noble and learned friend the Lord Chancellor.

EARL SPENCER.—I am rather reluctant to say anything among a body almost entirely composed of law Lords, but as this is a matter which affects the House at large perhaps I may have some little right to say something upon it. Probably I am the only lay Peer present to-day who has sat in the House when hearing an appeal. I remember very well when I was a mere boy I was called in one morning to make a quorum, and I recollect sitting here and hearing appeals. Happily that state of things has passed away; it was certainly open to objection, and the doing away with it was, in my opinion, one of the best of reforms. According to the statement we have heard, not only from the Lord Chancellor and Lord Ashbourne, but from Lord James, it is well understood that of late years lay Peers no longer take any part in the procedure of hearing appeals before the highest tribunal of the land.

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I have listened with the greatest care to the arguments which have been addressed to the House this morning. I confess my sympathy is very strong in favour of making this concession to Lord Kinross. I followed the precedents and analogies which were brought forward by Lord James, and I confess I did not think that some of them exactly applied. One of the strong points he made was with regard to the Privy Council. Lord Ashbourne has met that. It seems to me that the Crown has that matter entirely in its own hands, because until a Privy Councillor is called to sit on the Judicial Committee he is not a member of the tribunal. Then comes the question of practising before committees of this House. I think what is proposed now could hardly be a precedent for that. I at once admit that it is not right that anyone pleading before a tribunal should also sit upon that tribunal as Judge. No doubt any Peer might sit on a committee, but it does not follow that he would be put on a committee by the Lord Chairman. It is not likely that he would put a legal Peer upon the committee if he has been in the habit of practising before committees. The only precedent which certainly does throw a little difficulty in my way is the precedent of the House sitting as it did a few years ago—[1901] A. C. 446; Trial of Earl Russell—when the Lord Chancellor presided over a trial of a Peer for what I may call a criminal offence. There of course the whole House did sit. I remember on that occasion being appealed to by several of my friends and others to make a motion; but I declined to do so, as I thought it was more right that the question should be decided by the Law Lords than by the lay Peers. At the same time there we were, and I should have had a perfect right to make a motion with reference to the sentence. That is a case in which there might be a difficulty. Lord James was present there I think. I was going to throw out this suggestion: Is it possible that in passing the resolution in the Committee of Privileges or in the House that Lord Kinross may practise, to confine it to your Lordships' House when sitting as the highest Court of Appeal? If that could be done, it would sweep away the only difficulty I have.

LORD CHANCELLOR.—My motion was so intended.

LORD MACNAGHTEN.—I am very glad that the Lord Chancellor has submitted this question to the Committee for Privileges, and I am very glad to hear the opinion that has been expressed by a member of the House who is not a member of the legal tribunal. I entirely agree with everything the Lord Chancellor has said. One consideration which weighs practically with me a good deal—possibly because I spent a good part of my life at the Bar—is this. If you recognise that a barrister may practise before other tribunals you place him at a great disadvantage if you say he may not appear here, and you place his clients at a great disadvantage also if you say that he may not follow the case when it comes by appeal to this House.

VISCOUNT KNUTSFORD.—I may be allowed to express my complete concurrence in the views which have been stated by the Lord Chancellor and the Lord Chancellor of Ireland. It seems to me that we are dealing in this case with a matter of substance and not of technicality. There may be difficulties, but substantially there can be no doubt that the Lord who

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now seeks to appear before you would have no right, and could under no circumstances have a right, to sit also as a member of the Court in the case; therefore he would not be pleading before a Court in which he could be a Judge. That seems to me to be substantially the view of the question we ought to adopt. With the view entertained by Lord Spencer as to defining more clearly in the resolution the particular point we are engaged upon, I desire to express my hearty concurrence, and I understand that the Lord Chancellor agrees to that suggestion.

LORD ROBERTSON.—I merely rise to put one particular point. It is this—I do not see any technical difficulty at all in what is proposed, and for this reason: The suggestion is made that the noble counsel, having pleaded upon his case, could constitutionally come into the House and vote on that very case. That is not so. No man is entitled to sit and take part in a decision in this House or anywhere else unless he has heard the cause, and heard it as a Judge. Now, the Bar is outside the House of Lords altogether. Therefore a Peer who has heard the cause at the Bar has not heard the cause. Consequently that difficulty entirely vanishes. I fully concur with the view taken by Lord Spencer.

LORD JAMES.—Of course I accept the view that has been expressed almost unanimously, adding as a rider to the motion that the resolution is not intended to apply to the appearing of barristers who are Peers before Committees of this House, or before the House when sitting as a full Court in a criminal case.

LORD CHANCELLOR.—With reference to the case of Lord Russell, it was not a trial before this House. It was a trial before the Lord High Steward of England, the House sitting as the Judges of fact. It was not a sitting of the House within the language of my resolution. The resolution I propose is—"That according to the present practice of the House of Lords there is no reason why a Peer should not be heard as an advocate to argue questions of law before your Lordships' House; but this resolution is not intended to apply to the appearing of barristers who are Peers before Committees of this House."

LORD JAMES.—Could we add such words as "or before this House when sitting for the trial of criminal cases"?

LORD ASHBOURNE.—"Or when sitting under the presidency of the Lord High Steward on a criminal case"?

VISCOUNT CROSS.—I agree, subject to the remarks made by Lord Spencer, and now that that point has been met I entirely agree with the motion.

REPORT from the Committee for Privileges:—"That according to the present practice of the House of Lords there is no reason why a Peer should not be heard as counsel on an appeal at the Bar of this House; but that this resolution is not intended to apply to the appearing of barristers who are Peers before Committees of this House, or before this House when sitting under the presidency of the Lord High Steward on a criminal case." Made and agreed to, and resolved accordingly.

# CASES

DECIDED IN

# THE COURT OF JUSTICIARY,

## 1904–1905.

JOHN SHAW SOUTAR (Procurator-Fiscal, Dunfermline), Appellant.—*Sol.-Gen. Dundas—Deas, A.-D.*
JOHN CLARK, Respondent.—*Shaw, K.C.—Constable.*

No. 1.

Dec. 15, 1904.
Soutar v. Clark.

*Statutory Offences—Coal Mines Regulation Act*, 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 49, *General Rule* 24, *and sec.* 51 *and Special Rules—Mines and Minerals—Winding Engineman—Responsibility of Manager—Person not qualified allowed to work engine for raising material only.*—By section 49, General Rule 24, of the Coal Mines Regulation Act, 1887, it is enacted that in a coal mine which is usually entered by means of machinery a man not under twenty-two years of age shall be appointed for working the machinery which is employed in lowering and raising persons, and shall attend for that purpose during the whole time any person is below ground in the mine. By the Special Rules in force under section 51 of the Act in a mine usually entered by means of machinery it was provided that the engineman should remain in charge and so near his engine as at all times to have it completely and entirely under his control; should watch and attend to the various signals for raising and lowering the cage whether laden with persons or materials or empty; and (Special Rule 29) should not allow any person to interfere with the engine while being wrought. Section 51 of the Act enacts that the manager of a mine shall be guilty of an offence against the Act unless he proves that he has taken all reasonable means to enforce the rules.

*Held* that these general and special rules applied when the engine was being used for raising and lowering material as well as when it was being used for raising and lowering persons; and that a colliery manager who had permitted a person under twenty-two years of age to raise material but not persons by means of the winding-engine when it was under the charge of a qualified winding-engineman, had failed to the best of his power to enforce Special Rule 29, and was consequently guilty of a contravention of section 51 of the Act.

HIGH COURT. Lord Justice-General. Lord Adam. Lord Kinnear.

On a complaint under the Summary Jurisdiction Acts brought in the Sheriff Court at Dunfermline at the instance of John Shaw Soutar, Procurator-fiscal of Court, John Clark, colliery manager, Milesmark, Dunfermline, was charged with a contravention of the Coal Mines Regulation Act, 1887.*

* The Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), under the heading "General Rules" enacts as follows:—Sec. 49. "The following general rules shall be observed, so far as is reasonably practicable, in every mine:— . . . Rule 24. In any mine which is usually entered by means of machinery a competent male person not less than twenty-two years of age shall be appointed for the purpose of working the machinery which is employed in lowering and raising persons therein, and shall attend for

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The complaint set forth that Clark, being manager of Wallsend Pit, of Rosebank Colliery, Dunfermline, in October 1903 found James Hunter, who was employed as fireman at said mine, and who, in respect that he was less than twenty-two years of age, was not qualified to act as a winding-engineman, contravening Special Rule 29 then in force at said mine under section 51 of the Coal Mines Regulation Act, by working the engine and so interfering with it while it should have been wrought by George Russell, then employed as winding-engineman at said mine; and again found Hunter contravening Rule 29 in a similar manner in November 1903 while the engine should have been wrought by Robert Moodie, then employed

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that purpose during the whole time that any person is below ground in the mine."

Sec. 51, under the heading "Special Rules," enacts as follows:—"(1) There shall be established in every mine such rules (referred to in this Act as special rules) for the conduct and guidance of the persons acting in the management of such mine or employed in or about the mine as, under the particular state and circumstances of such mine, may appear best calculated to prevent dangerous accidents, and to provide for the safety, convenience, and proper discipline of the persons employed in or about the mine. (2) Such special rules, when established, shall be signed in duplicate by the inspector who is inspector of the district at the time the rules are established, and shall be observed in and about every such mine (including any extension thereof) in the same manner as if they were enacted in this Act. (3) If any person who is bound to observe the special rules established for any mine acts in contravention of or fails to comply with any of them, he shall be guilty of an offence against this Act, and also the owner, agent, and manager of such mine shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means, by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine so as to prevent such contravention or non-compliance."

The special rules in force at Wallsend Pit, Rosebank Colliery, in terms of section 51 of the Act, *inter alia*, provided as follows:—"*Manager.*—(2) Generally the mine shall be under the control, management, direction, and supervision of the manager, whose duty it shall be to carry out and see carried out the various provisions of the Act so far as incumbent on him, or on those acting under his control and directions. . . . He shall also appoint such competent persons as may be required for the purpose of carrying out the provisions of the statute. . . . *Winding-Engineman.*—(20) The engineman at the pithead shall during the hours of his shift remain in charge of and so near his engine as at all times to have it completely and entirely under his control. (21) He shall attend for the purpose of lowering and raising persons in the mine during the whole time that any person is below ground in the mine. . . . (27) He shall thoroughly acquaint himself with and shall watch and attend to the various signals made for raising or lowering the cage, whether laden with persons or materials, or when empty. He shall carefully and exactly stop the cage at the landing-places. He shall observe the indicator attached to the machinery shewing the position of the load in the shaft, and manage the brake connected with the engine. He shall further attend to and see that the indicator shews the position of the cage in the shaft, and that the indicator, brakes, and other fittings of the engine, and any steam and water gauges and safety-valves attached to the steam-boilers are kept in good order. . . . (29) He is prohibited from allowing any person whatever to interfere with the engine in any way while being wrought, and from allowing or permitting any person other than those authorised by the owner, agent, manager, under-manager, or oversman, to enter or remain in the engine-house. . . ."

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as winding-engineman at said mine; but that Clark failed on these occasions to prohibit Russell and Moodie from so employing Hunter as their substitute to work said engine, and failed to prohibit Hunter from so acting as their substitute; and that consequently Russell, in October 1903, and Moodie, from November 1903 till May 1904 inclusive, continued illegally so to employ Hunter, and Hunter continued illegally so to act, at intervals on each working day during said periods, and in particular on 14th May 1904; that therefore, Clark having during said period failed to the best of his power to enforce said special rule, and having failed to prohibit Russell, and Moodie, and Hunter, from acting as above set forth, did contravene section 51 of the Coal Mines Regulation Act, 1887, and Special Rule 29, by having failed to the best of his power to enforce the same so as to prevent contravention of or non-compliance therewith, and was liable to a fine, and in default of immediate payment, to imprisonment.

The following objections were stated to the relevancy of the complaint:—"(1) That it charges the manager with allowing the fireman to work the winding-engine, he being, because less than twenty-two years of age, not qualified to act as a winding-engineman, whereas such age limitation under general rule 24 applies only where the machinery is being used for raising or lowering persons; (2) The complaint does not aver that when the fireman was working said machinery it was being used for raising or lowering persons; and (3) That under Special Rule 2 the manager is entitled to appoint 'any competent person' to assist the winding-engineman in his duties except as regards his duty of raising or lowering persons."

The Sheriff-substitute (Shennan) repelled these objections.

The accused pleaded not guilty, and evidence was led.

The Sheriff-substitute, in respect of the proof adduced, found the complaint not proven.

The Procurator-fiscal appealed upon a stated case.

The stated case set forth as follows:—"The following facts were admitted or proved:—(1) That the respondent was, as charged, manager of the mine, and bound to enforce the Act and rules established under it for said mine, and that he had also under his charge two other mines; (2) that in October 1903 Russell was winding-engineman at the mine, and the respondent was informed by the oversman that on one occasion Hunter had been working the engine while drawing material during Russell's shift, and the respondent found fault with that having been done without his permission; (3) that between October 1903 and May 1904 Moodie was winding-engineman at the mine, and the respondent on one occasion saw Hunter working the engine, and again found fault with this being done without his permission, and at the same time made it clear that Hunter must not on any account draw men, but he did not expressly prohibit him from drawing material; (4) that on both occasions Hunter was under the supervision of the engineman; (5) that, during the period charged, Hunter, at intervals on each working day or thereby, assisted Moodie by working the engine for the purpose of raising material only, but that (except on the two occasions mentioned) the respondent did not know that Hunter was so acting; (6) that there were persons below ground in the mine when Hunter worked the engine; (7) that Hunter did not on any occasion lower or raise persons; (8) that in the course of his duty as fireman, Hunter had occasion to go into the engine-house to report to the engineman;

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(9) that the mine is usually entered by means of machinery, and Hunter is less than twenty-two years of age; (10) that the special rules produced were in force at said mine as charged, and that the respondent published them; (11) that the Enginekeepers' Society, of which a print of the rules is produced, exists for the purpose, *inter alia*, of affording instruction to apprentices in the system of engine-keeping; that Hunter's father is a winding-engineman; that Hunter intends to be a winding-engineman after he has reached twenty-two years of age; that he has been authorised by the society, in terms of Rule V., to receive instruction, and he had acted, before he came to Wallsend Pit, in the same way as he acted at that pit; (12) that the respondent believed that he was entitled, under Special Rule 2, to authorise any person whom he might consider competent, even though not twenty-two years of age, to work the winding-engine, so long as he did not lower or raise persons; and that this was in accordance with the practice of other colliery managers; (13) that the respondent considered Hunter to be a person competent, notwithstanding his age, to lower or raise material, and, if he had considered it necessary to give the engineman assistance in so doing, Hunter is the man whom he would have authorised to work the winding-engine for that purpose.

"On these facts I held that it was not necessarily a contravention of either the general or the special rules for the working of the mine for Hunter to assist the engineman to raise or lower material, and that therefore the respondent's knowledge of Hunter having so acted on two occasions, without expressly prohibiting him from doing so in future, did not imply that the respondent had failed to enforce these rules. Accordingly I found the complaint not proven."

The questions of law were:—"(1) Is the complaint relevant? (2) Is a colliery manager, who allows or permits a person under twenty-two years of age, in the circumstances set forth in the above findings, to raise material by means of the winding-engine when it is under the charge of a winding-engineman, guilty of failing to the best of his power to enforce section 51 of said Act and said Special Rule No. 29, so as to prevent contravention of or non-compliance therewith? (3) On the facts stated was the respondent rightly acquitted?"

Argued for the appellant;—By the rules in force at this mine it was provided that the winding-engineman should at all times have the engine completely and entirely under his control. No distinction was made between raising and lowering material and raising and lowering persons. Complete and entire control meant personal and exclusive control. The engineman was prohibited from allowing any person whatever to interfere with the engine (Special Rule 29). The appellant here had allowed a person under twenty-two, who was not and could not be a qualified winding-engineman to work the engine. He was consequently guilty of a contravention of section 51 of the Coal Mines Regulation Act. The expression in section 49, "so far as is reasonably practicable," only applied to the case of engineering and mining difficulties.[1]

Argued for the respondent;—The purpose of these rules was to safeguard persons. That purpose was not frustrated by allowing an apprentice to work the engine when it was being used for materials

[1] Wales v. Thomas, 1885, L. R., 16 Q. B. D. 340 (construing same expression in Coal Mines Regulation Act, 1872 (35 and 36 Vict. cap. 76), sec. 51.)

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only, and under the personal superintendence of the winding-engineman. Some means must be provided for training future winding-enginemen. General Rule 24 applied only to the working of the engine when it was being used for persons. Special Rule 21 shewed that these rules were intended to apply only to the raising and lowering of persons. But apart from this there was nothing in the rules which, properly construed, prohibited the engineman from having the aid of a competent assistant acting under his directions. Special Rules 20 and 27 were sufficiently complied with if the winding-engineman was present, and superintending, although be allowed an assistant as his hand actually to work the engine. The appellant had to read in the words "personal and exclusive" before "control," which was not legitimate. Special Rule 29 referred to interferences by outsiders, not to assistance given by an authorised and competent assistant, The Court was not bound to construe these rules literally, but in a reasonable spirit, and in such a way as to facilitate the working of the mine, provided nothing was done which could endanger life and limb. The general rules only applied so far as was reasonably practicable—sec. 49.

LORD JUSTICE-GENERAL.—This is a proceeding under the Coal Mines Regulation Act, 1887. It comes before us in the form of a stated case, and the questions put are these—(His Lordship read the questions).

Under the Act there are general rules and special rules. General Rule 24 provides—(His Lordship read General Rule 24). Section 51 of the Act provides—(His Lordship read section 51). Special Rule 29 established at this pit under this section provides—(His Lordship read Special Rule 29).

In this case the complaint is that the accused, the manager of the pit, failed to prohibit a man of less than twenty-two years from working the winding-engine, and so interfering with it, and so contravened section 51 and Special Rule 29 by failing to enforce the same.

In this case the Sheriff-substitute has found that the respondent believed that he was entitled to authorise a person under twenty-two years of age to work the engine so long as he did not lower or raise persons, and that this was in accordance with the practice of other colliery managers. But that is not enough, because, if practice is to be recognised as modifying the provisions of the statutory rules, variety and uncertainty will be introduced into the law. The question is whether what was allowed to be done here was in conformity with the statute and the rules. The rules are peremptory, and I cannot conceive of any enactments which require more strict and loyal obedience. If these rules are peremptory and must be literally obeyed, I think it is clear that Special Rule 29 was not obeyed in this case, and that the accused failed to do his best to enforce it. If that is so, then the first and second questions will be answered in the affirmative, and the third question will be answered in the negative.

LORD ADAM.—(After stating the charge and the facts found)—On these facts, having regard to the general and special rules applicable to this pit, was it legal to allow Hunter, being a man under twenty-two years of age, to work the winding-engine whether for raising or lowering persons or material? It is admitted that the respondent had no right to allow him to work it for raising or lowering persons. But it is said that it was competent and legal

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and admissible to allow him to work it so long as it was being used for raising and lowering material only.

Special Rule 29 in force at this pit says—(His Lordship read the rule). Now, Hunter did interfere with the engine, and it is said it was a breach of this rule for the manager not to prohibit him from doing so. The way in which the manager is reached is under section 51, subsection (3), of the Coal Mines Regulation Act, 1887, which enacts—(His Lordship read the subsection). So the charge here comes to be that Clark has not proved that he had taken all reasonable means to prevent contravention of Rule 29. There could be no doubt, if it was a breach of that rule to allow Hunter to work the engine when it was being used for material only, then the manager did not do his best to enforce the rule. The question is whether it was a breach. That depends first on General Rule 24—(His Lordship read General Rule 24). It is to be observed that a competent engineman not less than twenty-two is to be appointed for the purpose of working the machinery, not while it is employed, but "which is employed" in lowering and raising persons. Then there are the Special Rules established under section 51, which are to be observed in the same manner as if they were enacted in the Act. I cannot see why these rules are to be construed otherwise than according to their literal sense. The duties of the winding-engineman are prescribed by Special Rules 20, 21, and 27—(His Lordship read Special Rule 20). I fail to see how he could at all times have the engine completely and entirely under his control when he placed it in charge of an assistant when it was raising and lowering material. That is not retaining the engine under his control. It may be that Hunter, his assistant, was under his control, but that is a different thing. Then Special Rule 21 provides—(His Lordship read Special Rule 21). That rule does not mean that the engineman is to attend while someone else works the engine. Then Special Rule 27 provides—(His Lordship read Special Rule 27). No distinction is made in that rule between persons and material. The engineman, and no one else, is to do the things prescribed whether the engine is being used for persons or for material. The object of these rules is no doubt the safety of the miners. But the person who framed these rules may have thought that a fully qualified engineman was as necessary in the case of material as in the case of persons in order to secure safety. I can see that to allow an unqualified engineman to raise or lower material might be a great danger to the lives of those in the pit.

I think, therefore, that to allow Hunter to work the engine, even when it was being used for material only, constituted a breach of Special Rule 29, and consequently I agree that the questions should be answered as proposed by your Lordship.

LORD KINNEAR.—I agree. The complaint made against this coal-mine manager is that he failed to the best of his power to enforce the rules in force at this mine. The particular rules which he is said to have failed in enforcing are rules which in effect provide that no one is to take charge of a winding-engine except a competent male person not less than twenty-two years of age, and the contravention alleged is that a lad under twenty-two was allowed to work the winding-engine at this pit. The defence is that

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under the rules the accused was entitled to allow a person whom he considered competent, even although under twenty-two, to work the winding-engine so long as it is raising or lowering materials only and not persons. The question is whether this is the true construction. I agree that it is not.

The question turns in the first place on the meaning of General Rule 24. That rule provides, in the first place, that a competent male person not less than twenty-two shall be appointed for the purpose of working the machinery. I cannot find in the rule any expression or implication of a distinction between the two operations to which the machinery may be applied of raising and lowering materials and raising and lowering persons. There is no limitation to the case where the machinery is being used for any particular purpose. A competent male person not less than twenty-two is to be appointed for the purpose of working it whatever use it is put to. Then, in the second place, the rule provides that the person so appointed shall attend for that purpose during the whole time that any person is below ground in the mine. That rule having prescribed that a competent person is to be appointed and to attend, we must go to the special rules to see what are the special duties of the person so appointed. The special rule said to have been infringed is the 29th, and, if it stood alone, there might be some room for Mr Shaw's ingenious argument that it does not refer to persons working the engine but to outsiders. But it must be read along with Special Rules 20, 21, and 27. If it is so read it is clear that it is only a negative regulation to bring out more clearly the meaning of the previous positive regulations, which leave no room for Mr Shaw's interpretation. Special Rule 20 provides that the engineman is to remain in charge of, and so near his engine, as to have it completely and entirely under his control. I cannot accept the view that this rule is observed by a person who puts his engine out of his control and allows another person to work it. The respondent does not contend that he would be authorised to do so if the engine was being used for raising or lowering persons, but that it is otherwise when it is being used for materials. But what is meant by having an engine completely and entirely under control cannot possibly depend upon whether the person who controls it is using it for bringing up persons, or for bringing up material from a mine. A difference in the use makes no distinction in the person of the controller. This is confirmed by Special Rule 27, which contains special regulations as to the working of the engine whether it is being used for materials or persons. (His Lordship read Special Rule 27.) The engineman has all these duties to perform whether the cage is used for persons or materials or is empty. Whenever the engine is in operation he is charged with all these things. I therefore infer that whenever the cage is being raised or lowered, for whatever purpose, the engineman himself is to remain in charge. It is not a due compliance with these regulations for the engineman to remain and see what a lad under twenty-two appointed to assist him is doing. If he does so, there is a violation of the rules, and if the manager allows him to do so he fails to enforce the rules. I therefore agree that we must answer the questions as proposed by your Lordship.

THE COURT answered the first and second questions in the affirmative, and the third in the negative, and sustained the appeal.

W. J. DUNDAS, C.S., Crown Agent—WALLACE & BEGG, W.S.—Agents.

No. 2. THOMAS WILLIAM TODRICK (Procurator-Fiscal, Haddington), Appellant. —*Sol.-Gen. Dundas—M'Clure, A.-D.*

Dec. 15, 1904. Todrick v. Dennelar. PAUL DENNELAR, Respondent.—*Munro.*

*Complaint—Relevancy—Specification—Statutory Offence—Motor Car Act*, 1903 (3 *Edw. VII. cap.* 36), *sec.* 1, *subsec.* (1).—A complaint under the Summary Jurisdiction Acts set forth that the accused, time and place libelled, "did drive a motor car on" a highway libelled, "negligently, whereby said car came into collision with a horse and van which was then on said highway, contrary to the Motor Car Act, 1903, section 1." The Sheriff-substitute dismissed the complaint as irrelevant in respect that there was no specification of the *modus* of negligence. On appeal *held* that no further specification of *modus* was necessary, and that the complaint was relevant.

HIGH COURT. Lord Justice-General. Lord Adam. Lord Kinnear.

PAUL DENNELAR, motor car driver, Salton Hall, was charged in the Sheriff Court at Haddington at the instance of the Procurator-fiscal of Court on a complaint under the Summary Jurisdiction Acts, which libelled that the accused "on 9th September 1903, on the public highway leading between Beltonford and Broxburn, and particularly at a part thereof in the parish of Dunbar near to Eweford Farm Cottages, did drive a motor car on said highway negligently, whereby said car came into collision with a horse and van driven by James Millar, vanman, Hardgate Street, Haddington, which was then on said highway, contrary to the Motor Car Act, 1903, section 1."*

Counsel for the accused objected to the relevancy of the complaint in respect there was no specification of the *modus* of negligence libelled. The Procurator-fiscal maintained that there was sufficient specification.

The Sheriff-substitute (Macleod) sustained the objection, and in respect of the want of specification dismissed the complaint.

The Procurator-fiscal appealed upon a case stated.

The question of law in the case was,—"Is the complaint relevant?"

Argued for the appellant;—This would have been quite a sufficiently specific averment of a charge of culpable, reckless, and furious driving at common law.[1] The fact that this was a charge under the Motor Car Act, 1903, made no difference as regarded the specification required.

Argued for the respondent;—This was a statutory offence. Where a statute described an offence in general terms, such as driving negligently—the words used in the section libelled here—it was well settled that it was not sufficient in a complaint or indictment merely to echo the general words of the statute, and the *modus* in which the offence has been committed must be stated.[2] The offence of driving negligently might be committed in many different ways, for example,

* The Motor Car Act, 1903 (3 Edw. VII. c. 36), sec. 1, subsec. (1), enacts,—"If any person drives a motor car on a public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

[1] H. M. Advocate v. Calder, Sept. 18, 1877, 3 Coup. 494; H. M. Advocate v. Messon, April 29, 1841, 2 Swinton, 548; H. M. Advocate v. Murray, 1841, 2 Swinton, 549 (note); Macdonald, Criminal Law, p. 378.

[2] Martin v. Anderson, July 18, 1900, 2 F. (J. C.) 60, *per* Lord Trayner, at p. 61, 3 Adam, at p. 214; Clark v. Lang, May 10, 1876, 3 Coup. 268; H. M. Advocate v. Kelly, Dec. 24, 1885, 5 Coup. 722; Hume on Crimes, vol. ii., p. 190.

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by excessive speed, failure to give warning of approach, being on the wrong side of the road, not having the machine under control, or not keeping a good look-out. It was no hardship on the prosecutor to compel him to say which kind of negligence he was going to prove, and it was only fair that the accused should know what exact kind of negligence he was to be charged with, and what he would have to meet. It was plain that if this had been a civil action for damages this averment would have been irrelevant as wanting in specification. If such complaints as this were allowed to pass a person might be convicted for what was clearly no offence in law at all, and yet he could not suspend the conviction. In the cases quoted for the Crown it was plain that the nature of the negligence alleged was undue speed and furious driving.

LORD JUSTICE-GENERAL.—This appears to me to be a perfectly relevant complaint, and to give sufficient notice to the accused of the charge to be brought against him.

Formerly there were many technical rules of pleading which were stringently insisted on, but these are not very much approved of now.

All that is now required of the allegations made against the accused in a complaint is that they aver in a fair and reasonable manner the nature of the offence with which he is charged.

I think in this case that for all purposes of notice—which is the main purpose of pleading—this complaint is sufficiently specific.

LORD ADAM.—I am of the same opinion. It is a question of circumstances in all cases whether sufficient notice has been given to enable an accused to prepare his defence. All that is required for that purpose is stated here—the time, the place, and the offence charged.

It is said that "negligent driving" is the only thing charged, and that the prosecutor has failed to aver wherein the negligence consisted—whether in excessive speed, or in failing to keep a proper look-out, or in being on the wrong side of the road.

I think it was not necessary for him to do so.

I think that in this case sufficient notice has been given, and that therefore the question should be answered in the affirmative and the case remitted to the Sheriff to proceed.

LORD KINNEAR concurred.

THE COURT answered the question in the case in the affirmative, sustained the appeal, and remitted to the Sheriff-substitute to proceed as accords.

W. J. DUNDAS, C.S., Crown Agent—STRATHERN & BLAIR, W.S.—Agents.

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Dec. 15, 1904.
Powdrell v. Galloway.

FREDERICK POWDRELL, Complainer.—*A. R. Brown.*
JAMES KIRKLAND GALLOWAY (Procurator-Fiscal of Zetland), Respondent.—*Sol.-Gen. Dundas—M'Clure, A.D.*

*Review—Summary Procedure—Conviction in Absence—Record of Proceedings — Citation — Omission to state that accused duly summoned—Execution of Citation not produced as evidence—Summary Procedure (Scotland) Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *secs.* 6, 7, *and* 16, *and Schedule I.*

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—To entitle a Sheriff or Magistrate to dispose of a summary complaint in the absence of the respondent in terms of sec. 7 of the Summary Procedure Act, 1864, it is necessary that he should have proof that the respondent has been duly cited. The execution of citation lodged with the Sheriff-clerk will not be regarded as satisfying the condition when it is not noted on the record of the proceedings as having been produced in evidence.

HIGH COURT. Lord Justice-General. Lord Adam. Lord Kinnear.

FREDERICK POWDRELL, designed as residing at 39 Marischal Street, Aberdeen, master of the steam-trawler "Roslin," A. 8, was charged in the Sheriff Court at Lerwick on a complaint under the Summary Jurisdiction Acts, at the instance of James Kirkland Galloway, Procurator-fiscal of Zetland, with a contravention of the Herring Fishery (Scotland) Act, 1889, whereby he was alleged to have rendered himself liable to a fine, and failing payment to imprisonment.

On 23d July 1904 the Sheriff-substitute (Moffatt) granted warrant to cite the accused to appear at Lerwick on 2d September.

On 2d September the Sheriff-substitute in the absence of the accused adjourned the diet till 14th September, ordained the accused then to appear, and appointed the Prosecutor to intimate the adjourned diet to the accused.

The record of the procedings on 14th September bore:—"At Lerwick, 14th September 1904,—In presence of Alexander Moffatt, Esq., Advocate, Sheriff-substitute of Caithness, Orkney, and Zetland, at Lerwick.—Appeared the complainer; the said Frederick Powdrell, having been called, failed to appear. ALEX. MOFFATT.

"The witnesses after-named were examined in support of the complaint, viz.— . . .

"There was produced—(1) Ordnance Survey of Foula; and (2) Chart of North Sea shewing Foula. ALEX. MOFFAT.

"Lerwick, 14th September 1904.—The Sheriff-substitute, in respect of the evidence adduced, convicts the said Frederick Powdrell of the contravention charged, and therefore decerns and adjudges the said Frederick Powdrell to forfeit and pay the sum of £60 of fine, payable to the Procurator-fiscal of Court"; or to be imprisoned for thirty days.*

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* The Summary Procedure (Scotland) Act, 1864 (27 and 28 Vict. c. 53), enacts, section 7—"If the respondent after being cited shall fail to appear at the time and place mentioned in the warrant of citation, it shall be lawful for the Court, upon proof that the respondent has been duly cited, to issue a warrant in the second instance for his apprehension and interim detention, or the Court may adjourn the hearing to a future diet, with liberty to the respondent to appear at such adjourned diet, and may in its discretion appoint intimation of such adjourned diet to be made to the respondent; and in cases where the complaint concludes for a pecuniary penalty only in the first instance, or where the Act of Parliament founded on authorises procedure without the presence of the respondent, the Court may without adjourning proceed to hear and dispose of the complaint in the absence of the respondent." Section 16—"It shall not be necessary in any proceeding under the authority of this Act to record or to preserve a note of the evidence adduced, but the record shall set forth in the form of the Schedule I. to this Act annexed the respondent's plea, if any, the names of the witnesses, if any, examined upon oath or affirmation, with a note of any documentary evidence that may be put in."

Schedule I. annexed to the Act is as follows:—"Minute of procedure at the hearing . . . 2. When the respondent is absent.

"At the day of in presence of of His Majesty's justices of the peace for the county of [*or* sheriff or magistrate] J. K.

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Powdrell brought a suspension.

The complainer averred, *inter alia*;—(Stat. 4) "At said diet on 14th September 1904 no evidence was led before the Sheriff-substitute to prove that the complainer had been duly cited."

The complainer pleaded, *inter alia*;—(2) No proof having been led before the Sheriff-substitute in terms of section 7 of the Summary Procedure (Scotland) Act, 1864, to shew that the complainer had been duly cited, the whole proceedings at the diet on 14th September 1904 were inept, and the said sentence or conviction ought to be suspended.

The respondent stated, *inter alia*;—(Ans. 4) "The proceedings at said adjourned diet are referred to, and explained that the executions of service of said complaint for both diets were duly lodged. *Quoad ultra* denied."

The respondent admitted that in fact the complainer had not been served personally, and that a copy of the complaint was not left at his address as given in the complaint, but the respondent averred that service of the complaint for both diets had been duly made at another address in Aberdeen, which he alleged was the complainer's usual place of abode for purposes of citation. In these circumstances the suspension also raised the question whether in fact the complainer had been duly cited. But this question was not decided by the Court.

Argued for the complainer;—It was a condition precedent of adopting any of the courses authorised by sec. 7 of the Summary Procedure (Scotland) Act, 1864, that there should be proof of citation. Schedule I. (2) of the same Act also shewed that where the accused was absent such proof was essential. In this case the record of proceedings did not state that the accused had been duly summoned, the words "after having been duly summoned" (given in Schedule I. (2)), having been omitted. The Sheriff had no proof before him that the accused had been duly cited. It was said that the executions of citation had been lodged. But there was no note in the record of the executions of citation having been produced. If the executions were produced this was contrary to section 16 and Schedule I. (note). If they were not laid before the Sheriff, as in fact they were not, then there was no sufficient proof of proper citation. The executions were necessary productions, and required to be produced and noted on the record, although by themselves they were not sufficient proof that the accused was duly cited. As it did not appear on the face of the record that there had been any proof that the accused had been duly cited the suspension should be sustained.

Argued for the respondent;—The executions of citation, which had been duly lodged, if uncontradicted—and they could only be contradicted on the ground of falsehood—were sufficient evidence of due citation. But the executions of citation did not require to be noted as productions on the record. Section 16 of the Summary Procedure (Scotland) Act, 1864, only applied to documentary evidence produced in proof on the merits, and not to documentary evidence of the

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complained against having failed to appear, after having been duly summoned.

"The witness [*or* witnesses] after named was [*or* were] examined in support of the complaint, viz.—

"[*Note also any productions*]."

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preliminary procedure having been in order, which was in process. Schedule I. shewed that the noting of documents produced was to be after evidence had been led. The executions of citation were documents which had to be put in, and to have all their effect, before evidence was led at all.

LORD ADAM.—The suspender in this case is a seaman to trade and master of a steam-trawler, against whom the Procurator-fiscal of Zetland brought this complaint, on the ground that he had contravened the Herring Fishery (Scotland) Act, 1889, by using an otter trawl within three miles of the shore at a point off the island of Foula. That is the complaint, and upon hearing evidence the Sheriff, upon 14th September 1904, pronounced an interlocutor in which he convicted the said Frederick Powdrell of the contravention charged, and sentenced him to pay a fine of £60 or be imprisoned for thirty days in default of payment.

That is the charge in the complaint, and that is the sentence which the complainer seeks to have set aside on one or other of two grounds. The first of these is founded on the provision of section 6 of the Summary Procedure Act of 1864, which requires citation of a party, who cannot be personally cited, by leaving a copy of the complaint "at his usual place of abode." Now, the determination of the question so raised depends on a matter of fact about which the parties are not agreed, and taking the view I do on the second ground pleaded for this suspension it is unnecessary for us to come to any decision on this.

The second objection arises out of what took place at the hearing of the case. This was a proceeding in the absence of the respondent, and section 7 of the Summary Procedure Act which applies to such a proceeding enacts —"If the respondent after being cited shall fail to appear at the time and place mentioned in the warrant of citation it shall be lawful for the Court, upon proof that the respondent has been duly cited," to do certain things, including adjournment to a future diet, or in certain cases to proceed in the cause in absence of the respondent. From the minute of proceedings in the present case we find that the procedure followed was that the Sheriff on 23d July 1904 signed the warrant for service of the complaint on the respondent, citing him to appear personally on 2d September. On the latter date the case appears to have been called, and we are told the respondent did not appear, whereupon the Sheriff adjourned the diet to the 14th day of September, and appointed the complainer to intimate that diet to the respondent. That seems to be objected to as incompetent on the ground that the respondent not having been duly cited, or there being no proof that he had been duly cited, it was incompetent for the Sheriff to adjourn the diet in a proceeding that had not been properly brought before him. I agree that the proceeding was incompetent if the respondent had not been duly cited, but if he was duly cited and failed to appear it appears to me that the procedure was quite competent. All that the section requires to be done to justify an adjournment was done, and an intimation was ordered to be given to the respondent of the time and place of the adjourned diet. It is said that this should only have proceeded upon proof that the first citation had been duly made. I am unable to sustain that objection.

But now we come to the procedure at the hearing of the case at the

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adjourned diet, which is a more serious matter. What took place, we are told on the record, was this—"The said Frederick Powdrell having been called failed to appear." Then certain names of witnesses are recorded. Then a note is given of certain charts which were produced. These two charts are the only documents noted, and no mention is made of the execution of citation having been produced as evidence in the case. Then follows the conviction and sentence complained of.

Now, looking to the terms of the section, I should have thought that the first thing to do was to call the respondent to appear and answer the complaint in terms of the citation. If he did not appear, then the section says what must be done to entitle the Sheriff to try the cause as a cause in absence—"upon proof that the respondent has been duly cited." The suspender says that no such proof was led, and it is answered for the prosecutor that the execution of citation was lodged in the process, and that that was sufficient proof of the fact. Now, it is a curious fact in this case that the prosecutor in answer nowhere avers that any proof was led before the Sheriff as to the fact of citation. The averment by the suspender is quite definite. "At said diet on 14th September 1904 no evidence was led before the Sheriff to prove that the complainer had been duly cited." To that very distinct averment the only answer made is—"The proceedings at said adjourned diet are referred to, and explained that the executions of service of said complaint for both diets were duly lodged; *quoad ultra* denied." Not a word about their having been shewn to the Sheriff before he was asked to proceed in the absence of the respondent, and I have come to the conclusion that all that the prosecutor can aver is this, that the executions of citation were duly lodged with the Sheriff-clerk, but there is nothing at all to shew that these executions of citation were ever produced in evidence or shewn to the Sheriff. That might have been sufficient proof of citation to satisfy the requirements of section 7—I say nothing as to that—but it does not help the prosecutor in this case, as it only brings him against the provisions of the 16th section and relative schedule of the Summary Procedure Act of 1864, which require all documents produced in evidence to be noted on record. Now, that has again and again been held to be an imperative provision. We may have held that certain papers, such as notes used by a witness, or bank notes which had been stolen, were not documents produced in evidence, but we have nothing of that nature here. These executions of citation if put in as proof of citation, and indeed they appear to have been the only proof offered, were most essential documentary evidence in the case. According to my reading of the section, the Sheriff could not proceed a step in trying the case in absence without having led before him proof that the respondent had been duly cited to appear. But it is sufficient for the decision of this case that an essential document produced in evidence has not been noted in the minutes of proceedings.

Even if it be true that the suspender knew he was cited, and being cited chose to stay away, that would not be sufficient, in the view I take of this statute, to sustain a conviction in absence where there had been no proof led before the Sheriff that the accused was in fact duly cited. It is quite another matter where a party being duly cited chooses to stay away, and

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the prosecutor proceeds in terms of the statute to prove that citation was duly made, and a conviction follows proceedings *ex facie* regular. Here that has not been done, and even assuming that the suspender was duly cited, that fact does not appear *ex facie* of the record to have been proved in the case, and therefore the conviction cannot be sustained.

LORD KINNEAR.—I agree with Lord Adam. It is extremely important that proceedings against persons accused of an offence should not be allowed to go on in the absence of the accused unless it is proved to the satisfaction of the Sheriff or Magistrate that the complainer has been duly cited in terms of the statute.

Now, here the record does not shew that the Sheriff has taken the first step required to satisfy himself of the fact of the service of the complaint by calling for the execution of citation. If this had been done, and he had been satisfied by the execution of citation, this ought to have been noted on record. The record contains no note that the execution of citation was produced in evidence. Apart from that we find no note in terms of Schedule I. that the respondent "failed to appear after having been duly summoned." The note merely bears that "Frederick Powdrell having been called failed to appear." This statement does not shew that the Sheriff had been satisfied that citation had been duly made before he proceeded to hear the case in absence. It is said that we must take it that the execution of citation was in the hands of the Sheriff-clerk and that it was in order. But it is the Sheriff, and not the Sheriff-clerk, who has to be satisfied. I agree that the execution of citation was a document which if produced in evidence required to be noted on record.

I also agree that the question of fact as to whether or not citation was duly made is not before us in this suspension in a form which enables us to decide it. It does suggest itself to my mind that if the execution of citation had in fact been brought to the notice of the Sheriff, and his attention called to the discrepancy between the place of citation and the residence of the accused libelled in the complaint he might have been led to consider whether it was advisable to proceed with the case in the absence of the accused or whether further inquiry should be made to secure that the accused knew of the citation.

The LORD JUSTICE-GENERAL concurred.

THE COURT pronounced this interlocutor:—"Pass the bill: Suspend the conviction and sentence complained of *simpliciter*, and decern."

ALEX. ROSS, S.S.C.—W. J. DUNDAS, C.S., Crown Agent—Agents.

No. 4.
Dec. 16, 1904.
Kelly v. Smith.

JAMES KELLY, Complainer.—*Orr.*
ROBERT MACAULAY SMITH (Police Court Public Prosecutor, Edinburgh), Respondent.—*M'Clure, A.-D.*

*Review—Suspension—Mora—Acquiescence—Sentence implemented.*—A suspension of a conviction and sentence upon a summary complaint was presented fourteen months after the conviction had been pronounced and

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the sentence implemented. The complainer explained that he had objected to the relevancy of the charge, and that the first six months of the delay was due to his having waited for the result of an appeal to the High Court in another case, raising the same question, which was not decided until five months after his conviction, and that the subsequent delay was due to the fault of the Police Court officials.

The Court *refused* the bill.

HIGH COURT. Lord Justice-General. Lord Adam. Lord Kinnear.

JAMES KELLY, residing at 15 St Mary Street, Edinburgh, was charged in the Police Court, Edinburgh, under a summary complaint, at the instance of Robert Macaulay Smith, prosecutor for the public interest, with a contravention of section 284 of the Edinburgh Municipal and Police Act, 1879.[1]

The complaint set forth that the accused, contrary to the section libelled, between the dates libelled, "was the keeper, or a person having the care or management, of premises situated at 15 St Mary Street, Edinburgh, which premises, or a passage or place there," the accused "kept or used, or managed as a gambling or betting house, or acted in the conduct of betting therein."

The agent for the accused objected to the relevancy of the complaint. The Judge (Sheriff-substitute Orphoot) repelled the objection. The accused then pleaded not guilty, and evidence was led.

On 15th July 1903 the Judge found that the accused "between the dates, and in the passage libelled, acted in the conduct of betting, and to this extent" found "the accused guilty accordingly," and therefore fined him £5, with the alternative of thirty days' imprisonment. The fine was paid.

On 29th September 1904 Kelly presented a bill of suspension.

Argued for the complainer;—A passage was not a "house, building, room, or place" within the meaning of section 284 of the Edinburgh Municipal and Police Act, 1879,[1] and the conviction was therefore bad, and ought to be suspended.[2]

(2) There had been no undue delay in presenting the suspension. It was always a question of circumstances and discretion whether a suspension should be refused upon that ground.[3] The circumstances here were sufficient to justify the delay. The complainer certainly never acquiesced in the conviction. Two betting cases having been decided about the same time, viz., this case and *Wright's*[2] case, it was not thought necessary to appeal in more than one of them, the question being the same in both. The accused in both cases had the same legal advisers. The first six months' delay was thus explained by the complainer having waited until the decision of the High Court had been given in the case of *Wright*.[2] It was quite proper for the complainer to await the result of that appeal. After the decision in *Wright*[2] the complainer on 21st December 1903 applied to the Clerk and the Prosecutor of the Police Court to strike out the conviction, and to repay the fine, but this they refused to do, and said that the conviction could only be cleared away by bringing a suspension. In January 1904 the complainer's agent wrote for a copy of the proceedings in *Wright*,[2] but he did not get it till July. The delay after the decision in *Wright*[2] was therefore due to the fault of the Police Court officials.

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[1] 42 and 43 Vict. cap. cxxxii.

[2] Wright v. Smith, Dec. 19, 1903, 4 Adam, 316, 6 F. (J. C.) 18.

[3] Skinner v. Adamson, March 12, 1842, 1 Broun, 67.

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Argued for the respondent;—This suspension was barred by *mora*. *Mora* and acquiescence were enough to bar a suspension of an implemented sentence. Strictly and logically after a sentence had been implemented suspension was incompetent, but, reduction being incompetent in the Court of Justiciary, a relaxation of the strict rule had been introduced, and suspension of an implemented sentence was allowed if the suspension was brought timeously. If, however, there was any lengthened delay in seeking redress the Court would refuse to sustain the suspension.[1] The case of *Watson* v. *Scott*[2] was directly in point, as the suspension was brought there, as here, in consequence of a supervening decision of the High Court.[3] In the cases cited[1] the periods of delay were respectively eleven months, five months, and six months, whereas here the period was fourteen months, and even after the decision in *Wright*[4] nine months had elapsed before the suspension was presented. In no case had a suspension been sustained where there was delay unless the delay was adequately explained. Here there was no adequate explanation.

Lord Adam.—The complaint in this case was brought against a man Kelly for a contravention of section 284 of the Edinburgh Municipal and Police Act, 1879, by acting as the keeper, or as a person having the care or management, of premises at 15 St Mary Street, Edinburgh, which premises or a passage or place there he kept or used or managed as a gambling or betting house, or acted in the conduct of gambling or betting therein.

On that complaint he was tried, with the result that he was convicted of having contravened the said section of the Act, by having acted in the passage libelled in the conduct of betting, and sentenced to pay a fine of £5, or in default of payment to suffer thirty days' imprisonment.

He paid the fine and so implemented the conviction, and he now brings this suspension to have the conviction set aside. The prosecutor says that whether the conviction was right on the merits or not, this suspension is brought too late.

The ground on which this conviction is said to be bad is this—that it is not sufficient to charge a person with acting in the conduct of betting in a passage, and that in the previous case of *Wright* v. *Smith*,[4] it was decided that acting in the conduct of gambling in a passage did not fall within the terms of section 284 of the Act if the passage in question was a common passage.

That case was decided on 19th December 1903, and it then seems to have occurred to the present suspender that that case ruled this one, and the question now before us is—Is the complainer barred by lapse of time from bringing this suspension? We were referred to the cases of *Skinner* v. *Adamson*[1] and *Russel* v. *Sprot*,[1] which appear to be the leading cases on the point, and they seem to shew that where a conviction has been imple-

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[1] Skinner v. Adamson, March 12, 1842, 1 Broun, 67; Russel v. Sprot, Jan. 25, 1845, 2 Broun, 385; Watson v. Scott, Feb. 3, 1898, 2 Adam, 501, 25 R. (J. C.) 53.

[2] 2 Adam, 501.

[3] M'Donald v. Milne, Dec. 17, 1897, 2 Adam, 457, 25 R. (J. C.) 41.

[4] 6 F. (J. C.) 18, 4 Adam, 316.

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Kelly v. Smith.

mented there must be reasonable grounds for excluding the idea of acquiescence in the conviction, in order to make suspension a competent remedy.

The Court, however, has introduced relaxations of the rule where the circumstances warrant such a course being followed, and the question accordingly is whether this is a case for the exercise of that relaxation. The conviction in this case was pronounced on 15th July 1903, and the fine was paid shortly thereafter. The decision in the case of *Wright* v. *Smith*[1] was given on 19th December 1903—*i.e.*, six months after the conviction in the present case. What is the cause of the delay? It is not said that it was owing to want of money. The reason apparently is that the complainer in this case only thought of suspending after the decision in *Wright* v. *Smith*[1] had been pronounced; otherwise why did he not bring his suspension in July?

Moreover, the case of *Wright*[1] was decided in December 1903, and we are now in December 1904. Is there any good reason for this further delay?

No doubt at first there was some reason for the delay, for the complainer's agents had applied to the Prosecutor and the Clerk of Court after the case of *Wright*[1] had been decided to have the conviction in this case deleted from the record. The answer they got was that that could not be done, and that the proper remedy was to bring a suspension in the ordinary way.

Why did he not do so? Why did he not bring it until a period of eight months had elapsed?

I am disposed to think that in the circumstances of the present case this suspension comes too late. This conviction was implemented eighteen months ago, and I do not think any good reason has been shewn for interfering with it now.

LORD KINNEAR.—I agree, and for the reasons which Lord Adam has given. I think this suspension is too late. We are asked in December 1904 to suspend a conviction pronounced on 15th July 1903, and followed by payment of the fine imposed. No satisfactory reason has been given for the delay. Even if the first delay of six months is sufficiently explained by the suspender having waited for the decision in the case of *Wright*,[1] Dec. 19, 1903, which I think it is not, the second delay between December 1903 and September 1904 is not explained at all. The suspender now says that the conviction is liable to a fatal objection, and I assume that this is so, although I do not give any opinion on the subject. If so, he was bound to present his suspension at once, or at least immediately after the decision in the case of *Wright*[1] in December 1903. The course which the suspender pursued after that date is not favourable. He asked the Prosecutor and the Clerk in the Police Court to strike out the conviction against him and to repay the fine. The answer they gave was the perfectly proper one, that they could do nothing of the kind, and that if he wanted to clear away the conviction he must bring a suspension. But he did not do so for eight

[1] 6 F. (J. C.) 18, 4 Adam, 316.

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months. The six months which he had delayed before December 1903 and the eight months after that make fourteen months' delay in all, and I think that brings this case within the authorities cited.

The LORD JUSTICE-GENERAL concurred.

THE COURT refused the bill.

CLARK & MACDONALD, S.S.C.—THOMAS HUNTER, W.S.—Agents.

No. 5.
Dec. 16, 1904.
Wright v. Thomson.

JAMES WRIGHT, Complainer.—*Orr.*
CHARLES THOMSON (Burgh Prosecutor, Alloa), Respondent.—*Younger.*

*Review—Conviction and Sentence—Signature by one magistrate when three alleged to be present.*—In a suspension of a conviction and sentence under a summary complaint the complainer averred that, while the conviction and sentence was signed by one magistrate only, there were three magistrates present on the bench at the trial, who all took part in the deliberations on the case. The record of procedure bore that the trial was in presence of the only magistrate who had signed.

*Held* that, the procedure being *ex facie* of the record quite regular, there was nothing in the averments of the complainer to entitle him to suspension of the conviction, and motion for inquiry as to whether the magistrates who did not sign in fact acted at the trial, *refused.*

*Williamson* v. *Thomson*, 3 Irv. 295, and *Simpson* v. *Reid*, 3 Adam, 617, 4 F. (J. C.) 62, *distinguished.*

HIGH COURT.
Lord Justice-General.
Lord Adam.
Lord Kinnear.

ON a summary complaint brought in the Police Court at Alloa, under the Summary Jurisdiction Acts, and the Burgh Police (Scotland) Act, 1892, at the instance of Charles Thomson, solicitor, Alloa, burgh prosecutor, James Wright, hairdresser, Alloa, was convicted of a contravention of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), section 407, by using his shop as a gaming or betting house, and was fined £5, with the alternative of thirty days' imprisonment.

He brought a suspension.

The complainer averred;—(Stat. 2) "The complainer . . . appeared . . . to answer to said complaint." (Stat. 3) "The Court commenced at eleven o'clock, and there were then on the bench Bailies Calder, Duff, and Crawford, all magistrates of the burgh of Alloa. The said complaint was called in Court before said three magistrates. The complainer pleaded not guilty to the charge against him, and after evidence had been led the respondent and the agent for the complainer addressed the said three magistrates. After hearing the respondent and the said agent, the three magistrates retired with the Clerk of Court to consider their judgment. After being absent from Court for some time Bailie Calder announced that the charge against Wright had been found proved." (Stat. 4) "The said three magistrates thereupon heard the complainer's agent, who asked that the penalty should be modified. After hearing the respondent in reply, the said three magistrates consulted together and Bailie Calder intimated that the complainer was fined £5 with the alternative of thirty days' imprisonment." (Stat. 5) "There are herewith produced copies of the Alloa newspapers containing reports of the trial. These reports all bear out the truth of the foregoing averments by the complainer." (Stat. 6) "Though the said three magistrates were present at the

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hearing of the complaint last mentioned, and took part in the deliberations thereon, the said conviction is signed by only one of said magistrates, viz., Bailie Calder. The said Bailie Calder signs said conviction in his individual capacity, and not as preses of the Court." *

The complainer pleaded;—The said conviction ought to be suspended, in respect that it is signed by only one magistrate out of three who were on the bench during the hearing of the complaint on which said conviction followed, and who tried said case.

Argued for the complainer in the suspension;—If a case was tried before more than one magistrate then either all must sign the conviction or one must sign as preses, and a conviction in such circumstances signed by one magistrate not signing as preses was bad, and should be suspended.[1] This was a matter not of form but of substance.[1] Here it was relevantly averred, and at least *prima facie* proved by the newspaper reports produced, that there were in fact three magistrates who sat in this trial, and the sentence was signed only by one, who did not sign as preses. If the facts were as averred by the complainer then the conviction was clearly bad. No doubt there was this difference between the present case and the cases of *Williamson*[1] and *Simpson*,[1] that there the record bore that more than one magistrate had sat in the trial, whereas here the record bore that there was only one magistrate sitting. But it was specifically averred, and *prima facie* proved, that the record was not in accordance with the facts, and if this averment was denied by the respondent inquiry should be allowed as to what was the truth of the matter.[2] In the case of *Nardini* v. *Walker*[3] a remit was refused only because the complainer's averments were improbable, and the respondent's version of the facts the more credible. That was not so here.

Argued for the respondent;—The proper evidence as to who were present as judges at the trial was the record kept by the Clerk. In *Williamson* v. *Thomson*[1] and *Simpson* v. *Reid*[1] the record bore that more than one magistrate was sitting in judgment, while only one signed. Here the record was *ex facie* quite regular. It was moreover true in fact. One magistrate only tried the case. Two others were

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* The record of the procedure at the trial was as follows:—

"*Alloa, 30th May* 1904.—In presence of John Joseph Calder, Esq., one of the magistrates of the burgh of Alloa, appeared the said James Wright, and the charge being read, he answers that he is not guilty.

"JOHN J. CALDER, *Magistrate.*

"Whereupon the following witnesses were examined in support of the complaint, viz.:"—(Here follow names of witnesses).

"3. CONVICTION.

"*Alloa, 30th May* 1904.—The magistrate, in respect of the evidence adduced, finds the accused guilty of the offence charged, and therefore fines and amerciates said accused in the sum of £5, payable to the Clerk of Court, and in default of immediate payment thereof, sentences and adjudges said accused to be imprisoned for the space of thirty days from this date unless said fine be sooner paid, and thereafter to be set at liberty; and for that purpose grants warrant to officers of law to convey the said accused to the prison of Glasgow, thereafter to be dealt with in due course of law.

"JOHN J. CALDER, *Magistrate.*

[1] Williamson v. Thomson, Nov. 29, 1858, 3 Irv. 295; Simpson v. Reid, March 20, 1902, 3 Adam, 617, 4 F. (J. C.) 62.

[2] Moncreiff on Review in Criminal Cases, pp. 179-180.

[3] March 18, 1903, 5 F. (J. C.) 69, 4 Adam, 174.

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present, one in waiting, and one as a spectator. Even if the sitting magistrate had consulted his brethren in the course of the trial that would not have made them judges sitting in the cause. There was no case for inquiry here. Such inquiry would only be allowed in a suspension if the matters complained of really amounted to oppression or to a miscarriage or denial of justice.[1] No such case was averred here.

LORD JUSTICE-GENERAL.—I cannot say I have any doubt as to the manner in which this case is to be disposed of. It was a proceeding in the Police Court of Alloa, and as the case comes before us on the record there was undoubtedly one magistrate who sat, and the question comes to be if there is ground for allowing inquiry as to the allegation that there were also two other magistrates who sat judicially, and of whose views we have no record. Now, I think we should always be disposed when we find the proceedings *ex facie* regular to presume they correctly state what happened, and are therefore to make faith in judgment unless there are distinct averments that the record is false or important matter has been omitted. Here it is averred that whereas the sederunt is made to consist of one magistrate it really consisted of three. This is a matter which must have been in the knowledge of the magistrates and the Clerk; they could have no doubt who was trying the case. Other magistrates may have been present. It is a common practice for a number of magistrates to attend and arrange that one of their number should try the case. The others may stand about or go away. In this case the allegation amounts to no more than this, that three magistrates were present, of whom one was undoubtedly acting officially, and nothing is said to make it clear that the other two were seised of their office so as to make it a *sine qua non* that they should appear in the sederunt. The Clerk would make it his business to ascertain whether they were acting officially or not. I see no ground for setting aside the proceedings on such allegations as we have.

LORD ADAM.—The charge in this case was that the accused did contravene the Burgh Police (Scotland) Act, 1892, particularly sec. 407 thereof, by using the shop kept by and occupied by him in Coalgate Street, Alloa, as a gaming or betting house. Upon this charge he was tried, with the result that he was convicted and fined £5, with the alternative of thirty days' imprisonment. That conviction is signed "John J. Calder, Magistrate." It is now sought to set it aside on the ground that John J. Calder was not the sole magistrate who tried the case, but that in fact there were three magistrates, and that the case having been tried by three magistrates the conviction required to be signed by all the three or by one of them as preses, and that this conviction was not so signed. The question therefore is whether it was not the fact that John J. Calder was the sole magistrate who tried the suspender. If it was the fact, then there is no ground of objection to the conviction. It is not said that the suspender suffered any injustice or oppression. It is said that this matter of the signing of the conviction is one of substance and not of form, but I do not see how it could involve any practical injustice to the suspender here.

[1] Moncreiff on Review in Criminal Cases, p. 180.

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To see who it was that tried the case we must go to the minutes of procedure. They bear that the suspender was tried "in presence of John Joseph Calder, Esq., one of the magistrates of the burgh of Alloa." Therefore, as far as the minutes shew, Mr Calder was the magistrate, and the only magistrate, who tried the case. That is in conformity with the usual practice in the Police Court. One bailie is appointed to sit in the Court for a certain period. I have no doubt that in this case Bailie Calder sat alone and tried the case by himself.

It is said that there were other bailies on the bench. Suppose there were, that does not make them magistrates who tried this case, and even if, happening to be present, they were consulted by the magistrate who was trying the case, that would not make any difference. The presence of other magistrates on the bench does not come to much.

But then it is said that all the three magistrates and the clerk retired together after the case had been heard. Suppose they did, and suppose the Judge who was trying the case did consult the other magistrates who happened to be present, I do not think that supports the suspender's contention. Then the suspender goes on to say that they came back, and Bailie Calder announced the conviction and the sentence. There is nothing in this to shew that Mr Calder was not the sole magistrate who tried the case. It is not said that the other magistrates interfered in any way with the conduct of the trial. All that is said is that they "were present at the hearing" and "took part in the deliberations thereon." There is nothing here to justify inquiry or the disturbing of this conviction and sentence.

This case is quite different from the case of *Williamson*,[1] where the record bore that the case was tried by more than one magistrate and the conviction was only signed by one of them, whereas here the record bears that the case was tried by one magistrate only.

I see no ground for interfering with the conviction.

LORD KINNEAR.—I quite agree, for the reasons stated by your Lordships, and I should only add that the judgment proposed seems to me to be entirely consistent with the previous cases of *Williamson* v. *Thomson*[1] and *Simpson* v. *Reid*,[2] and at the same time it is not inconsistent with the opinions of the Judges who dissented in these cases. In the case of *Williamson* v. *Thomson*[1] the record bore that the trial took place in the presence of two magistrates, while the conviction bore to have been pronounced only by one. There was nothing to shew whether the other magistrate had concurred in the sentence pronounced. In *Simpson* v. *Reid*[2] the record was exactly in the same terms. It bore that the accused appeared in the presence of James Scott and David Patrick Donald, magistrates of the burgh of Johnstone, whereas the conviction was signed by one only of these magistrates. In that case there was a difference of opinion. Lord Kyllachy, who was one of the majority, held that the Court must proceed on the record, and could not go behind it to inquire as to whether the magistrate who did not sign the conviction was on the bench merely as a

[1] 3 Irv. 295. [2] 4 F. (J. C.) 62, 3 Adam, 617.

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spectator. In the present case we must take the record as it stands. The objection is purely technical, and I see no reason in the cases cited for disturbing the conviction.

THE COURT refused the bill.

CLARK & MACDONALD, S.S.C.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

No. 6.

Dec. 17, 1904. Hunter v. Wintrup.

JOHN HUNTER, Complainer.—*T. B. Morison.*
GEORGE WINTRUP (Sanitary Inspector, Kirkcudbright), Respondent.—*M'Clure.*

*Statutory Offence—Public Health—Sale of Food and Drugs Act*, 1875 (38 *and* 39 *Vict. cap.* 63), *secs.* 18 *and* 21, *and Schedule—Analyst's Certificate—Statement of Weight—Article liable to decomposition—Butter—Margarine—Statement as to change in Constitution—Suspension.*—In the schedule form of analyst's certificate given in the Sale of Food and Drugs Act, 1875, a space is left for the weight of the sample analysed, but it is provided that "when the article cannot be conveniently weighed this passage may be erased or the blank may be left unfilled." It is also provided that "in the case of a certificate regarding . . . butter . . . the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis."

In a suspension of a conviction under the Sale of Food and Drugs Act, 1875, sec. 6, for selling butter containing 92 per cent of foreign ingredients, *held* (1) that it was not a valid objection to the analyst's certificate appended to the complaint that the space for the weight of the sample was left blank without any statement that the article could not be conveniently weighed; but (2) that the certificate was invalid in respect that the analyst did not report whether any change had taken place in the constitution of the article, the direction in the schedule so to report being imperative in the case of butter, and that, the article having been sent for analysis as butter, the failure to comply with the direction was not excused by the article having proved on analysis to be margarine; and bill of suspension *sustained* and conviction *quashed.*

HIGH COURT. Lord Adam. Lord M'Laren. Lord Kinnear.

IN the Sheriff Court at Kirkcudbright, on a complaint under the Summary Jurisdiction Acts, at the instance of George Wintrup, sanitary inspector of the county and of the burgh of Kirkcudbright, and officer charged with the execution of the Sale of Food and Drugs Acts, 1875 to 1899, John Hunter, grocer, High Street, Kirkcudbright, was charged, time and place libelled, with having sold to the complainer to his prejudice one-half pound of salt butter which was not of the nature, substance, and quality of the article demanded by the purchaser, in respect that it contained 92 per cent of foreign ingredients, namely, foreign fat, contrary to the provisions of sec. 6 of the Sale of Food and Drugs Act, 1875, as amended by sec. 2 of the Sale of Food and Drugs Amendment Act, 1879.

The certificate of the analyst, under the Food and Drugs Acts, which was appended to the complaint, was as follows:—

"I, the undersigned, public analyst for the stewartry of Kirkcudbright, and burghs of Kirkcudbright, Dalbeattie, Castle-Douglas, Gatehouse, and New Galloway, do hereby certify that I received, on the 6th day of August 1904, from Mr George Wintrup, inspector, a sample of butter, marked No. 247, for analysis (which then weighed ), and have analysed the same, and declare the result of my analysis to be as follows:—

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"I am of opinion that the said sample contained the percentages of foreign ingredients as under:—

"At least 92 per cent of the fat present is foreign fat.

"This is a sample of margarine.

"As witness my hand at Dumfries, this 19th day of August 1904.

"JAMES DAVIDSON."*

The accused, *inter alia*, stated the following objections:—

"*To certificate produced.*

"To the certificate of the analyst being received in evidence in respect—

"(1) That butter being an article that can be conveniently weighed, and the certificate being blank on this point, the certificate is not in conformity with the Act and schedule.

"(2) It being enacted that in a certificate regarding butter the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis, and this not being complied with, the certificate is not in conformity with the Act.

"(3) That the certificate, while bearing that the sample was received on 6th August 1904, bears to be granted on 19th August 1904, and during this period of thirteen days the butter was liable to decomposition."

The Sheriff-substitute (Napier) repelled these objections.

The accused pleaded not guilty.

Evidence was led, and the Sheriff-substitute, in respect of the evidence adduced, convicted Hunter of the contravention charged, and fined him £3 with the alternative of twenty days' imprisonment.

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* The Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), sec. 6, enacts—"No person shall sell to the prejudice of the purchaser any article of food . . . which is not of the nature, substance, and quality of the article demanded. . . ." Section 18 enacts—"The certificate of the analysis shall be in the form set forth in the schedule hereto, or to the like effect." Section 21 enacts—"At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated. . . ."

The schedule appended to the Act is as follows:—

"*Form of Certificate.*

"To (1) . I, the undersigned, public analyst for the , do hereby certify that I received on the day of 18 , from (2) , a sample of for analysis (which then weighed (3) ), and have analysed the same, and declare the result of my analysis to be as follows:—I am of opinion that the same is a sample of genuine ; *or*, I am of opinion that the said sample contained the parts as under, or the per-centages of foreign ingredients as under:—

"*Observations.* (4)

"As witness my hand this day of

"(1) Here insert the name of the person submitting the article for analysis.

"(2) Here insert the name of the person delivering the sample.

"(3) When the article cannot be conveniently weighed, this passage may be erased, or the blank may be left unfilled.

"(4) . . . In the case of a certificate regarding milk, butter, or any article liable to decomposition, the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis."

The Sale of Food and Drugs Act, 1879 (42 and 43 Vict. c. 30), section 2, provides that in the sale of adulterated articles it shall be no defence to allege that the purchase was made for analysis.

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Hunter brought a suspension.

The complainer pleaded, *inter alia*;—The said pretended sentence or judgment ought to be suspended in respect— . . . (2) The pretended analyst's certificate is inept and invalid, and not conform to the statute libelled.

The complainer also objected to the conviction and sentence upon other grounds which the Court did not find it necessary to consider.

The complainer in the suspension maintained the objections to the validity of the certificate stated by him in the Sheriff Court, and contended that in view of the importance of the certificate in prosecutions of this kind, the conviction must be quashed where, as here, the certificate was not valid and was not strictly in accordance with the directions in the statute. He cited the Act and cases undernoted.[1]

Argued for the respondent;—(1) It must be assumed that the analyst found it inconvenient to weigh the sample. The statute[2] did not lay on the analyst the duty of giving a reason for not giving the weight. He was entitled to leave the weight blank and say nothing about it. He was the sole judge as to whether the sample could be conveniently weighed or not. (2) The article here was not butter, but margarine. The provisions of Note 4 to the schedule did not apply to margarine, and where the article, as here, was margarine, the analyst was not bound to report whether any change had taken place.

LORD ADAM.—This is a suspension of a conviction proceeding on a complaint under the Food and Drugs Acts. The charge was that the accused did sell to the complainer to his prejudice one-half pound of salt butter which was not of the nature, substance, and quality of the article demanded by the purchaser, in respect that it contained ninety-two per cent of foreign ingredients. There was appended to the complaint, and made part of it, the certificate of the public analyst who had analysed the article of food referred to in the complaint. The accused appeared to answer to the complaint, and stated an objection to the relevancy, which was repelled. The trial went on, evidence was led, and the accused was convicted and sentenced to pay a fine of £3, or to imprisonment for twenty days.

Now, four objections are stated to this conviction. Two of them turn on the form of the analyst's certificate, the third is on a point of procedure, and the fourth relates to the form of the sentence.

The first objection to the form of the certificate by the public analyst is, that whereas the form of a certificate given in the schedule to the Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63) requires the sample to be weighed, or a statement to be made that it could not conveniently be weighed, this certificate did not state why the sample was not weighed. I think there is no substance in this objection. In the form of certificate after the words "which then weighed" there is a blank, and the note to the form is this, "when the article cannot conveniently be weighed, this passage may be erased or the blank may be left unfilled." It is left in the dis-

[1] Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), secs. 6, 14, 18 (and Schedule), and 21; Hudson v. Bridge, (1903), 19 T. L. R. 369, 67 J. P. Rep. 186; Goulder v. Rook, [1901], 2 K. B. 290, *per* Lord Alverstone, C. J., at p. 295; Fyfe v. Hamilton, Oct. 22, 1894, 1 Adam, 484.

[2] Sale of Food and Drugs Act, 1875, Schedule.

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cretion of the analyst. Here he left the blank unfilled. I think he filled up this part of the certificate in the form required by the Act.

The next objection is a more serious one. The note to the schedule form requires that "in the case of a certificate regarding milk, butter, or any article liable to decomposition, the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis." The article sent to the analyst in this case was butter. That being so, the note to the schedule form left the analyst no option whether he should or should not report whether any change had taken place in the article. It required him to report on that point. But he does not do so. The space for this report is left blank. It is said that the analyst received the sample on 6th August and did not analyse it until 19th August. Even if it were necessary to shew that the sample might have deteriorated, I think the suspender has done so, but it is not necessary. The note to the form is imperative, and says that the analyst shall report whether any change had taken place. This is not a case where, as in *Hudson*,[1] there was a doubt whether the article in question would change. The direction in the case of butter is imperative. This certificate contains no report of the nature required by the note to the schedule. I agree in what was said in the English cases as to the importance of the analyst's certificate. It is the foundation of the whole case for the prosecutor. Section 21 of the Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), says that it is to be sufficient evidence of itself of the facts stated in it, and it is of the last importance that all the directions of the statute with regard to it should be strictly complied with. That being so, it appears to me that this objection to the conviction is well founded. It is said that the article here was not butter but margarine. I think there is nothing in that. What was sent to the analyst was sent as butter. He analysed it as butter. He was bound to report upon it as required in the case of butter. I do not know whether in fact it would deteriorate or not. It is immaterial. I think this objection is good. If so, it is not necessary to consider the other objections.

LORD M'LAREN.—The first objection to the proceedings is founded on *the* direction in the schedule appended to the 1875 Act (38 and 39 Vict. cap. 63) as to the weighing of the sample sent for analysis. The direction is that the analyst shall certify that he received on from a sample of for analysis (which then weighed ), and it is provided in a footnote that "when the article cannot be conveniently weighed this passage may be erased or the blank left unfilled."

I assume, in accordance with elementary principles, that in the absence of evidence to the contrary the analyst must be held to have complied with the statutory direction and to have applied his mind to the question whether the article could be conveniently weighed or not. All proof on this point would appear to be superfluous, because I assume that he has done his duty, and the only question is whether he ought to have made a special report.

We have sometimes had occasion to criticise public officials who have

[1] 19 T. L. R. 369, 67 J. P. Rep. 186.

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tried to improve on a statute, but in this case the analyst has complied literally with the statutory directions and has left the form blank as to the matter of weight. This objection therefore entirely fails.

The second objection is more serious. It relates to the failure of the analyst to comply with the direction in the footnote appended to the schedule as to a certificate regarding "milk, butter, or any article liable to decomposition." This direction is imperative as distinguished from the direction contained in the previous footnote, which gives the analyst a discretionary power as to entering the weight. In the case of "milk, butter, or any article liable to decomposition," the analyst is required to make a special report as to whether any change has taken place in the constitution of the article that would interfere with the analysis. Here he has not done so.

Now, we are not without guidance in this matter, for this question was very carefully considered in the case of *Hudson* v. *Bridge*.[1] I refer particularly to the opinions expressed by Lord Alverstone and Mr Justice Channell. I entirely concur in the reasoning of these learned Judges, and I think the direction in the schedule refers to the article in question, which purported to be butter sent for analysis. The analyst must keep in view the provisions as to a certificate relating to butter when the substance sent him for analysis is sent to him as butter. He cannot know what the article is until he has analysed it, but he is required to deal with it from the beginning as if it were butter, which is an article liable to decomposition.

The objection taken is no doubt a strict one, but, in my opinion, it must be sustained. There ought to have been a special report as to whether any change had taken place in the constitution of the article that would interfere with the analysis. In the ordinary case the examination of the analyst as a witness is dispensed with, and it is necessary, in order that advantage may be taken of this economical provision, that the report should be strictly in terms of the statute.

In the circumstances it is unnecessary to consider the other objections.

Lord Kinnear.—I agree with your Lordships on both the points decided. I give no opinion on the other points. They are not necessary for our judgment, and therefore I agree with your Lordship in the chair in expressing no opinion upon them one way or the other.

The Court pronounced this interlocutor:—"Pass the bill: Suspend the conviction and sentence complained of *simpliciter*, and decern."

P. H. Cosens, W.S.—T. & W. A. M'Laren, S.S.C.—Agents.

No. 7.
Dec. 20, 1904.
Flannagan v. Hill.

Andrew Flannagan, Appellant.—*Cooper, K.C.*—*Munro.*
George Hill (Burgh Prosecutor, Kilmarnock), Respondent.—*Wilson, K.C.*—*H. Young.*

*Statutory Offences—Betting and Gaming Offences—Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407—*House, room, or place used as betting-house—Place enclosed but not roofed in—Person conducting*

[1] 1903, 67 J. P. Rep. 186, 19 Times L. R. 369.

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*betting.*—*Held* that a space of ground enclosed by walls, but not roofed in, which was entered by a door with a lock, and which was fitted up as a quoiting-ground, but was used primarily as a place for conducting betting transactions, was a "place" used as a betting-house within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892; and that a person who was not the tenant of the ground, or employed by him, but was the person who had conducted the betting there, was rightly convicted of a contravention of that section.

*Conviction and Sentence—Betting and Gaming Offences—Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 407—*Forfeiture of money found in place where betting conducted.*—*Held* that it was not a valid objection to a conviction and sentence for using a place as a betting-house contrary to section 407 of the Burgh Police (Scotland) Act, 1892, that the magistrate had not, as part of the sentence, forfeited the money found on the accused when he was apprehended.

HIGH COURT.
Lord Adam.
Lord M'Laren.
Lord Kinnear.

ANDREW FLANNAGAN, bookmaker, residing at Morton House, Morton Place, Kilmarnock, was charged in the Police Court, Kilmarnock, at the instance of George Hill, burgh prosecutor for the public interest, upon a summary complaint, which set forth that on 16th, 17th, 21st, and 22d June 1904, "within the enclosed piece of ground or place situated in Woodstock Place, at the junction of Woodstock Place and Morton Place, in the burgh of Kilmarnock, which piece of ground or place is enclosed by stone and brick walls and door under lock and key," the accused did "use said enclosed piece of ground or place as a betting-house for conducting betting, all contrary to section 407 of the Burgh Police (Scotland) Act, 1892,* whereby" the accused "is liable in a penalty not exceeding £50, and in default of immediate payment to imprisonment for a period not exceeding two months."

The accused objected to the relevancy of the complaint upon various grounds, and, *inter alia*, upon the grounds (*a*) that the accused was not alleged to be the owner or keeper or caretaker of or manager or otherwise connected with the enclosure; (*c*) that said enclosure was not a house, room, or place within the meaning of the section libelled; and (*e*) that the penalty was incorrectly stated. These objections were repelled by the Magistrate.

At an adjourned diet the accused pleaded not guilty. Evidence was led, and the Magistrate, "in respect of the evidence adduced,"

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 407, enacts,—"It shall be lawful for the chief constable or any constable of police, having good grounds for believing that any house, room, or place is kept or used as a gaming or betting house, to enter such house, room, or place, and if needful, to use force for the purpose of effecting such entry, and to take into custody all persons who shall be found therein, and to seize all tables for and instruments of gaming found in such house, room, or place, and all moneys and securities for money found therein; and the owner or keeper of such gaming or betting house, or other person having the care or management thereof, and also any person who shall act in any manner in conducting such gaming or betting, shall be liable in a penalty not exceeding £50; and upon conviction of any such offender all such tables and instruments of gaming shall be destroyed, and all the moneys and securities for money which shall have been seized as aforesaid shall be paid over to the collector of police, and applied in the same way and manner as penalties by this Act are directed to be applied; and every person found within such premises without lawful excuse shall be liable in a penalty not exceeding £10."

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found "the accused guilty of the offence charged," and fined him £25, with the alternative of thirty days' imprisonment. The sentence did not contain any forfeiture of the money found in the place alleged to be used as a betting-house.

Flannagan appealed upon a stated case.

The case stated that the Magistrate held, *inter alia*, the following facts proved:—(1) That the appellant was a bookmaker. (2) That the ground in question was a place in the burgh of Kilmarnock. That it was of a triangular shape and its area was 138 square yards. That it was enclosed by walls 6 feet in height, and was vacant of buildings. That the doors were kept locked when the ground was not open to the public. (3) That the ground in question was let to George Wylie for three years from Whitsunday 1904, at a rent of £5 per annum. That the lease was assigned by George Wylie to Alexander Biggar. (5) That while the ground in question might serve for practising quoiting, it is quite unsuitable for quoiting matches on account of its dimensions. (6) That the ground was advertised as the Central Quoiting Ground, and opened on 11th June 1904 to the public, the charge for admission being advertised as 1d. (7) That Alexander Biggar was in charge of the entrance door on the four dates specified in the complaint. (9) That the appellant was present on the ground on each of the 16th, 17th, and 21st June from a few minutes before 12 o'clock noon until the closing of the ground in the afternoon, and left on each day in company with the said Alexander Biggar. That the appellant was present also on the ground from 11.50 A.M. on 22d June until his arrest at 1.50 P.M. on that day. That he was also present on the ground on the evening of 17th June from 7 till 9.15, and on the evening of the 18th from 6.45 till 9.25, leaving on each occasion in company with the said Alexander Biggar. (10) That the appellant sometimes moved about the ground, occasionally quoited, and occasionally marked for others who were quoiting, but generally took up a position near the wall along Woodstock Place, with his back towards that wall. (11) That on 16th June fifteen men entered the ground in question, of whom nine gave money and slips of paper to the appellant, who wrote something in a note-book. That some of these persons subsequently received money from the appellant. Similar findings were made as to 17th, 21st, and 22d June. (12) That no match at quoits took place on the ground in question on any of the dates mentioned in the complaint, but a little quoiting took place on each of these dates. That some of the men who entered the ground quoited for a considerable time, that others only threw a few quoits, but the majority did not quoit at all. That a good many of them on entering the ground went direct to the appellant, handed him money and slips of paper, and left the ground immediately. (13) That there was found upon the person of the appellant when he was apprehended, *inter alia*, sixteen slips of paper with the names of horses running in races on 21st and 22d June and sums of money written thereon, such as are used for betting purposes; a note-book having the names of horses and sums of money written thereon; and £15, 15s. 10½d. in money.

The presiding Magistrate held it proved that the ground in question was not used in good faith as a quoiting ground, but that it was primarily used as a betting-house by the appellant, that the appellant acted in conducting betting upon the enclosed ground in question, and that such enclosed ground was a place within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892.

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The questions of law were, *inter alia*:—"(4) Is the ground in question a place within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892? (5) Was the Magistrate right in holding that on the facts held proved there was a contravention of section 407 of the Burgh Police (Scotland) Act, 1892, and convicting the appellant of the offence charged? (6) Was the Magistrate entitled to convict the accused without forfeiting the money and other productions taken from him within the enclosure in question at the time of his apprehension?"

Argued for the appellant;—(1) Assuming for the purposes of this appeal that this enclosure was used for betting, this was not a "place" within the meaning of the Burgh Police (Scotland) Act, 1892,[1] sec. 407. A "place" in the sense of that section must be a place which could be held to be a "betting-house," and it must be a place *ejusdem generis* with a house or room. It must be a roofed building. It was also essential that the betting should be carried on by or under the owner or the occupier.[2] Even if this was a "place" within the meaning of the section the appellant was not the occupier or keeper of the premises, nor was he a person "conducting such gaming or betting" in the sense of the section. Conducting meant conducting as the person having control over the place as occupier, and occupying and using it as a betting establishment.[3] (2) The penalty (*a*) was not correctly stated in the complaint, and (*b*) was not imposed as directed by the statute. Section 407 directed that all implements of gaming and all money found in the betting-house should be forfeited. £15 was found on the accused. There was nothing about forfeiture in the complaint. This was contrary to the direction in the Schedule form of complaint,[4] which required that the forfeiture should be stated. It might be enough if the prosecutor simply referred to the section libelled for the penalties and forfeitures incurred without setting them forth. But if he set them forth he must set them forth correctly.[5] If a person accused was liable to a forfeiture the magistrate should be informed of it, because it might affect the amount of penalty or imprisonment which he would think it right to award. The conviction and sentence simply echoed the complaint. There was nothing about forfeiture of the money found on the accused. A statutory penalty or forfeiture could not be dispensed with altogether. If the sentence was not in accordance with the statute it was no answer to say that the sentence imposed was more lenient than the sentence which might have been imposed.[6]

Argued for the respondent;—(1) Section 407 of the Burgh Police (Scotland) Act, 1892,[1] dealt with private places used for betting. Cases relating to public places used for that purpose were not in

[1] 55 and 56 Vict. cap. 55.

[2] Henretty v. Hart, Dec. 17, 1885, 5 Coup. 703, 13 R. (J. C.) 9; Wright v. Smith, Dec. 19, 1903, 4 Adam, 316, 6 F. (J. C.) 18; Powell v. Kempton Park Racecourse Co., [1897], 2 Q. B. 242, aff. [1899], A. C. 143; Young v. Neilson, May 22, 1893, 3 White, 487, 20 R. (J. C.) 62.

[3] Powell, [1899], A. C. 143.

[4] Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), Schedule VII., Form I.

[5] Mackenzie v. Cadenhead, Dec. 17, 1897, 2 Adam, 443, 25 R. (J. C.) 44; Thomson v. Wardlaw, Jan. 23, 1865, 5 Irv. 45.

[6] Fraser v. Neilson, Feb. 6, 1903, 4 Adam, 139, 5 F. (J. C.) 51.

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point. Betting in public places was dealt with in section 393 of the Act.[1] The case of *Powell* v. *Kempton Park Racecourse Company*[2] was to be distinguished. The "place" there was an enclosure adjoining a racecourse, and belonged to a racecourse company. It was held in proceedings against the company that the company were not guilty of using the place for betting or of conducting betting because bookmakers were permitted by them to resort to the place for betting purposes, just as any other member of the public might. In that case it was said that any place which was sufficiently definite, and in which a betting establishment might be conducted, would be a "place" within the meaning of the Act there construed,[3] and this implied that the place did not necessarily require to be covered by a roof.[4] The case of *Henretty* v. *Hart*,[5] which was a prosecution directed against the occupier of a racecourse, had no application here either. Under the Betting Act, 1853,[3] proceedings on account of using "places" on racecourses for betting had been held good when directed against the bookmakers themselves.[6] Sec. 407 was to be read as striking not only at the owner or keeper of premises used for betting and persons acting under him, but also at the persons in fact conducting the betting in the premises so used, although not the owners, occupiers, or keepers.[7] It was not necessary to prove that the accused was the owner, keeper, or occupier of the premises, if (*a*) they were used as a betting establishment, and (*b*) the accused was the person who in fact conducted the betting there carried on. These two facts were established here. (2) It was not necessary to set forth the forfeiture incurred in the complaint or in the sentence. The forfeiture was automatic, and operated without any authority being required. It was not part of the sentence at all.[8] In no previous case under any of the statutory enactments against betting was the forfeiture prayed for in the complaint.

Lord Adam.—The appellant in this case was charged with a complaint setting forth that he did, on the dates therein specified, within an enclosed piece of ground in the burgh of Kilmarnock, "use the said enclosed piece of ground or place as a betting-house for conducting betting," contrary to section 407 of the Burgh Police (Scotland) Act, 1892, whereby he became liable to a penalty not exceeding £50, and in default of payment to imprisonment for a period not exceeding two months.

The case sets forth the procedure which took place in the Police Court, viz., that certain preliminary objections were stated to the relevancy of the complaint and repelled—and then follows a statement of the facts which the presiding Magistrate held to be proved, and which includes an elaborate description of the piece of ground in question.

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[1] 55 and 56 Vict. cap. 55.

[2] [1899], A. C. 143.

[3] Betting Act, 1853 (16 and 17 Vict. cap. 119.)

[4] [1899], A. C., *per* Lord Chancellor Halsbury, at p. 162.

[5] 5 Coup. 703, 13 R. (J. C.) 9.

[6] Shaw v. Morley, (1868), L. R., 3 Ex. 138; Bows v. Fenwick, (1874), L. R., 9 C. P. 339.

[7] Regina v. Preedy, (1888), 17 Cox, C. C. 433.

[8] Gardner v. Dymock, Jan. 9, 1865, 5 Irv. 13, *per* Lord Cowan, at p. 26, and Lord Jerviswoode at p. 41; Pyper v. Ingram, Feb. 19, 1901, 3 F. 514, *per* L. P. at p. 522.

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Then we have a statement as to how this piece of ground was used, and also as to what took place there on the occasions in June when the appellant visited the ground.

We are also told that when the appellant was arrested he was searched, and sixteen slips of paper with the names of horses and sums of money written thereon, a notebook also containing the names of horses and sums of money, a parcel of tickets, and £15, 15s. 10½d. in money were found on his person and taken from him before he left the ground to go to the Police Office.

On these facts the Magistrate held it proved that the ground in question was not used in good faith as a quoiting ground, but that it was primarily used as a betting-house by the appellant, that the appellant acted in conducting betting upon the enclosed ground in question, and that such enclosed ground was a place within the meaning of section 407 of the Burgh Police (Scotland) Act, 1872, and he accordingly convicted the appellant and fined him £25.

The question of law specially put to us was the 4th,—"Is the ground in question a place within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892?"

Now, that section sets forth—(His Lordship read the section).

It is said by the appellant that this piece of ground is not a "house," or "room," or "place" in the sense of the Act, and that it is not a "place," because "place" must mean something *ejusdem generis* with a "house" or "room."

Now, it is to be observed in the first instance that what seems to be contemplated by this section of the statute is an *enclosed* place, and of that there cannot be much doubt, for the section gives the police power to force an entrance if necessary, and to arrest any persons found therein.

Further, the "place" must have limits, and I should think also that to be of the same nature as "house" or "room" it must be the private property of the owner.

Now, what we have here is an enclosure. The gate leading into the ground was always kept locked except when the appellant made his appearance, when it was opened, and it was again shut and locked when he went away. It seems beyond all doubt to have been mainly used for the purpose of betting, and the question is whether such a piece of ground as this falls within the description of a "house, room, or place used as a betting-house," *i.e.*, a place used for the purpose of betting.

There can be no doubt that this piece of ground was used as a betting-house—for the question after all is, how was this piece of ground kept or used? *i.e.*, for what purpose was it kept or used? Was it or was it not used for the purposes for which a betting-house is kept or used? That seems to me to be the proper way in which to construe the words of the section before us, and I have no doubt that upon the facts stated here it was so used. Therefore it humbly appears to me that this enclosure was kept and used as a betting-house.

If that be so, the next question is, was the appellant in the circumstances a person against whom this complaint could be brought? That again depends on the latter part of section 407, which provides as follows—(His Lordship read the part of the section in point).

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It is said, however, that the appellant is not the owner or keeper of the place, but the facts shew that he was not there as a stranger or visitor, but that he was present as the person conducting the betting. That being so, and as the place wherein he was conducting it falls within the meaning of a "place" in the sense of the Act, I think that he comes within the category of a person acting in conducting a betting-house, and that he is liable to a penalty.

I think therefore that the offence here falls within the section, and that the appellant was rightly convicted.

The other objections stated to us were not objections on the merits, but were purely technical. I do not think there was anything in these objections which would justify us in interfering with the result at which the Magistrate has arrived.

LORD M'LAREN.—The most important question in the case is whether this enclosed ground is subject to be treated as a betting-house under section 407 of the Burgh Police Act. If the provisions of the Act had been directed against the keeping of a betting-house, or if the words had amounted only to the prohibition of betting in any house, room, or place, I should have been disposed to think that it would be too extended a construction of the Act, and not within its fair meaning, to apply it to an enclosed open-air place like a yard or garden not fitted for habitation. But the words of the section are not nearly so restricted as that, because the section is directed against the keeping of any house or place which is kept or used "as a betting-house." Accordingly, the question is not what is the character or description of the place in which the offence is committed, but, whatever be its description, was it kept or used for the purposes for which a betting-house is usually kept—in other words, for the purpose of carrying on the practice of betting as a trade. On the facts found, it appears to me to be clear that in this enclosure betting was regularly and extensively carried on by the appellant as his trade. The people who went there for the most part went to make bets. The ostensible use of the enclosure was quoiting, but that was not what it was really used for. The ground was not suitable, and it was little used for that purpose. So much for the use which is made of this enclosure, and we have to consider whether this amounts to the use of the enclosure "as a betting-house." Now, the syllable "house" when united to another word may have a wider meaning than when it stands alone. A place for giving stage representations in the open air might not unreasonably fall within regulations as to "play-houses." On the other hand a coach-house or a boat-house seems to imply a roofed building, the object being protection. The thing intended to be prohibited by the statute was the carrying on of the business of betting in private premises, and I think we are not giving the section too wide a meaning if we hold that a place which is enclosed and kept under a lock and key, although it is without a roof, and which is regularly used for the purpose of betting, may be a "place" which is kept and used as a betting-house.

There are other objections to the conviction. The most important of these arises on the same section of the statute. It is, whether it is necessary that money found on the establishment should be forfeited as part of the

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sentence. As I read the clause it is not put upon the magistrate who hears the case to forfeit anything. What he has to do is to convict and impose a suitable penalty. Then the section provides that "upon conviction of any such offender . . . all the moneys and securities for money, which shall have been seized as aforesaid, shall be paid over to the collector of police." If here any money was lawfully seized (within the scope of this enactment) it was not part of the magistrate's duty to forfeit the money, and indeed he had no power to do so. If there is no conviction the money is to be paid to the owner. If there is a conviction then the money found is to be paid over to the collector of police. It appears to me that this provision was designed to leave open the claims of persons who might say they had nothing to do with the betting, and that the money was theirs. It would be rather unfair if sums of money, it may be of considerable amount, were liable to be forfeited by the sentence of a police magistrate, possibly upon imperfect evidence, or in the absence of the owner of the money. I am therefore of opinion that the conviction is not open to objection on the ground that the money seized ought to have been forfeited. It is not at all clear to my mind that the money to be impounded includes money which may be found on the person of the accused. Primarily what is meant is money found upon a gaming table, or in the repositories of the keeper of the house. It was certainly not intended that persons who are merely found in the betting-house, and who are not proved to have assisted the keeper of the house in his trade, should be searched, still less that money found on their persons should be forfeited as a consequence of the conviction of the keeper of the betting-house.

LORD KINNEAR concurred.

THE COURT answered the 4th, 5th, and 6th questions in the case in the affirmative, and dismissed the appeal.

GARDINER & MACFIE, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

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JOHN KERR TASKER (Justice of the Peace Court Procurator-Fiscal, Fifeshire), Appellant.—*Munro.*
JOHN SIMPSON, Respondent.—*C. D. Murray.*

*Justice of Peace—Jurisdiction—Jurisdiction in Police Burgh—Licensing Offences—Licensing (Scotland) Act*, 1903 (3 *Edw. VII. cap.* 25), *sec.* 91.—*Held* that the Justices of the Peace of a county have concurrent jurisdiction along with the Magistrates of a police burgh situated within the county to try offences under the Licensing (Scotland) Act, 1903, where such offences are committed within burgh by persons residing therein.

HIGH COURT.
Lord Adam.
Lord M'Laren.
Lord Kinnear.

JOHN SIMPSON, licensed grocer, residing at Simpson's Square, Buckhaven, was charged in the Justice of Peace Court of Fifeshire, at the instance of John Kerr Tasker, Procurator-fiscal of Court, upon a complaint under the Summary Jurisdiction (Scotland) Acts, which set forth that the accused, "on Sunday, 6th November 1904, within the dwelling-house at Simpson's Square, Buckhaven, aforesaid, Wemyss parish, Fifeshire, occupied by him, did traffic in exciseable liquors without a certificate to him in that behalf granted, according to the

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provisions of the Act first after mentioned, by selling a pint bottle of whisky to" a person named and designed, "contrary to the Licensing (Scotland) Act, 1903, section 65."

On 25th November 1904 the accused appeared to answer to the complaint in the Justice of the Peace Court at Kirkcaldy in presence of two of the Justices of the Peace for the county of Fife. He took objection to the jurisdiction of the Court in respect that the alleged offence was stated to have been committed within Buckhaven, which was within the police burgh of Buckhaven, Methil, and Innerleven, which had a separate licensing authority, and by a person residing therein, and was therefore, by section 91 of the Licensing (Scotland) Act, 1903, excluded from the jurisdiction of the Justices of the Peace for the county.*

The Justices sustained the objection, and dismissed the complaint.

The Procurator-fiscal appealed upon a stated case.

In the case the Justices stated as follows:—"It was admitted at the Bar by the appellant that the *locus delicti*, being the residence of the respondent, is within the before-mentioned police burgh" (*i.e.*,

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* The Licensing (Scotland) Act, 1903 (3 Edw. VII. cap. 25), enacts:—Sec. 91 (1). "Every person who shall commit any breach of certificate, or who shall in any other manner offend against this Act, shall be prosecuted, and all penalties . . . shall be recovered, unless by this Act otherwise specially directed or authorised, before the Sheriff or any two or more justices of the peace of a county, or any magistrate of a royal, parliamentary, or police burgh having jurisdiction in the county or burgh, as the case may be, in which such offender shall reside or such offence shall have been committed, at the instance of the procurator-fiscal or other prosecutor ordinarily acting in such respective Courts, or in the case of a Justice of the Peace or Burgh Police Court, at the instance of such other party as shall be specially appointed to prosecute such class of offences by the justices of the peace of the county in general quarter sessions assembled, or the town-council of the burgh, as the case may be; . . . and all penalties and expenses of prosecutions and convictions incurred under and imposed by this Act shall, when recovered, if adjudged by any Sheriff, or justice or justices of the peace, or magistrate of any burgh (other than a royal or parliamentary burgh having a separate Licensing Court) be wholly paid into the county fund, and if adjudged by any magistrate of any royal or parliamentary burgh having a separate Licensing Court be wholly paid into the police funds, or where there shall be no police funds, into the corporation funds of the burgh in which such penalties shall be imposed, respectively. (2) Breaches of certificate and other offences in this section referred to may, unless by this Act otherwise specially directed or authorised, be prosecuted and tried as police offences before and by any magistrate or magistrates of any royal, parliamentary, or police burgh officiating in any Court for the trial of police offences under the provisions of any local or general Police Act, in the same way and manner in all respects as may be provided for the trial of police offences by any such local or general Police Act in force in the county, district, or burgh where the offender shall reside, or the offence shall have been committed, and such magistrate or magistrates shall have power to impose the penalties and punishments, and declare the forfeitures, provided in that behalf by this Act. (3) Every offence committed against this Act shall, except where inconsistent with the provisions and conditions of this Act, be tried and determined under the provisions of the Summary Jurisdiction Acts, . . . and it shall be lawful for the Sheriff, justice or justices, magistrate or magistrates, before whom any prosecution is brought, to proceed in absence of the accused. . . ."

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Buckhaven, Methil, and Innerleven), "and that the said burgh has a separate licensing authority, with a prosecutor appointed by the town-council of the said burgh to prosecute in the burgh offences against the said Licensing (Scotland) Act, 1903, in terms of section 91 of the said Act. It was admitted on behalf of the respondent that the said burgh is within the county of Fife, and that the respondent is a magistrate of the said burgh."

The question of law was,—"Whether the terms of section 91 of the Licensing (Scotland) Act, 1903, exclude the jurisdiction of His Majesty's Justices of the Peace for the county of Fife to try in their Court a complaint at the instance of their procurator-fiscal against a person residing in the burgh of Buckhaven, Methil, and Innerleven, accused of a contravention of section 65 of the said Act alleged to have been committed within the said burgh, which is a police burgh within the said county having a separate licensing authority?"

The commission to the Justices of the Peace of the county of Fife was produced. The portions of it founded on in argument are quoted in note *infra*.*

Argued for the appellant;—The county Justices had jurisdiction in this case. Jurisdiction within police burghs was conferred upon magistrates of police of a police burgh by the Burgh Police (Scotland) Act, 1892,[1] which replaced the General Police and Improvement (Scotland) Act, 1862,[2] but the jurisdiction so conferred was concurrent with, not exclusive of, the jurisdiction of the county Justices.[3] The Police Act had a bearing here, because under the Licen-

* "Know ye that We have assigned you jointly and severally and every one of you Our Justices to keep Our Peace in the County of Fife, and to keep and cause to be kept all the Ordinances and Statutes for the good of Our Peace and for the preservation of the same, and for the quiet rule and government of Our People, made in all and singular their Articles in Our said County (as well within liberties as without) according to the force, form, and effect of the same: And to chastise and punish all persons that offend against the form of those Ordinances and Statutes, or any one of them, in the aforesaid County, as it ought to be done, according to the form of these Ordinances and Statutes; . . . We have also assigned you and every two or more of you Our Justices to inquire the truth more fully by the Oath of good and lawful men of the aforesaid County, by whom the truth of the matter shall be the better known of all and all manner of crimes, trespasses, and all and singular other offences of which the Justices of Our Peace may or ought lawfully to inquire by whomsoever and after what manner soever in the said County done or perpetrated, or which shall happen to be there done or attempted: . . . And to hear and determine all and singular the crimes, trespasses, and offences aforesaid, and all and singular other the premises according to the Laws and Statutes of Our Realm as in the like case it has been accustomed or ought to be done: And the same offenders and every of them for their offences by fines, ransoms, amerciaments, forfeitures, and other means, as according to the Law and Custom of Our Realm or form of the Ordinances or Statutes aforesaid it has been accustomed or ought to be done to chastise and punish: Provided always that if a case of difficulty upon the determination of any of the premises before you or any two or more of you shall happen to arise, then let judgment in no wise be given thereon before you or any two or more of you, unless in the presence of one of Our Judges aforesaid."

[1] 55 and 56 Vict. cap. 55, secs. 454 and 477.

[2] 25 and 26 Vict. cap. 101.

[3] 55 and 56 Vict. cap. 55, secs. 477, 508, and 509.

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sing (Scotland) Act, 1903,[1] section 91, subsection (2), licensing offences were authorised to be tried in the same way as police offences. The county Justices had been held to have concurrent jurisdiction in the county of the city of Edinburgh.[2] The county Justices' commission gave them jurisdiction "as well within liberties as without," and the jurisdiction so given was not confined to their jurisdiction in offences against the peace, but extended to all statutory offences which they were empowered to try anywhere in the county. The Licensing (Scotland) Act, 1903,[1] section 91, did not purport to take away any jurisdiction previously exercised. Previous to 1903 the county Justices had jurisdiction in police burghs to try licensing offences. For the purposes of the present question there was no difference between section 25 of the Public-Houses Acts Amendment (Scotland) Act, 1862,[3] and section 91 of the Act of 1903. Under section 25 of the 1862 Act the county Justices had concurrent jurisdiction in police burghs. That was assumed to be the case in *Stirling* v. *Dickson*.[4] But further, the terms of section 91 shewed that concurrent jurisdiction was intended to be exercised by county Justices in police burghs. Under section 25 of the 1862 Act and section 91 of the 1903 Act the position of the county Justices and the Sheriff, and of their respective prosecutors, was the same. If the Sheriff had jurisdiction so had the Justices. Undoubtedly the Sheriff had jurisdiction.[5] It was not competent upon the question stated in this case to decide the question whether the county Justices ever had jurisdiction in licensing offences in police burghs. The question as stated here assumed that the county Justices had jurisdiction prior to the Act of 1903. It was therefore sufficient for the decision of this case that there was nothing in that Act to take away their jurisdiction. Apart from that, however, there could be no doubt that originally the county Justices had jurisdiction in the territory now occupied by police burghs, and there was no statutory provision by which that jurisdiction had been taken away. Therefore it must still remain. Police burghs and royal burghs were not in the same position. Throughout they were treated in the Acts as different.

Argued for the respondent;—The county Justices had no jurisdiction in this case. The terms of the county Justices' commission had no bearing upon the present question. Assuming that, "as well within liberties as without," referred to burghs (which was not admitted), it referred to the original peace jurisdiction only, and not to additional statutory jurisdictions. Neither had the Burgh Police (Scotland) Act, 1892,[6] any bearing here. There was no doubt that in Police Act offences the Justices had concurrent jurisdiction. The respondent was prepared to concede that for the purposes of this question section 25 of the Public-Houses Acts Amendment (Scotland) Act, 1862,[7] was substantially the same as section 91 of the Licensing (Scotland) Act, 1903.[8] But it was submitted that the county Justices never had

[1] 3 Edw. VII. cap. 25.
[2] Wright v. Bell (Outer-House, Lord Pearson), 12 S. L. T. 25.
[3] 25 and 26 Vict. cap. 35.
[4] Dec. 10, 1900, 3 Adam, 252, *per* Lord Justice-General at p. 260, and Lord Adam at p. 261, 3 F. (J. C.) 17, at p. 20.
[5] Stirling v. Dickson, 3 Adam, 252, 3 F. (J. C.) 17.
[6] 55 and 56 Vict. cap. 55.
[7] 25 and 26 Vict. cap. 35.
[8] 3 Edw. VII. cap. 25.

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jurisdiction in licensing offences in police burghs. The words "as the case may be" in section 91 pointed to alternative and not to concurrent jurisdiction. They must necessarily refer to jurisdiction, and not to the residence of the accused or the *locus delicti*. The word "county" in section 91 meant the county outside of royal, parliamentary, and police burghs. The Sheriff, no doubt, had concurrent jurisdiction, but that was because, at common law, and apart from statute, he had jurisdiction to try all offences in the county, unless his jurisdiction was expressly excluded.[1] The position of the Justices was entirely different. The history of the jurisdiction in licensing cases supported the respondent's contention. Licensing offences were created, and jurisdiction was given to try them, by the Act 29 Geo. II. cap. 12, secs. 10 and 14. By section 14 the jurisdiction was conferred upon Justices in the county and Magistrates in royal burghs. By section 32 of 5 Geo. III. cap. 46, penalties were made recoverable before the Sheriff, or the Justices, or the Bailie Court of any royal burgh, "within whose jurisdiction respectively" the offender should reside. This enactment was repeated in section 16 of 44 Geo. III., cap. 55, which in turn was repealed and re-enacted by section 23 of the Home Drummond Act,[2] and was repeated in section 25 of the Public-Houses Acts Amendment (Scotland) Act, 1862.[3] Although the word "respectively" was not found in the two last-mentioned statutes, the scheme of all the Acts was trial by Justices in the county outside of royal and, in the last-mentioned Act, also parliamentary burghs, and in the burghs by the magistrates, the Justices not having concurrent jurisdiction in the burghs. Police burghs created after 1862, under the General Police and Improvement (Scotland) Act, 1862,[4] were put in this respect in the same position as royal and parliamentary burghs, and the magistrates of all burghs had now jurisdiction in licensing offences within burghs exclusive of the justices. The case of *Stirling* v. *Dickson*[5] had no bearing. It merely decided that the Sheriff's Procurator-fiscal had a good title to prosecute.

LORD ADAM.—This is an appeal on a case stated between the Procurator-fiscal of the Justice of the Peace Court of Fifeshire and John Simpson, a licensed grocer, residing and carrying on his business in Buckhaven, under a complaint charging the respondent with a contravention of the Licensing (Scotland) Act, 1903, in respect that he sold certain exciseable liquors without the requisite licence in his dwelling-house in Buckhaven.

When the case came before the Justices at their Court in Kirkcaldy objection was taken to their jurisdiction, "in respect that the alleged offence is stated to have been committed within Buckhaven, which is within the police burgh of Buckhaven, Methil, and Innerleven, which has a separate licensing authority, and by a person residing therein, and is therefore by section 91 of the Licensing (Scotland) Act, 1903, excluded from the jurisdiction of the Justices of the Peace for the county." There is no dispute as to the facts. The complaint libels that John Simpson committed the

[1] Cameron v. Macniven, Jan. 28, 1894, 1 Adam 346, 21 R. (J. C.) 31.
[2] Licensing (Scotland) Act, 1828 (9 Geo. IV. cap. 58).
[3] 25 and 26 Vict. cap. 35.
[4] 25 and 26 Vict. cap. 101.
[5] 3 Adam, 252, 3 F. (J. C.) 17.

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offence in Buckhaven, and resided there, and Buckhaven is a police burgh having a separate licensing authority. The question of law which the Justices put to us in the case is, whether they were justified in sustaining the respondent's objection, and refusing jurisdiction in the case. The question before us therefore resolves itself into this, whether the Justices of the Peace of the county of Fife have a concurrent jurisdiction within the area of the burgh of Buckhaven with the burgh magistrates to try licensing offences committed within the burgh?

The position of matters is this: This burgh of Buckhaven is not a royal burgh, but it is a police burgh, and it is admitted that until the Police Act of 1862 (25 and 26 Vict. cap. 101) the Justices of the county were the only magistrates who had summary jurisdiction to try offences of this kind in the area which now forms the burgh. That Police Act for the first time created police burghs with magistrates of their own. The parties to this case are at issue as to whether or not in such police burghs the Justices of the Peace for the county in which they are situated have in fact claimed and exercised a concurrent jurisdiction with their magistrates. There is a dispute as to the practice, and we must therefore take the question before us as if there were no practice, and decide it on general principles on a proper construction of the several Acts, and particularly of the Licensing Act of 1903. We have been referred to the terms of the commission issued to Justices of the Peace to shew that in certain matters they had a concurrent jurisdiction with magistrates in such burghs, but, as has been pointed out, these terms though very wide are mainly limited to the maintenance of the peace, and nothing is said about licensing matters. As I understand, nobody disputes that in ordinary matters the jurisdiction of the Justices extends over the whole county, burgh as well as rural, but the question before us is just whether that concurrent jurisdiction covers licensing offences, and that depends on the terms of section 91 of the Act of 1903. We can derive very little aid from any other part of the Act.

That section provides—"(1) Every person who shall commit any breach of certificate, or who shall in any other manner offend against this Act, shall be prosecuted, . . . unless by this Act otherwise specially directed or authorised" (here comes in the cardinal point), "before the Sheriff or any two or more Justices of the Peace of a county, or any magistrate of a royal, parliamentary, or police burgh having jurisdiction in the county or burgh, as the case may be, in which such offender shall reside or such offence shall have been committed," and so on. There is no dispute that the Sheriff of the county has a concurrent jurisdiction with the magistrates within police burghs, but it is disputed that the Justices have such a concurrent jurisdiction. It is matter of admission that prior to the Police Act of 1862, which dealt with police burghs, Justices had jurisdiction over the areas which are now formed into police burghs, and in the ordinary case that jurisdiction is expressly reserved to them in the Act of 1862, when it created the jurisdiction of the magistrates. There is nothing in that Act to deprive the Justices of the jurisdiction they possessed over these areas by the mere fact that they have been erected into police burghs with a magisterial bench of their own.

But, then, it is said that the words "as the case may be" in section 91

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of the Act of 1903 restrict the jurisdiction of the justices of a county to licensing offences committed within the county, but outwith the limits of police and other burghs. I do not think there is any difficulty in interpreting the phrase. It means that on the occurrence of any offence it shall be tried by whoever has jurisdiction over the place where the offence has been committed. If the Sheriff has jurisdiction, let the case be tried by him; if the Justices have jurisdiction, let them try it; or if the Magistrates have jurisdiction let the case be tried by them. The question just is, who has jurisdiction to try offences in ordinary cases in the county or burgh? Have the Justices, like the Sheriff, jurisdiction over the whole county, rural as well as police burghs? I think they have. Whether they have concurrent jurisdiction in cases occurring in royal or parliamentary burghs does not require to be decided in the case before us. It is sufficient for the decision of this case that the Justices admittedly had ordinary jurisdiction over these areas before they became police burghs, that nothing has happened to deprive them of that jurisdiction since, and therefore the Justices have a concurrent jurisdiction in all summary cases in such police burghs with the Magistrates.

I am of opinion that the judgment is wrong, and that we should answer the question of law in that sense.

LORD M'LAREN.—I am of the same opinion on all the points argued to us. It seems to me to be undoubted that immediately on the passing of the Home Drummond Act the Justices of Fife had jurisdiction to try all offences against the Licensing Statutes occurring within the area of the county which now lies in the burgh of Buckhaven. There is no doubt that this district lies within the county of Fife, and therefore the Justices of the county of Fife, and the Justices of no other county, were the Court for trial of licensing offences until the erection of the district into a police burgh by the Act of 1862—the Sheriff having a concurrent jurisdiction with them. As the jurisdiction of the Justices existed under these Acts it lies on the party denying its continued existence to shew that it has been taken away. I know of no authority except the Legislature which can take away an existing jurisdiction. We were referred to the Licensing Acts of 1862 and 1903. It was admitted by counsel for the respondent that no distinction could be taken between the language of the sections relating to this matter in these two statutes. There are variations of phraseology, but these are chiefly verbal, and are immaterial to the decision of this question. The argument may therefore be taken on either of these enactments. The substance of the argument is this, that inasmuch as provision is made for trial of licensing offences "before the Sheriff or any two or more justices of the peace of a county or any magistrate of a royal, parliamentary, or police burgh having jurisdiction in the county or burgh as the case may be, in which such offender shall reside," it is meant that the magistrates of burghs are to have exclusive jurisdiction for the trial of licensing offences committed within their bounds. Now, apart from the provisions of the licensing statutes, the mere constitution of an area of a county into a police burgh could not take away the jurisdiction which the justices had before such erection. That is to say, in other matters the justices still have

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concurrent jurisdiction with the magistrates of a police burgh within their county, and if that jurisdiction does not extend to licensing offences this can only be the result of some provision of the licensing statutes. But there is no evidence in the Licensing Act of 1903, or in its analogue of 1862, that any amendment was intended either for enlarging or abridging the existing jurisdiction of magistrates and justices of the peace. The words "as the case may be" are distributive words, and their effect according to known rules is to apply each subject to its proper predicate. Therefore if the county justices had a concurrent jurisdiction with the magistrates of police burghs these words are sufficient for the purpose of applying the concurrent jurisdiction to the particular case of licensing offences within the area over which that concurrent jurisdiction extends. It is not intended to treat counties as discontinuous from the burghs, or burghs as separate areas within which the justices of the county could have no concurrent jurisdiction with the magistrates. I mean that the language of the enactment is consistent with an intention not to disturb existing jurisdictions. Now, if that be so, it follows that the Justices of Fife still have within the area of the burgh of Buckhaven that concurrent jurisdiction with the magistrates which they had prior to the Licensing Act of 1903. By that statute the jurisdiction has not been taken away, and therefore when this case was brought before them the Justices were not entitled to decline jurisdiction.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find that His Majesty's Justices of the Peace of a county have concurrent jurisdiction along with the Magistrates of a police burgh to try offences under the Licensing (Scotland) Act, 1903, where such offences are committed within burgh by persons residing therein: Therefore answer the question in the case in the negative, sustain the appeal, and remit to the Justices to proceed."

JOHN C. BRODIE & SONS, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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JAMES DUNBAR (with Consent and Concurrence), Complainers.—*Ure, K.C.—Tait.*
ARCHIBALD JOHNSTON, Respondent.—*Campbell, K.C.—Hossell Henderson.*

*Procedure—Indictment—Instance—Indictment in Sheriff Court at instance of private prosecutor with concurrence of Lord Advocate—Sheriff—Competency—Criminal Procedure (Scotland) Act*, 1887 (50 *and* 51 *Vict. cap.* 35), *sec.* 2—*Statutory Offences—Merchandise Marks Act*, 1887 (50 *and* 51 *Vict. cap.* 28), *sec.* 2 (6).—*Held* that apart from the Merchandise Marks Act, 1887, an indictment in the Sheriff Court at the instance of a private prosecutor for his private interest with concurrence of the Lord Advocate was not competent, and that the proviso in sec. 2 (6) of that Act, assuming it to apply to Scotland, does not by implication make such an indictment competent.

*Question*, whether indictment is competent in any Court at the instance of a private prosecutor with concurrence of the Lord Advocate.

*Statute—Applicability to Scotland—Merchandise Marks Act*, 1887 (50 *and* 51 *Vict. cap.* 28), *sec.* 2 (6).—*Question*, whether the proviso in sec. 2 (6)

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of the Merchandise Marks Act, 1887, that a person charged before a Court of summary jurisdiction shall be informed of his right to be tried on indictment, applies to Scotland.

"JAMES DUNBAR, aerated water manufacturers" in Edinburgh, presented a complaint in the Sheriff Court at Edinburgh under the Summary Jurisdiction (Scotland) Acts, 1864 to 1881, with consent of the Procurator-fiscal, against Archibald Johnston, aerated water manufacturer, Edinburgh, in which they charged the accused with a contravention of the Merchandise Marks Act, 1887.

Upon the complaint being called in Court on 15th July 1904, the accused having appeared and having been informed by the Sheriff-substitute (Guy) that he had a right to be tried on indictment,* he required that he should be so tried. The Sheriff-substitute accordingly allowed the complaint to be withdrawn so that the accused's request might be complied with.

Thereafter Johnston was served with an indictment in the following terms:—"Archibald Johnston, aerated water manufacturer, 67 Canongate, Edinburgh, you are indicted at the instance of James Dunbar, aerated water manufacturers, 14 Maryfield, Edinburgh, with the consent and concurrence of the Right Honourable Charles Scott Dickson, His Majesty's Advocate, and the charge against you is that" (time and place libelled) "you did" (certain things libelled), "contrary to the Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), sec. 2, subsec. 2."

This indictment was signed "James Dunbar," and was also signed by the Lord Advocate as concurring.

The warrant to cite was for trial in the Sheriff Court.

At the first diet on 24th October 1904 the accused appeared and objected (1) to the instance of the indictment on the ground that the Lord Advocate was alone entitled to prosecute on indictment, and that his concurrence was not sufficient,† and also (2) to the relevancy of the indictment.

The Sheriff (Maconochie) sustained the objection to the instance, and dismissed the indictment as incompetent.

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* The Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), sec. 2, subsec. 6, enacts:—"Any offence for which a person is under this Act liable to punishment on summary conviction may be prosecuted, and any articles liable to be forfeited under this Act by a Court of Summary Jurisdiction may be forfeited, in manner provided by the Summary Jurisdiction Acts: Provided that a person charged with an offence under this section before a Court of Summary Jurisdiction shall on appealing (*sic*) before the Court, and before the charge is gone into, be informed of his right to be tried on indictment, and if he requires be so tried accordingly."

As to right to be tried by indictment in England, see 42 and 43 Vict. cap. 49, sec. 17.

Sec. 21 enacts that in the application of the Act to Scotland "Summary Jurisdiction Acts" means the Summary Procedure Act, 1864, and any Acts amending the same; and "Court of Summary Jurisdiction" means the Sheriff Court.

† The Criminal Procedure (Scotland) Act, 1887, enacts:—Sec 2. "All prosecutions for the public interest . . . before the Sheriff Court where the Sheriff is sitting with a jury shall proceed on indictment in name of Her Majesty's Advocate, and in all cases in which by the existing law and practice such prosecutions proceed on criminal letters, indictment shall be used instead thereof. . . ."

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"James Dunbar" thereupon presented a bill of advocation.

The complainers pleaded;—(1) The indictment having been properly raised at the instance of the complainers, with the concurrence of the Lord Advocate, the interlocutor or judgment complained of is ill-founded, and ought to be recalled. (3) The respondent having been properly called before the Sheriff's Summary Court, on complaint by the complainers, with concurrence of the Procurator-fiscal, and having demanded to be tried on indictment, as provided by the Merchandise Marks Act, 1887, sec. 2 (6), cannot now object to the instance of the indictment, and the interlocutor or judgment complained of ought to be recalled. (4) The said interlocutor or judgment complained of is erroneous and contrary to law, in respect the provisions of the Merchandise Marks Act, 1887, impliedly sanction bringing indictments at the instance of private prosecutors, at least in circumstances such as those narrated.

Argued for the complainers;—Under the law prior to the Criminal Procedure (Scotland) Act, 1887, an indictment at the instance of a private prosecutor with consent of the Lord Advocate was competent.[1] Indictment was well known before public prosecution was introduced. [LORD M'LAREN referred to Maclaurin's Criminal Trials, 250, case of *British Linen Company* (1765).] Indictment was competent in the Sheriff Court.[2] The provisions of sec. 2 of the Criminal Procedure Act, 1887, applied in the case of private prosecutions where as here the public had an interest. It was a sufficient safeguard against unfounded prosecutions on indictment that the Lord Advocate's concurrence was required. His concurrence was not given as matter of course.[3] By implication, prosecutions in the present form were made competent by the Merchandise Marks Act, 1887. That Act authorised private prosecution.[4] The accused had a right under the Act to be tried on indictment.[5] If that were so, and if an indictment at the instance of a private prosecutor, even with concurrence of the Lord Advocate, were incompetent, then the Act was rendered nugatory. There had been four cases of prosecutions on indictment under the Merchandise Marks Act, 1887, in the Sheriff Court at the instance of a private prosecutor with concurrence of the Lord Advocate. The practice was therefore in the complainers' favour.

Argued for the respondent;—(1) Indictment was only competent at the instance of the Lord Advocate, and this had been the rule for at least 200 years.[6] The word indictment was sometimes loosely used in the text writers to cover both indictment and criminal letters.[7]

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[1] Lothian's Forms of Process (1732), p. 27; Pitcairn's Criminal Trials, vol. ii. p. 520, case of John Elliot *et passim;* Hume on Crimes, vol. ii. pp. 155 and 163, 23 and 131; Books of Adjournal, Feb. 1, 1785, case of Cumming of Altyre; Arnot's Criminal Trials, 130, case of Thomas Armstrong (1601), at p. 132; Burnett's Criminal Law (1811), 296; Sir George Mackenzie's Criminal Law, Part II., Titles 19 and 21, Works, vol. ii. 224 and 233.

[2] Mackenzie, Criminal Law, Part II., Tit. 19, Works, vol. ii. 224; Criminal Procedure (Scotland) Act, 1887, sec. 2.

[3] Angus Mackintosh, Nov. 4, 1872, 2 Couper, 367, at p. 372.

[4] Burns v. Turner, Dec. 17, 1897, 2 Adam, 450, *per* Lord Moncreiff, at p. 457, 25 R. (J. C.) 38, at p. 41.

[5] Merchandise Marks Act, 1887 (50 and 51 Vict. cap. 28), sec. 2 (6).

[6] Mackenzie, Criminal Law, Part II., Tit. 19, sec. 1, Works, vol. ii. 224; Hume on Crimes (ed. 1800), vol. i., p. 246; Alison's Criminal Law, vol. ii. 217.

[7] Alison, vol. ii. 219; Hume, vol. ii. 131.

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That was the case in the passage from Hume (vol. ii. 163) cited by the complainers. In the case there referred to criminal letters, and not indictment, was the form in fact used. (2) None of the instances of indictments at the instance of private prosecutors were Sheriff Court cases. Indictment was not competent in the Sheriff Court apart from the Criminal Procedure Act, 1887, sec. 2. That section only applied to prosecutions for the public interest. In all other cases the procedure must be by way of criminal letters. Indictment at the instance of a private prosecutor was therefore not rendered competent by the Criminal Procedure Act, 1887. Nor was it rendered competent by the Merchandise Marks Act, 1887. No right to proceed in this way was expressly conferred by that Act, and such a right was not to be inferred by implication.

LORD ADAM.—This advocation is brought of proceedings in the Sheriff Court at the instance of the complainers against the respondent. It is a very unusual form of proceeding to bring an advocation, but no objection has been stated, and none could be taken, as it is perfectly competent. What has been brought under our notice is an indictment at the instance of the complainers, with concurrence of His Majesty's Advocate, against Archibald Johnston, an aerated water manufacturer. The complainers are designed as "James Dunbar, aerated water manufacturers," from which I conclude that they are a company. The charge against the respondent is that on 9th June 1904, at a place specified, he did by the hands of a vanman in his employment, and acting with his authority, sell to one or other of certain parties aerated waters of his own manufacture, or at least not manufactured by the complainers, to which, contrary to the Merchandise Marks Act, 1887, section 2, subsection 2, a false trade description had been applied by enclosing the said aerated waters in five bottles, two of which were embossed with the words or letters "Regd. James Dunbar, 14 Maryfield, Edinburgh. D.," and the remaining three bottles were embossed with the registered trade-mark of the complainers, viz., "Dunbar's Aerated Water, 14 Maryfield, James Dunbar, Edinburgh."

The history of the proceedings is this: The charge was originally brought by way of summary complaint before the Sheriff. When the case was called the Sheriff-substitute, assuming that a certain provision of section 2, subsection 6, of the Merchandise Marks Act, 1887, applied to Scotland and this case, took the view that the duty lay on him of informing the respondent that he had a right to be tried on indictment if he chose. The Sheriff-substitute accordingly so informed the respondent, who thereupon claimed the right. The summary proceedings were then dropped, and this indictment was brought in the Sheriff Court, with the result that the Sheriff dismissed the indictment as incompetent. The question before us is whether that judgment was right.

Now, we have nothing to do with the previous proceedings. The only question is whether the indictment is competent or incompetent. We may be of the opinion that there is no right in an offender brought up on a summary charge in Scotland to require trial on an indictment. The statute assumes that a right exists, which may exist in England, but certainly does not in Scotland. We were informed that in England there is such a right

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to demand trial on indictment, when the trial would proceed before a jury, and not summarily before a Judge. I can see, therefore, how the section operates in England, but by no means am I to be held as being of the opinion that there is such a right in Scotland. With these observations, I now proceed to consider the objections to this indictment. The first objection is that the indictment is incompetent, because indictments can only competently proceed at the instance of the Lord Advocate, and not as here at the instance of a private party with concurrence of the Lord Advocate. The second objection is that even allowing that prosecution on indictment is in general competent to a private party with concurrence of the Lord Advocate, yet in this particular case, being in the Sheriff Court, such indictment is incompetent. This objection proceeds on the ground that section 2 of the Criminal Procedure Act, 1887, which directs that prosecutions shall proceed on indictment in the Sheriff Court, does not make such indictments as this competent.

I do not propose to offer any opinion on the first objection, as I think the second objection is well founded and is sufficient. With the information which is before us we are not in a position to say whether an indictment could only proceed at the instance of the Lord Advocate. The libel is, however, incompetent because it is not in proper form. It is not disputed that originally the only form in use in the Sheriff Court was that of criminal letters, and indictments were not known unless where the Lord Advocate prosecuted in exceptional instances. We are here dealing with an indictment in the Sheriff Court at the instance of a private party with concurrence of the Lord Advocate. The only authority for bringing an indictment in the Sheriff Court is the second section of the Criminal Procedure Act, 1887, and I do not think that it applies at all in this case. It provides that "all prosecutions for the public interest before the High Court of Justiciary and before the Sheriff Court, where the Sheriff is sitting with a jury, shall proceed on indictment in name of Her Majesty's Advocate, and in all cases in which by the existing law and practice such prosecutions proceed on criminal letters, indictment shall be used instead thereof, and such indictment may be in accordance with the forms contained in Schedule A." That clause is, beyond all question, applicable only to prosecutions for the public interest. The question, therefore, is whether this prosecution is or is not for the public interest. I think that it is for a private interest, and although there may be some indirect public interest served by the prosecution going on, yet it is not a prosecution for the public interest in the proper and technical sense. If it had been for the public interest, and at the instance of the Lord Advocate, he would have had sole control over the proceedings, but here the prosecution might be abandoned at any time without his being consulted or even against his wishes. I am of opinion that there is here no prosecution "for the public interest" in the words of the Act, but merely a private prosecution with the concurrence of the Lord Advocate. If that be so, then the question is whether the form of prosecution by indictment under section 2 of the 1887 Act applies. I am of opinion that it does not. If the prosecution is not for the public interest, there is no authority at all in this clause of the Act for a private person proceeding by an indictment. I think, therefore, that the second objection

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is well founded, and affords sufficient ground for refusing the bill. I am the less reluctant to sustain this objection, because we could not have decided the question on the other objection without engaging in a farther and far wider inquiry.

LORD M'LAREN.—In a strict sense the real question is whether this indictment is incompetent. It is necessary, however, to look at the terms of the Act of Parliament on which it proceeds, because the Merchandise Marks Act might have authorised a proceeding which was formerly not competent in the Sheriff Court, but I do not think it has done so.

The argument addressed to us, however, had a much wider range, including some interesting topics in the history of our criminal procedure. But I hardly think we need to consider these topics, for the question is not whether indictment or criminal letters is the proper form of process in a proceeding in the High Court at the instance of a private prosecutor, but only whether this indictment is competently brought in the Sheriff Court of the Lothians.

The researches of counsel on either side of the bar have not enabled them to furnish us with a single example of an indictment in the Sheriff Court at the instance of a private prosecutor. The most modern authority to which we were referred is a passage in Sir George Mackenzie's Criminal Law, where he says that such an indictment is only competent at the instance of the procurator-fiscal of the sheriffdom.

By the Criminal Procedure Amendment Act, it is provided in substance that prosecutions for the public interest before the Sheriff Court are to proceed at the instance of His Majesty's Advocate, and it was not unnatural that when the Lord Advocate was authorised to prosecute in his own name before the Sheriff Court, he should prosecute in the form in which the chief law officer is accustomed to proceed in prosecutions before the High Court.

It is only by a very forced interpretation of the Act that it could be held to confer any right on private prosecutors to proceed by way of indictment. For a long time it was competent to proceed in Sheriff Court prosecutions by criminal letters only, but in so far as regards the substitution of indictments for criminal letters no change has been made applicable to prosecutions at the instance of private prosecutors. There are other clauses in the Act which make it unnecessary to use certain words of style, &c., and I have no doubt that these provisions would apply to private as well as to public prosecutions.

It may be said that the Merchandise Marks Act assumes a right on the part of an accused person to be tried by indictment, and no doubt an offender can be tried on indictment in Scotland if the Crown thinks that such procedure is appropriate. But I should not wish it to be assumed as entering into my opinion that any such right exists in Scotland as a right to be tried on indictment.

A magistrate may try an offender summarily, or he may commit him for trial, but if he commits him it rests with the Lord Advocate or his depute to decide whether he shall be tried on indictment in the High Court or before the Sheriff and a jury. The question is not a question of form, at

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least it is a case where form may become substance, and I know of no right on the part of an accused person in Scotland to insist on being tried by indictment.

I do not think that in this view any violence is done to the language of the Merchandise Marks Act, for I have no difficulty in holding that it applies only to cases where the right to be tried on indictment exists, and I cannot help thinking that all this difficulty has arisen out of an attempt to apply to Scotland a provision which was meant to apply only to prosecutions in England.

LORD KINNEAR.—I agree that this indictment was incompetent in the Sheriff Court, and as this is enough for the decision of the case, I do not desire to say anything on the other very interesting questions which were argued before us. But I desire, like your Lordships, that it should be understood that we are not deciding that persons prosecuted under the Merchandise Marks Act have a right to be tried on indictment if they demand it. The question is not before us for decision, but since it has been discussed at the bar, I may say that, as at present advised, it seems to me at least arguable that the proviso founded on in subsection (6) of section 2 of the Act does not confer any right, but assumes that there is or may be an existing right to be tried on indictment if the accused so requires. The magistrate is to inform the accused of his right to be tried on indictment. The section applies to both England and Scotland, and enacts that an offender may be prosecuted "in manner provided by the Summary Jurisdiction Acts." Now, there are Summary Jurisdiction Acts in England and also in Scotland. Trial in the manner provided by the Summary Jurisdiction Acts means trial in the manner provided by the Summary Jurisdiction Acts in force in either country, according as the trial takes place in the one or the other. Reading the clause therefore upon the ordinary principle of construction, *applicando singula singulis*, it appears to me that trials in England and Scotland are to be conducted according to the procedure prescribed by the Acts in force in each of these countries respectively. Now, it appears that there is a clause in the English Summary Jurisdiction Act which confers a right to trial on indictment if it is demanded. But it is admitted that no such right is given by any Summary Procedure Act in Scotland. All that the Merchandise Marks Act says is that the magistrate is to inform the accused of his right. The record in this case states that the Sheriff informed the accused of his right to be tried on indictment, but we are not told what specific information the Sheriff gave him on the subject. But whatever be the true meaning of section 2 (6) of the Merchandise Marks Act, it does not affect the question whether this indictment was competent in the Sheriff Court, and I agree with your Lordships that it was not, and that on that ground alone the decision must be upheld.

THE COURT refused the bill.

GEO. ARNOTT EADIE, S.S.C.—DALGLEISH & DOBBIE, W.S.—Agents.

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Phyn v. Kenyon.

CHARLES STEWART PHYN (Clerk of Nith District Fishery Board), Appellant.—*Johnston, K.C.—Chree.*
ROBERT KENYON AND ANOTHER, Respondents.—*Macphail.*

*Statutory Offences—Act* 24 *and* 25 *Vict. cap.* 109, *sec.* 11—*Salmon Fisheries (Scotland) Act*, 1862 (25 *and* 26 *Vict. cap.* 97), *sec.* 33—*Fishings—Procedure—Complaint—Relevancy.*—In a prosecution for using a fixed engine to catch salmon in the Solway Firth, contrary to the English Act 24 and 25 Vict. cap. 109, sec. 11, and the Salmon Fisheries (Scotland) Act, 1862, sec. 33, which made the provisions of the English Act with regard to the use of fixed engines applicable to the waters of the Solway Firth in Scotland as the same should be fixed by the Commissioners, *opinion per cur.* that the complaint was irrelevant because it failed to state that the Commissioners under the Act of 1862 had made sec. 11 of the English Act applicable to the *locus* of the alleged illegal fishing.

In a prosecution for using a fixed engine to catch salmon in the Solway Firth, contrary to 24 and 25 Vict. cap. 109, sec. 11, and the Salmon Fisheries (Scotland) Act, 1862, sec. 33, it was found by the Sheriff that the accused were fishermen in the employment of the tenant of the salmon-fishings in question, and that they used the alleged fixed engine complained of in accordance with their master's instructions. *Held* that the accused were not "owners" of the fixed engine in the sense of sec. 11 of the Act 24 and 25 Vict. cap. 109, and were therefore not liable for penalties under that section.

HIGH COURT. Lord Adam. Lord M'Laren. Lord Kinnear.

CHARLES STEWART PHYN, solicitor, Dumfries, Clerk of the Nith District Fishery Board, brought a complaint under the Summary Jurisdiction (Scotland) Acts in the Sheriff Court at Kirkcudbright, which libelled "that Robert Kenyon and Peter Williamson, both fishermen, residing at Carsethorn, in the parish of Kirkbean and Stewartry of Kirkcudbright, did on 31st May 1904, in the Solway Firth, and at that part thereof in the parish of Kirkbean and Stewartry of Kirkcudbright, opposite the lands of Arbigland in said parish and stewartry, place and use for catching salmon a hang or drift net, being a fixed engine, contrary to the Act 24 and 25 Vict. cap. 109, section 11, made applicable to the *locus* above libelled conform to the Salmon Fisheries (Scotland) Act, 1862, section 33, as amended by the Act 26 and 27 Vict. cap. 50, section 3,* whereby the said Robert Kenyon and Peter Williamson are liable to forfeiture of said net, and in addition thereto, to a penalty of £10 each for each day of so placing or using the same. . . ."

The accused stated certain objections to the competency and relevancy of the complaint, but the Sheriff-substitute (Napier) repelled these objections so far as preliminary.

The accused pleaded not guilty, and after evidence had been led, the Sheriff-substitute assoilzied them from the complaint.

The prosecutor appealed upon a stated case.

In the case the Sheriff-substitute stated that, *inter alia*, he found the following facts proved:—"The respondents are salmon fishermen in the employment of the tenant of Arbigland salmon-fishings . . . when fishing they use a net," which "can be used either as a draught net or as a whammel net, *i.e.*, a hang or drift net. When it is used as a draught net it is not a fixed engine, and is admittedly used in a

* Section 11 of the Act 24 and 25 Vict. cap. 109, and section 33 of the Salmon Fisheries (Scotland) Act, 1862 (25 and 26 Vict. cap. 97), are quoted in Lord Adam's opinion *infra*, p. 48. The amendment made by section 3 of the Act 26 and 27 Vict. cap. 50, merely alters the citation of the Act 24 and 25 Vict. cap. 109.

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legal manner. But it cannot always be so used, profitably at least, and the respondents have instructions from the tenant when they cannot use the net as a draught net to use it as a whammel net. When so used it is said to be used in an illegal manner. . . . On 31st May 1904, about 8 A.M. . . . the respondents . . . when at a considerable distance from the shore shot a net, of the dimensions above described, outwards towards the sea or English coast, from a boat opposite Arbigland and on the Arbigland fishing, and so used the net as a whammel net." "I held that the net used was not a fixed engine, and assoilzied the accused."

The following question, *inter alia*, was put to the Court:—"(3) Whether in the circumstances the respondents were properly assoilzied?"

At advising,—

LORD ADAM.—The respondents in this case are charged with having on 31st May 1904 in the Solway Firth, and at a part thereof in the parish of Kirkbean and stewartry of Kirkcudbright, opposite the lands of Arbigland in the said parish, placed and used for catching salmon a hang or drift net, being a fixed engine, contrary to the Act 24 and 25 Vict. cap. 109, section 11, made applicable to the *locus* above libelled, conform to the Salmon Fisheries (Scotland) Act, 1862, section 33, as amended by the Act 26 and 27 Vict. cap. 50, section 3, which is merely a verbal amendment.

Section 11 of the Act 24 and 25 Vict. cap. 109, which is an English Act, and does not extend to Scotland, enacts:—"No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters; and any engine placed or used in contravention of this section may be taken possession of or destroyed; and any engine so placed or used, and any salmon taken by such engine shall be forfeited, and in addition thereto the owner of any engine placed or used in contravention of this section shall" incur certain penalties.

By the Salmon Fisheries (Scotland) Act, 1862, Commissioners were appointed, whose duty it was, *inter alia*, section 6 (1), "to fix and define, for the purposes of this Act and the other Acts relating to salmon and salmon fisheries in Scotland, the natural limits which divide each river in Scotland (including the estuary thereof) from the sea, in so far as the same may not be already fixed by statute or by judicial decision," and section 6 (2), "to fix, for the purposes of this Act, the limits of the Solway Firth, having regard to" the Act 44 Geo. III. cap. 45 (the Solway Fishing Act).

The 33d section of the Salmon Fisheries (Scotland) Act, 1862, enacts:—"From and after the 1st day of January 1865 the provisions of" the Act 24 and 25 Vict. cap. 109, "shall extend and apply to salmon fisheries in the waters and on the shores of the Solway Firth situate in Scotland, as the same may be fixed by authority of this Act, and to the rivers flowing into the same, in so far as such provisions relate to the use of fixed engines for the taking of salmon."

It is clear, therefore, that section 11 of the English Act, a breach of which is complained of, is not made applicable by the Scottish Act to fishing in the Solway Firth generally, but only to fishing in such portion thereof as may have been fixed by the Commissioners. But this complaint is an entire blank as to whether the Commissioners have ever fixed to what

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fisheries in the waters or on the shores of the Solway Firth situated in Scotland the Act shall be applicable, or that it has been made applicable by the Commissioners to the fishings in question. On that ground I think that this complaint is quite irrelevant.

But further, by section 6, subsection 1, of the Fisheries (Scotland) Act, the Commissioners were directed to fix and define for the purposes of the Act the natural limits which divide each river,—including the estuary thereof,—from the sea. The Commissioners by bye-law, dated 26th April 1864, approved by the Secretary of State on 25th August 1864, which came into force on 7th March 1865, fixed a common estuary for the Nith, the Annan, and the Esk, and fixed and defined the limits which divided it from the sea to be a straight line drawn from the hotel of Skinberness in the parish of Abbey Holme in the county of Cumberland to the large house at Carsethorn of Arbigland in the county of Kirkcudbright. It is obvious that the Solway Firth opposite Arbigland is partly estuary and partly sea. To charge the respondents, therefore, as is done in this case, with fishing with a fixed engine opposite the lands of Arbigland is not necessarily charging them with any offence. If they were fishing on one side of the line they were fishing in the sea and were committing no offence; if on the other side, that should have been libelled in the complaint.

The 11th section of the Act applies only to the owner of the engine complained of, and the forfeitures and penalties are imposed only upon him. It is not set forth in the complaint that the respondents are the owners of the nets the use of which is complained of. They are merely designed as fishermen. It was held, however, in the case of *Marshall* v. *Phyn*,[1] on the construction of this section of the Act, that it was not a good objection to the relevancy of the libel that it did not state that the respondent was the owner of the engine, and that, if he were not owner the *onus* lay upon him to prove it. In giving judgment in that case the late Lord Justice-General said,[2]—"It seems to me that the word 'owner' in the statute is used in a somewhat large sense. It does not in my view necessarily mean the person in whom the technical right of property in the nets is vested. The meaning of the statute is, in my judgment, that the person against whom proceedings are to be taken shall not be, *e.g.*, a servant fishing in the employment of another, but the person who has the lawful possession and control of the nets, whether he is technically the proprietor of them or not."

Now, the Sheriff has found in fact that the respondents are salmon fishermen in the employment of the tenant of the Arbigland salmon-fishings, and that when the net is used as a whammel or drift net it is by his instructions. That being so, it is clear to me that the respondents are not "owners" of the net in the sense of the statute, and that section 11 has no application to them, and that they were on that ground rightly assoilzied by the Sheriff; and I think that we should answer the third question, which is enough for the disposal of this case, in the affirmative.

I am not disposed, and I do not think it necessary, to answer the second question, which asks whether a drift or hang net is a fixed engine within

[1] 3 F. (J. C.) 21, 3 Adam, 262.
[2] 3 F. (J. C.), at pp. 23-24.

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the meaning of the Salmon Fishery Act, 1861. It is clear that the proper respondents in such a case are the owners of the engine complained of, but the owners are not parties to this case, the respondents being, as the Sheriff says, merely their servants. I therefore think that we should find it unnecessary to answer the second question, the more especially as it is asked in a case the libel in which, in my view, is quite irrelevant.

As regards the first question I do not understand what particular question of law it is intended to raise, and I think we should decline to answer it also.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Answer the third question in the case in the affirmative: Find it unnecessary to answer the first and second questions: Dismiss the appeal, and decern."

BONAR, HUNTER, & JOHNSTONE, W.S.—LINDSAY, HOWE, & Co., W.S.—Agents.

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JOHN TODD, Complainer.—*T. B. Morison.*
JAMES MAGOWAN, Respondent.—*Sol.-Gen. Salvesen—Young.*

*Jurisdiction—Civil or Criminal—Suspension—Competency—Summary Procedure Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 28.—The Summary Procedure Act, 1864, sec. 28, distinguishes between criminal and civil complaints thus:—(1) Complaints in which the Court may pronounce sentence of imprisonment, or in default of payment of a penalty may grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation—are to be deemed criminal. (2) Other complaints are to be deemed civil.

In a complaint for recovery of a penalty under an Act by which the Court was not authorised to pronounce sentence of imprisonment, or in default of payment of the penalty to grant a warrant of imprisonment for a specified time, the Court granted a warrant to imprison the respondent for one month unless the penalty should be sooner paid.

*Held* that the complaint was civil, and that a suspension in the High Court of Justiciary was incompetent.

*Summary Procedure—Sentence—Imprisonment—Summary Procedure Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 18 (6).—The Summary Procedure Act, 1864, sec. 18 (6), enacts that, in complaints for contravention of an Act of Parliament which imposes a penalty for contravention but contains no special provision for the recovery thereof or for the substitution of a term of imprisonment in default of payment, the judgment of the Court shall authorise execution by arrestment, poinding and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), "and the warrant of imprisonment to be granted in pursuance of any such judgment . . . shall authorise the detention of the respondent until liberated in due course of law."

*Opinion per cur.* that the section does not authorise the granting of a warrant for the detention of a respondent "for" a specified term "unless the penalty shall be sooner paid."

*Summary Procedure—Sentence—Imprisonment—Summary Procedure Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 18 (6), *Schedule K* (6).—Schedule K (6) of the Summary Procedure Act, 1864, supplies (in cases where it is inexpedient to issue a warrant of arrestment, poinding and sale) a form of warrant for imprisonment, in default of payment of a penalty, for a specified period, unless the penalty be paid before its termination, but provides that this form is only to be used "where the Acts founded on authorise imprisonment for a specified period."

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*Opinion per cur.* that the words "authorise imprisonment" could not be read as "do not exclude imprisonment," and that consequently it was not competent to use this form of warrant in a case where the Act imposing the penalty did not authorise imprisonment for a specified period in default of payment.

*Murray* v. *Jones*, 2 Couper, 284, *disapproved.*

HIGH COURT. (Full Bench). Lord Justice-General. Lord Justice-Clerk. Lord Kinnear. Ld. Kyllachy. Lord Kincairney.

JAMES MAGOWAN, officer of Inland Revenue at Brechin (prosecuting for His Majesty by order of the Commissioners of Inland Revenue), brought a complaint under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881, and the Criminal Procedure Act, 1887, in the Justice of the Peace Court at Montrose, against John Todd, master of the vessel "Thistle" of Dundee. The complaint set forth that Todd had been guilty of an offence within the meaning of the 3d section of the Act 9 Geo. IV. cap. 47 (the Passage Vessel Licences Act, 1828), as amended by the Passenger Vessels Licences Amendment (Scotland) Act, 1882 (45 and 46 Vict. cap. 66), and concluded that he was thereby "liable to forfeit the penalty of £10 provided by the 3d section of the Act 9 Geo. IV. cap. 47." *

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* Section 3 of the Act 9 Geo. IV. cap. 47, imposing the penalty, does not authorise any imprisonment, and does not provide any means for recovering the penalty.

The Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), enacts:—

Sec. 18. "In cases of conviction or judgment against the respondent in prosecutions and proceedings under this Act, the sentence of the Court may be in one or other of the forms contained in the Schedule (K) to this Act annexed, or as nearly as may be in such form, according to the nature and circumstances of the complaint, viz.:— . . .

"(6) In complaints for the contravention of any Act of Parliament under which the accused is or shall be liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment, and also in all cases where, under the authority of any Act of Parliament, such penalty is or shall be recoverable by action, civil process, or diligence, the judgment of the Court shall authorise execution by arrestment, poinding and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), and may be in the form No. 6 in the said schedule; and the warrant of imprisonment to be granted in pursuance of any such judgment may be in the said form No. 6, and shall authorise the detention of the respondent until liberated in due course of law; and in all cases where, under the authority of any Act of Parliament, such penalty is or shall be declared to be recoverable by arrestment, poinding or distress and sale, or imprisonment, or by any combination of those forms of diligence other than as above provided for, the judgment of the Court may be expressed in the said form No. 6, so far as applicable, and no warrant of imprisonment shall be issued upon a judgment in such form until after the period allowed for execution by arrestment or poinding, except in the event mentioned in the said form No. 6.

. . . . . .

"SCHEDULE K.

. . . . . .

"6. *Judgment for a Penalty recoverable by Diligence.*

"The justices [*or* justice, *or* sheriff, *or* magistrate], in respect of the judicial confession of the said *J. K.* [*or* of the evidence adduced], convict

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On 22d September 1904 the Justices, after hearing the case in the absence of the accused, pronounced the following conviction and sentence:—"The Justices, in respect of the evidence adduced, convict the said John Todd of the contravention charged, and therefore adjudge him to forfeit and pay the sum of £10 sterling of penalty; and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment after the lapse of three days from this date; and grant warrant to officers of Court to apprehend the said John Todd, and convey him to the prison of Montrose, and to the keeper thereof to receive and detain him for the period of one month from the date of his imprisonment, unless the said penalty shall be sooner paid."

Todd brought a suspension in the High Court of Justiciary.

The complainer averred (Stat. 3) that it was impossible for him to attend the calling of the complaint in the J. P. Court at Montrose on

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the said *J. K.* of the contravention [*or* offence] charged [*or state to what extent he is guilty*], and therefore adjudge him to forfeit and pay the sum of £ of penalty [*or* modified penalty, *where there is power to modify*], of £ , and also find the said *J. K.* liable in £ of expenses to the complainer, and * ordain instant execution by arrestment, and also execution by poinding [and imprisonment, *where there is power to imprison*]; grant warrant to officers of Court to arrest all debts and sums of money owing to the said *J. K.*, and [*if time is allowed, add* in default of payment within days from this date] to poind his goods and effects and to sell the same at the expiration of not less than forty-eight hours after such poinding, without further notice or warrant; [*where the Act authorises imprisonment, add*], and appoint a return or execution of such poinding and sale to be made within days from the expiration of the period hereby allowed for payment, under certification of imprisonment [*if for a term specify the term*], in default of payment or recovery of the said sums with the expenses of diligence before the time allowed for such report.

[*Signature of judges or judge.*]

"*Warrant of Imprisonment to be granted upon Officer's Report.*

"The justice [*or* sheriff, *or* magistrate], in respect it appears that the sums mentioned in the foregoing judgment, with the expenses of diligence, have not been paid or recovered under the said judgment in whole or in part, grants warrant to officers of Court to apprehend the said *J. K.*, and convey him to the prison of , and to the keeper thereof to receive and detain him until liberated in due course of law [*or if the imprisonment is for a term, say*, for the period of days from the date of his imprisonment, unless the said sums, with £ for the expenses of diligence, shall be sooner paid]. [*Signature of judge.*]

"* [*If at the hearing it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place of the warrant annexed to the judgment in the preceding form, say:*

"And in respect it is inexpedient to issue a warrant of poinding and sale [*or* of arrestment, poinding, and sale], ordain instant execution by imprisonment, and grant warrant to officers of Court to apprehend the said *J. K.*, and convey him to the prison of , and to the keeper thereof to receive and detain him for the period of from the date of his imprisonment, unless the said penalty and expenses shall be sooner paid].

"[*This form only to be used where the Acts founded on authorise imprisonment for a specified period.*]"

The Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), enacts:—Sec. 6 (*b*). "Where a warrant of imprisonment is granted,

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22d September, in respect that, as it had been arranged that his vessel, the "Thistle" should be employed at a visit of the Channel Fleet in the Tyne, it was absolutely necessary that he and his crew should leave Dundee on the 21st with his vessel the "Thistle," to permit of her being inspected by the Board of Trade for the necessary certificate: that his agents had seen the collector of Inland Revenue at Dundee, who had said that he was agreeable, as far as he was concerned, to the adjournment being granted; and that, when the complaint was called in Court on 22d September, the complainer's agent explained the complainer's position and moved for an adjournment, but that the Court, without consulting their clerk, refused the motion and insisted on the trial proceeding.

The complainer pleaded, *inter alia*;—The said pretended conviction ought to be suspended in respect— . . . (2) The refusal of the complainer's motion for adjournment was oppressive and illegal. . . . (4) The conviction is irregular and incompetent.

The respondent maintained that the suspension was incompetent.*

Argued for the respondent;—*On competency*—This was an Exchequer

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whether in default of payment of a penalty or expenses, or for failure to find caution or security, or in default of recovery of sufficient goods by poinding and sale, when the amount adjudged to be paid, or for which security is to be found—

| | |
|---|---|
| Does not exceed ten shillings - | The period of imprisonment shall not exceed seven days. . . . |
| Exceeds five pounds but does not exceed twenty pounds - - | Two months." |

Sec. 8 (1). "Subject to the provisions of section six, in all proceedings under the Summary Jurisdiction Acts where a warrant of poinding and sale is competent, a warrant of imprisonment in default of recovery of sufficient goods shall likewise be competent for a period not exceeding three months, and the Court shall specify the term of imprisonment in the warrant."

* The Excise Management Act, 1827 (7 and 8 Geo. IV. cap. 53), enacts, sec. 79,—"No writ of certiorari or other writ or process shall be issued at the suit of any defendant out of any of His Majesty's Courts of Record in England, Scotland, or Ireland, nor shall any bill of suspension, advocation, or reduction be passed, nor shall any letter or letters of suspension, advocation, or reduction, or any other proceeding, be issued out of the Court of Session or Court of Justiciary in Scotland to supersede, sist, stay, remove, or in anywise affect any information or judicial proceeding before the Commissioners of Excise or before any Justice or Justices of the Peace in the United Kingdom in pursuance of this Act or any other Act or Acts of Parliament relating to the revenue of Excise, or any judgment thereupon."

The Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), enacts, sec. 28,—". . . In all proceedings by way of complaint instituted in Scotland, in virtue of any such statutes as are hereinbefore mentioned, the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint, or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation; and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament, the jurisdiction shall be held to be civil. . . ."

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prosecution. Suspension was therefore incompetent.[1] *On the merits*—(1) The Passage Vessel Licences Act, 1828,[2] did not itself prescribe the way in which the penalty imposed by sec. 3 was to be recovered, but it was an Excise statute, and the penalty was therefore recoverable as provided by the Excise Management Act, 1827, secs. 89 and 90.[3] The Summary Jurisdiction Acts now applied to Revenue prosecutions.[4] Therefore the provisions of sec. 6 (*b*) of the Summary Jurisdiction (Scotland) Act, 1881, applied here. That section authorised imprisonment for a specified period corresponding to the amount of the penalty. The result was that, although the Act of 1828 did not itself authorise imprisonment for a specified period, yet reading together with it secs. 89 and 90 of the Act of 1827, and sec. 6 (*b*) of the Summary Jurisdiction (Scotland) Act, 1881, and secs. 18 (6) and 19 of the Summary Procedure Act, 1864,[5] a sentence of imprisonment for a specified period was authorised by the Acts founded on, and consequently the sentence here pronounced was perfectly competent. [The LORD JUSTICE-GENERAL referred to *Murray* v. *Jones*.[6]] That decision was precisely in point, and in favour of the respondent. (2) It was a matter absolutely within the discretion of the Justices whether an adjournment should or should not be granted.

Argued for the complainer;—*On competency*—The grounds of suspension here were (1) that the sentence was *ultra vires;* and (2) oppression. A suspension upon such grounds was not excluded by sec. 79 of the Excise Management Act, 1827.[7] *Mackenzie* v. *Martin*[8] was decided not in accordance with any general rule but upon its own special circumstances. *On the merits*—(1) The refusal of an adjournment in the circumstances averred here amounted to oppression. (2) It was incompetent and *ultra vires* for the Justices in this case to grant warrant for imprisonment in the second alternative form of Schedule K (6). (*a*) The Act founded on in the prosecution was the Passage Vessel Licences Act, 1828, sec. 3. That enactment did not authorise imprisonment for a specified period, and therefore the proviso at the end of the form used applied and made it incompetent to use that form here. Sec. 3 of the 1828 Act did not authorise imprisonment at all. It only authorised recovery of £10 as a debt. No doubt it was a debt which even yet might be enforced by imprisonment under sec. 4 of the Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), but that was imprisonment as a civil debtor. (*b*) Even if sec. 90 of the Excise Management Act, 1827, was to be

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[1] Excise Management Act, 1827 (7 and 8 Geo. IV. cap. 53), sec. 79; Evans v. M'Loughlan, Feb. 21, 1861, 4 Macq. 89; Mackenzie v. Martin, Jan. 26, 1891, 18 R. (J. C.) 16, 2 White, 589, and cases there cited; Young v. Townshend, Nov. 24, 1856, 2 Irvine, 525; Lazenby v. M'Arthur, Nov. 9, 1874, 2 R. (J. C.) 6, 3 Couper, 23.

[2] 9 Geo. IV. cap. 47.

[3] Excise Management Act, 1827, secs. 3 and 28; Customs and Inland Revenue Act, 1888 (51 and 52 Vict. cap. 8), sec. 8.

[4] Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), sec. 11.

[5] 27 and 28 Vict. cap. 53.

[6] June 17, 1872, 2 Couper, 284.

[7] Simpson v. Board of Trade, Feb. 3, 1892, 19 R. (J. C.) 66, 3 White, 167; Moncreiff on Review in Criminal Cases, 283-286, and cases there cited; M'Kenzie v. M'Phee, Jan. 28, 1889, 16 R. (J. C.) 53, 2 White, 188.

[8] 18 R. (J. C.) 16, 2 White, 589.

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regarded by implication as founded on in the prosecution, it did not authorise imprisonment for a specified period. What it authorised was imprisonment until the penalty had been paid if the amount could not be recovered by poinding. (c) The effect of secs. 6 and 8 (1) of the Summary Jurisdiction (Scotland) Act, 1881, in such a case as the present was at most only to authorise imprisonment for a specified period failing recovery by poinding, &c., and these sections did not authorise the Justices, without granting a warrant for poinding, &c., to pronounce a sentence of imprisonment for a specified period on failure to pay the penalty.[1]

At advising,—

LORD JUSTICE-GENERAL.—This is a suspension at the instance of John Todd, captain of the vessel named the "Thistle," against a conviction for a contravention of the conditions of a licence certificate granted to him under certain Acts, the contravention being that upon the steamer which was making a coast voyage on a Sunday spirits were sold. The complaint was served upon the suspender, and for perfectly good reasons he was not able to be present at the date which was originally fixed for the trial. He communicated with the prosecutor upon that matter, and was led to understand that there would be a postponement of the inquiry. But the postponement was, as matter of fact, not granted, and he was convicted without an opportunity of being heard in his own defence. I cannot disguise from myself that I think that was a somewhat hard measure upon this person in respectable circumstances at the time. He had perfectly good reasons connected with official business for being away, and I think this postponement ought to have been granted. But I am not of opinion that upon that ground we should have interfered with the conviction, because this is an Exchequer prosecution, and there are, as your Lordships are aware and as was pleaded in the suspension, very minute provisions as to appeals under Exchequer prosecutions which, in a matter of this sort, I think ought to have been taken advantage of if the point were to be raised, and therefore, on the question raised there, I do not think the conviction could be disturbed.

But there is another objection of a more formidable nature which arises on the sentence. The conviction is given in the print, and it is in these terms:—"The Justices, in respect of the evidence adduced, convict the said John Todd of the contravention charged, and therefore adjudge him to forfeit and pay the sum of £10 sterling of penalty; and in respect it is inexpedient to issue a warrant of poinding and sale, ordain execution by imprisonment after the lapse of three days from this date; and grant warrant to officers of Court to apprehend the said John Todd, and convey him to the prison of Montrose, and to the keeper thereof to receive and detain him for the period of one month from the date of his imprisonment, unless the said penalty shall be sooner paid." Now, the section of the statute under which the conviction is sought is the third section of the Act 9 Geo. IV. cap. 47, applied to the particular case by certain other sections of other statutes which are set forth in the complaint, and which I need not specify, because they are only sections of application. The point is that the section

[1] Simpson v. Board of Trade, 19 R. (J. C.) 66.

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which creates the offence and provides for the penalty of £10 does not authorise any imprisonment, and does not provide any method for recovering the penalty. Accordingly, when we turn to the Summary Procedure Act of 1864, under which these proceedings are brought, the section which deals with these matters is section 18, and there are various subsections. I do not read the earlier subsections, because your Lordships are familiar with them, but it is sufficient to say that they provide for a variety of cases which are not this. And then we come to subsection 6, and the beginning of subsection 6 is this—"In complaints for the contravention of any Act of Parliament, under which the accused is or shall be liable to a penalty, and where no special provision is made for the recovery thereof, or for the substitution of a term of imprisonment in default of payment." Now, that is the case on hand. Then the section goes on to say,—"The judgment of the Court shall authorise execution by arrestment, poinding and sale, and imprisonment (unless recovery by imprisonment is excluded by the terms of the Act), and may be in the form No. 6 in the said schedule" (namely, Schedule K), and I ask your Lordships' particular attention to these words, "and the warrant of imprisonment to be granted in pursuance of any such judgment may be in the said form No. 6, and shall authorise the detention of the respondent until liberated in due course of law." I need scarcely point out to your Lordships that here there is no authorised detention until liberated in course of law, but, on the contrary, there is a specified term of imprisonment. The prosecutor has been probably, I think, misled here by the construction of Schedule K in regard to No. 6, and also by a judgment which I shall have occasion to comment on in a moment. Going back to form No. 6—that is the authorised form—form No. 6 provides for the penalty and for the authorisation of poinding, and then there is a warrant of imprisonment to be granted to the officers of Court on their seeing that the penalty has not been recovered under the arrestment and poinding. And that is an echo of what the statute said, viz., authorising the detention of the respondent until liberated in due course of law; because the form is, "Grants warrant to officers of Court to apprehend the said J. K., and convey him to the prison of , and to the keeper thereof to receive and detain him until liberated in due course of law." Then there is an asterisk appended to that form of the schedule, which is, "If at the hearing it shall appear that the issuing of a warrant of arrestment, poinding, and sale would be inexpedient, then, in place of the warrant annexed to the judgment in the preceding form, say." And then comes the warrant which is incorporated in the sentence in this case, but there is an addendum at the end of it—"This form only to be used where the Acts founded on authorise imprisonment for a specified period." Now, of course it is quite clear that the Act here founded on does not authorise imprisonment for a specified period, and accordingly I should have thought that perfectly clear had it not been for the judgment in *Murray* v. *Jones*, which is reported in 2 Couper, p. 284, in which the late Lord Moncreiff in giving the leading judgment of the Court held that "authorise" was equivalent to "did not exclude." Of course we are in a position, having sat here as a larger Bench, to review that judgment, and I am bound to say I do not think it can be supported. Doubts are thrown

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on it in a text book written by Lord Moncreiff, now no longer with us on the Bench, and I think the doubts there expressed are well founded. After one reads the judgment of the late Lord Moncreiff in *Murray* v. *Jones*[1] it is perfectly clear, for his Lordship so expresses it, that he came to the conclusion he did because he thought that if you read the word "authorise" in its natural sense, then there would be no prosecution under subsection 6 to which the form with the asterisk could apply. In coming to that conclusion I think his Lordship omitted for the moment to read the latter portion of subsection 6. If the form of subsection 6 was limited to the portion I have read, that proposition would be true; but subsection 6 not only deals with a case such as this where there is no special provision made for the recovery of the penalty or substitution of imprisonment, but it also goes on to deal with cases—I am now reading the concluding portion of subsection 6—"In all cases where, under the authority of any Act of Parliament such penalty is or shall be declared to be recoverable by arrestment, poinding or distress and sale, or imprisonment, or by any combination of those forms of diligence other than as above provided for, the judgment of the Court may be expressed in the said form No. 6 so far as applicable, and no warrant of imprisonment shall be issued after a judgment in such form until after the period allowed for execution by arrestment or poinding except in the event mentioned in the said form No. 6." So that it is quite clear that what I might call the latter or alternative portion of the schedule of the form No. 6 is really applicable and useful to the concluding portion of subsection 6 and not to the first portion at all. That being so, it seems to me that this conviction is clearly bad.

But while I think that, at the same time it has a somewhat peculiar result, which is this, that if you turn to sec. 28 of the Summary Procedure Act it seems to me to be perfectly clear that having arrived at the view that I have done on the conviction, the complainer here has mistaken the Court for his remedy. Under sec. 28 it is perfectly clear that this conviction ought to have been attacked by civil suspension, because the criterion under sec. 28 which determines civil and criminal review goes not according to what is done but according to what ought to be done or can be done by the magistrate; and, considering as I have done what ought and could be done under this section, I am at once led to the conclusion that the suspension here is civil.

The result of course would be that I do not think this Court has jurisdiction to quash the conviction, but as at the same time I think the conviction undoubtedly bad, and as sitting in another Court I would be prepared to suspend the conviction to-morrow, I put it to the Solicitor-General, as the Court has held so strongly as to this person not having a chance to defend himself, whether he would not undertake to recommend the Crown to repay the fine and make a moderate award of expenses.

LORD JUSTICE-CLERK.—Your Lordship has expressed the view I entertain most fully, and I have nothing to add.

LORD KINNEAR.—I agree.

[1] 2 Couper, p. 284.

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LORD KYLLACHY.—I entirely agree.

LORD KINCAIRNEY.—I also agree.

THE COURT refused the bill of suspension.

ELDER & AIKMAN, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

No. 12.

July 12, 1905.
Saunders v. Paterson.

EDWARD SAUNDERS AND OTHERS, Appellants.—*A. Moncrieff.*
CHARLES ROBERT PATERSON, Respondent.—*Wilton.*

*Summary Procedure—Complaint—Penalty—Poaching—Game—Game (Scotland) Act*, 1832 (2 *and* 3 *Will. IV. cap.* 68), *sec.* 1.—The Act 2 and 3 Will. IV. cap. 68, enacts, sec. 1, that a person who trespasses in pursuit of game or conies in the daytime shall be liable to forfeit and pay a sum not exceeding £2; and that if any persons to the number of five or more together shall trespass in pursuit of game or conies in the daytime, each of such persons shall be liable to forfeit and pay a sum not exceeding £5.

In a summary prosecution against five persons for trespassing in pursuit of game or conies in the daytime, contrary to the Act 2 and 3 Will. IV. cap. 68, sec. 1, the prosecutor concluded for the forfeiture and payment by each person of a sum not exceeding £2.

*Held* that although five persons were alleged to have participated in the trespass the prosecutor was entitled to restrict himself to the minor offence and the minor penalty.

*Statutory Offence—Poaching—Proof of title to prosecute—Game Tenant.*—*Held* that in a prosecution for day poaching, where it was alleged in the complaint that the prosecutor was the game tenant, and no objection had been taken to the prosecutor's title to prosecute at the outset, it was not necessary for the prosecutor to prove his title.

*Procedure—Conduct of Trial—Proof—Recall of witness—Evidence (Scotland) Act*, 1852 (15 *and* 16 *Vict. cap.* 27), *sec.* 4.—*Opinion*, that in a summary prosecution for day poaching at the instance of a person alleged in the complaint to be the game tenant it was competent for the Sheriff-substitute, *ex proprio motu* after both the prosecutor and the accused had closed their proof, and been heard in argument, to recall a witness for the prosecution to prove the prosecutor's title to prosecute.

HIGH COURT. Lord Justice-Clerk. Ld. Kyllachy. LdStormonth-Darling.

CHARLES ROBERT PATERSON, residing at Castlewigg House, Whithorn, Wigtownshire, brought a complaint under the Summary Jurisdiction Acts, in the Sheriff Court at Wigtown, against Edward Saunders, farm servant, California, Whithorn, Wigtownshire, and four other persons, in which the prosecutor set forth that the accused "did on the 23d day of October 1904 trespass in the daytime within the meaning of the Act 2 and 3 William IV. caput 68, in a wood on the estate of Castlewigg . . . known as 'Culloden Wood,' without leave of the proprietor . . . or of the complainer, who is tenant of the shootings in said wood, or of any other person entitled to give leave, in search or pursuit of game, conies, or rabbits, contrary to the said Act 2 and 3 William IV. caput 68, section 1, whereby the said Edward Saunders," and the other four persons accused "are each liable to forfeit and pay any sum of money not exceeding £2 as to your Lordship shall seem meet."

On 14th November 1904 the Sheriff-substitute (Watson) convicted the accused of the contravention charged, and sentenced each of them to pay 2s. of penalty, and 8s. of expenses, with the alternative of ten days' imprisonment.

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The accused appealed upon a stated case.

In the case the Sheriff-substitute stated as follows:—

"After evidence was given by one witness (David Ross) for the prosecution, a second witness (M'Connell) was called, and of consent of both parties, he was held as corroborating Ross in full, and the respondent closed his case.

"One of the appellants then began to give evidence on their behalf, but their agent did not proceed with his evidence, but withdrew the witness and also closed his case.

"The agent for the respondent addressed the Court and thereafter the agent for the defence after addressing the Court on the want of evidence of the respondent's title, moved that the complaint should be dismissed in respect that respondent had failed to prove that he was shooting tenant of the wood in question, and had thus failed to qualify a title to prosecute the complaint.

"I then recalled David Ross, the first witness for the prosecution, for the purpose of remedying this omission in the evidence. The appellants' agent objected to the witness being recalled, on the ground that the prosecutor had closed his case and had been heard in debate. I then informed the appellants' agent that if he had closed his case under a misapprehension, I would allow him to reopen it and proceed with his evidence. At the same time I indicated that if he availed himself of the opportunity so given and if his purpose was to put each of the five accused into the witness-box, I desired first to recall M'Connell, the second witness for the prosecution (whom the parties had agreed to hold as concurring with Ross, the first witness) in order that he might be separately examined. The appellants' agent agreed to this course without prejudice to his right to insist in the objection stated to the recall of the witness Ross. M'Connell was accordingly recalled, examined and cross-examined, after which the appellants each gave evidence on their own behalf. It was proved that the respondent was game tenant of the estate of Castlewigg, which includes 'Culloden Wood,' that the appellants, who had two dogs with them, beat the bushes in the said wood with sticks and hunted with dogs, and that a freshly killed rabbit was found on one of the appellants."

The questions of law were:—"(1) Is the complaint irrelevant . . . (*c*) because of incorrect statement of the statutory penalties in the body of the complaint?* (2) Whether both the respondent and the

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* The Game (Scotland) Act, 1832 (Day Poaching Act), (2 and 3 Will. IV. cap. 68), enacts, sec. 1:—"If any person whatsoever shall commit any trespass by entering or being, in the daytime, upon any land, without leave of the proprietor, in search or pursuit of game or of . . . conies, such person shall, on being summarily convicted thereof before a justice of the peace, on proof on oath by one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, forfeit and pay such sum of money not exceeding two pounds, as to the justice shall seem meet, together with the costs of the conviction; and . . . if any persons to the number of five or more together shall commit any trespass by entering or being, in the daytime, upon any land in search or pursuit of game, or of . . . conies, each of such persons shall, on being summarily convicted thereof before a justice of the peace on proof on oath of one or more credible witness or witnesses, or confession of the offence, or upon other legal evidence, forfeit and pay such sum of money, not exceeding five pounds, as to the said justice shall seem meet, together with the expenses

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appellants having closed their proof and argued the case, I was then entitled *ex proprio motu* to recall a witness for the prosecution to prove the respondent's title?" *

Argued for the appellants;—(1) The Game (Scotland) Act, 1832,† sec. 1, imposed different penalties for two different offences. The offence set forth in the complaint was the second of these two offences, for five persons were alleged to have participated in the trespass libelled. But the penalty concluded for was the penalty imposed for the offence first mentioned in the section. The complaint was therefore irrelevant in respect that the penalty was incorrectly stated. (2) The Sheriff-substitute at the stage and in the circumstances stated was not entitled to recall a witness.[1] It was essential that the prosecutor's title to prosecute should be proved.[2]

Counsel for the respondent was not called upon to reply with regard to the first question.

Argued for the respondent;—The Sheriff-substitute was entitled to recall a witness at the stage and in the circumstances stated.[3] But the prosecutor's title having been set forth in the complaint, and no objection having been taken to it at the outset it was not necessary that his title should be proved.[4]

LORD KYLLACHY.—In this case the only objections pressed upon us were (1) that the penalties were not correctly specified in the body of the complaint; and (2) that the Sheriff was not entitled to recall a certain witness to supply a certain alleged defect in the complainer's proof.

As to the first point, we did not call for a reply, being satisfied that the prosecutor was quite entitled to limit himself, if he chose, to the minor offence and the minor penalty.

As to the second point, what we have to decide is whether we are prepared to affirm the proposition that in such circumstances as occurred here it was *ultra vires* of the Sheriff, or other summary Judge, to recall a witness after proof on both sides had been closed. Now, I am not prepared

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of process; provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass."

* The Evidence (Scotland) Act, 1852 (15 and 16 Vict. cap. 27), enacts, sec. 4,—"It shall be competent to the presiding judge or other person before whom any trial or proof shall proceed, on the motion of either party, to permit any witness who shall have been examined in the course of such trial or proof to be recalled."

† 2 and 3 Will. IV. cap. 68.

[1] Wynn v. Lindsay, Nov. 22, 1883, 11 R. (J. C.) 18, *per* Lord Young, at p. 19, 5 Couper, 370, at p. 373; Clark and Bendall v. Stuart, June 8, 1886, 13 R. (J. C.) 86, *per* Lord Craighill at pp. 92-93, 1 White, 191, at pp. 204-5; Summary Procedure Act, 1864 (27 and 28 Vict. cap. 53), sec. 14.

[2] See Ferguson v. M'Nab, June 12, 1885, 12 R. 1083, *per* Lord Fraser, at p. 1086; Game (Scotland) Act, 1832 (2 and 3 Will. IV. cap. 68), sec. 2.

[3] Evidence (Scotland) Act, 1852 (15 and 16 Vict. cap. 27), sec. 4; Collison v. Mitchell, March 12, 1897, 24 R. (J. C.) 52, 2 Adam, 277; Robertson v. Mackenzie, April 26, 1856, 2 Irvine, 411; Robertson v. Steuart, Feb. 27, 1874, 1 R. 532; Macdonald, Criminal Law, 463; Dickson on Evidence, vol. ii., sec. 1769.

[4] Lees v. Macdonald, Feb. 20, 1893, 20 R. (J. C.) 55, *per* Lord M'Laren, at p. 57; Russell v. Colquhoun, Nov. 24, 1845, 2 Broun, 572.

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so to hold. I am not prepared to do so even assuming in the appellants' favour that a material omission had been made in the complainer's proof, and that the effect of what the Sheriff did was to supply that omission. I am not prepared to say that even on that assumption the Sheriff was disabled, if he thought fit, from recalling the witness. I think it would be difficult to say so, having in view the terms of the Evidence Act of 1852,[1] and the decision of this Court in the case of *Collison*.[2]

But further, and this is sufficient, I do not see my way to affirm that it was necessary for the private prosecutor—in a case like the present—where his title was set forth in the complaint and no objection had been taken to it at the outset, to prove the title so set forth. There is at least some authority to the contrary in the case of *Lees* v. *Macdonald*,[3] authority from which, as at present advised, I see no reason to differ.

We therefore answer the first question in the negative in all its branches. With respect to the second question, we answer in the affirmative. With regard to the third question, we heard no argument. It was not explained to us to what it referred, and we do not require to deal with it.

The LORD JUSTICE-CLERK and LORD STORMONTH-DARLING concurred.

THE COURT answered the first question in the negative, and the second question in the affirmative, and dismissed the appeal.

SIMPSON & MARWICK, W.S.—WILLIAM DOUGLAS, S.S.C.—Agents.

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July 12, 1905.*
Hunter v. Waddell.

ISAAC HUNTER AND ANOTHER, Complainers.—*Munro.*
PETER HUGH WADDELL (Burgh Prosecutor, Troon), Respondent.—*Chree.*

*Review—Suspension—Oppression—Order for detention of child in industrial school—Notice to father—Industrial Schools Act*, 1866 (29 *and* 30 *Vict. cap.* 118), *sec.* 15.—The Industrial Schools Act, 1866, sec. 15, enacts, —"Where a child apparently under the age of twelve years is charged before two justices or a magistrate with an offence punishable by imprisonment or a less punishment, but has not been in England convicted of felony or in Scotland of theft, and the child ought in the opinion of the justices or magistrate (regard being had to his age and to the circumstances of the case) to be dealt with under this Act, the justices or magistrate may order him to be sent to a certified industrial school."

On 11th August 1904 a boy of eleven was summoned to appear on 15th August in a Burgh Police Court to answer to a charge of theft. The summons was handed to the boy's mother in her shop, and a copy of the complaint was served at the same time. The boy's father was not present. On 15th August the boy appeared in Court, but neither his father nor his mother attended the Court. The boy pleaded guilty. The prosecutor then withdrew the charge of theft, and the magistrate granted an order for the detention of the boy in an industrial school until he attained the age of sixteen.

In a suspension at the instance of the boy and his father on the ground

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[1] 15 and 16 Vict. cap. 27, sec. 4.
[2] 24 R. (J. C.) 52, 2 Adam, 277.
[3] 20 R. (J. C.) 55, 3 White, 468.
* Decided Nov. 7, 1904.

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HIGH COURT. Lord Justice-Clerk. Lord M'Laren. LdStormonth-Darling.

that the order for the detention of the boy in the industrial school was oppressive, in respect that it had been pronounced without notice to the father, *held* that the order was not in the circumstances oppressive, and suspension *refused*.

ON 11th August 1904 Isaac Hunter, a boy of eleven years of age, son of and residing with William Hunter, fruiterer, 44 Back Temple-hill, Troon, was, along with four other boys, summoned to appear on 15th August in the Burgh Police Court, Troon, to answer to a summary complaint at the instance of the burgh prosecutor charging the boys with stealing from an automatic machine twenty-four cakes of sweetmeats of the value of 2s.

On 15th August the boys appeared, and all of them pleaded guilty. The prosecutor then withdrew the charge of theft against Isaac Hunter, and he was dealt with under section 15 of the Industrial Schools Act, 1866,* and sent to the Certified Industrial School at Kilmarnock, there to be detained until he should attain sixteen years of age. The other boys were fined 2s. 6d. each with the alternative of 24 hours' imprisonment. The fines were paid.

Isaac Hunter and his father William Hunter, as his tutor and administrator-in-law, brought a bill of suspension of the order for detention of Isaac Hunter in the industrial school and for his liberation.

They stated;—(Stat. 3) On the evening of Thursday 11th August 1904, a summons calling upon the complainer Isaac Hunter to appear in the Police Court on the 15th August following to answer to a charge of theft was handed to Mrs Hunter, the boy's mother, in her shop. A copy of the complaint was served at the same time. "The complainer William Hunter was not present on the occasion . . . and was not communicated with by the police." (Stat 4) "In the belief that the Magistrate would simply admonish or otherwise leniently treat the complainer the said Isaac Hunter (against whom there had been no previous complaint), neither the said Mrs Hunter nor the complainer William Hunter was present in Court when the said complaint was called on 15th August 1904; and the said Isaac Hunter was not otherwise represented. The complainer the said Isaac Hunter, as well as the said other boys, pleaded guilty. . . . In the case of the complainer the said Isaac Hunter the Magistrate referred to the annoyance, in the shape of absence from school, caused by the said complainer to the local school board, of which the said Magistrate is believed to have been at the time a member. The respondent having thereupon withdrawn the charge against the complainer the said Isaac Hunter," the Magistrate then pronounced the order under suspension. (Stat. 5) "The said proceedings, in so far as affecting the complainer the said Isaac Hunter, were irregular, unwarrantable, harsh, and oppressive, and prejudicial to the complainers. The respondent was well aware that the complainer, Isaac Hunter, was the son of a respectable working man in Troon, who should at least have had the opportunity of being heard in regard to the proposal to send the said boy to an industrial school. The foresaid charge was of a trifling character. . . . In any event, the said Magistrate was not justified, on the ground assigned by him as above stated, in imposing so severe a penalty upon the complainer the said Isaac Hunter. It was harsh and oppressive. The complainer William

* See Rubric.

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Hunter and his said wife are quite able to take charge of the said Isaac Hunter at home, and are prepared to do so. The said boy is in delicate health, and requires his mother's attention. This would have been explained to the Magistrate had the said boy's parents been consulted in regard to said order."

The complainers pleaded;—(1) The order complained of being, in the circumstances condescended on, unwarrantable and irregular, the complainers are entitled to have same quashed, and the complainer the said Isaac Hunter is entitled to liberation. (2) The said order being, in the circumstances stated, harsh and oppressive, it should be quashed, the complainer the said Isaac Hunter liberated, and the respondent found liable in expenses.

The burgh prosecutor lodged answers. He stated;—(Ans. 3) "The summons and execution are referred to. Admitted that the complainer William Hunter was not present on the occasion. Explained that the constable who served the complaint specially warned Mrs Hunter that the complainer William Hunter or she must attend with their son in the Police Court on the following Monday." (Ans. 4) "Admitted that neither Mr nor Mrs Hunter was present in Court on 15th August 1904. . . . Explained that the parents of the other four boys were all present in Court, stated that they had punished their children for the theft, and undertook to look more carefully after them in future. Explained that Isaac Hunter, as was well known to the Magistrate on the bench, as well as the other members of his family, were extremely irregular in their attendance at school. . . ." (Ans. 5) "Denied. . . . Explained that the detention order was pronounced by the Magistrate in the belief entertained by him, on reasonable grounds, from his knowledge of the family history, that Isaac Hunter was persistently neglected by his parents, and that it was in his interest that he should be sent to a certified industrial school, where he would be properly taught, trained, clothed, lodged, and fed."

The respondent pleaded;—The order complained of having been pronounced regularly, and in the due exercise of the Magistrate's discretion, the suspension should be refused.

The undernoted authorities were cited at the hearing.[1]

LORD M'LAREN.—The complaint in this case states that the boy having been brought before the magistrates on a charge of theft, and having pleaded guilty, was sent to an industrial school instead of being sentenced to imprisonment or fined. There are various conditions under which children may be sent to industrial schools. There is the provision applicable to children who may be found begging or wandering about without any fixed occupation or place of abode, there is the provision applicable to destitute children, and there is this provision applicable to children who have not been well brought up, and who have fallen into the commission of petty crimes.

In cases that have come before this Court by bill of suspension the principle has been laid down that although the statute founded on does not require or prescribe a form of notice to parents, yet in the case of a parent

[1] *By the Complainers.*—Wilson v. Stirling, March 9, 1874, 1 R. (J. C.) 8, 2 Coup. 518; M'Kenzie v. M'Phee, Jan. 28, 1889, 16 R. (J. C.) 53, 2 White, 188. *By the Respondent.*—Taylor v. Tarras, March 4, 1901, 3 F. (J. C.) 39, 3 Adam, 298.

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whose address is known, and still more if he is a well conducted person, it is just and equitable that notice ought to be given him before such a serious interference with his parental rights is decreed by law. These decisions no doubt are well founded, and in similar circumstances my opinion would be in entire concurrence with them—that where the father is known, and where it is possible that he might be able to state circumstances that would affect the decision of the Magistrate, he ought to be informed and to have an opportunity of appearing before a detention order is pronounced.

But these decisions must not be taken as establishing an absolute right to notice or as having the force of a statutory provision. All that has been laid down is, that where it is inequitable that a detention order should be pronounced without notice to the parent, the Court will set aside the order.

In the present case I am unable to say that the proceedings were inequitable. The boy was brought up on a charge of theft, and was proceeded against in the most formal way—that is to say, by summons regularly served. The father was bound to know that his son was to be tried on a charge of theft. If he took any interest in the welfare of his son he would naturally be present, if for no other purpose at least to endeavour to obtain mitigation of sentence. He knew that the charge was a serious one, because, however insignificant the value of the article stolen, it is always a serious thing for a boy entering on the business of life to have a conviction for theft against him in the books of the Police Court. The father knew that this was the charge, and if he did not take the trouble to attend, I do not think he can be afterwards heard to say that it was inequitable that a detention order had been pronounced without further communication being made to him.

I have no reason to suppose that if the boy's father had been in attendance a different order would have been pronounced. Nothing that has been said would suggest to my mind that this was not a suitable case for sending the boy to a certified industrial school, and this being an appeal to the equitable jurisdiction of the Court, I am of opinion that the order pronounced should stand.

LORD STORMONTH-DARLING.—I am not disposed to dissent in this case. I certainly see nothing oppressive in the conduct of the Magistrate here. I recognise the difficulty of holding that, under section 15 of the Industrial Schools Act, 1866, notice to the parent of a proposal to send a child to an industrial school is a legal requirement, but I do think that it would be expedient in practice not to make such an order without giving the parent or guardian of a child, if he be accessible, an opportunity of appearing and stating any circumstances which might influence the Magistrate in coming to a decision on that matter.

LORD JUSTICE-CLERK.—I concur with both your Lordships. I think it would be advisable in such cases for the Magistrate to act with great care, so that it might not subsequently be brought forward as an objection that he had acted without the whole facts being before him. I am clearly of opinion that the procedure adopted here is not oppressive in a case such as this where a summons has been served, and where a parent does not choose to appear and so give evidence of a reasonable and natural interest in the

welfare of his child. If a parent does not choose to appear in Court I think the Magistrate is entitled to assume that the parent leaves it to him to deal with the child as may seem most suitable to him under the circumstances. I am of opinion that suspension ought to be refused, as this case is one quite distinguishable from the cases quoted on behalf of the complainers.

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THE COURT refused the bill.

W. CROFT GRAY, S.S.C.—MACKAY & YOUNG, W.S.—Agents.

No. 14.

July 12, 1905.*
Lauder v. Hurst, Nelson, & Co., Limited.

WILLIAM BEITH LAUDER, Appellant.—*Sol.-Gen. Dundas—Blackburn, A.-D.*
HURST, NELSON, & COMPANY, LIMITED, Respondents.—*Wilson, K.C.—D. P. Fleming.*

*Review—Appeal—Summary Complaint—Jurisdiction—Civil or Criminal—Summary Procedure (Scotland) Act*, 1864 (27 *and* 28 *Vict. cap.* 53), *sec.* 28—*Summary Prosecutions Appeals (Scotland) Act*, 1875 (38 *and* 39 *Vict. cap.* 62), *sec.* 7—*Summary Jurisdiction (Scotland) Act*, 1881 (44 *and* 45 *Vict. cap.* 33), *sec.* 9—*Statute Law Revision Act*, 1894 (57 *and* 58 *Vict. cap.* 56), *sec.* 1.—In a summary complaint against an incorporated company the jurisdiction is civil within the meaning of sec. 28 of the Summary Procedure (Scotland) Act, 1864, and an appeal under the Summary Prosecutions Appeals (Scotland) Act, 1875, in such a complaint lies to the Court of Session—not to the Court of Justiciary.

*North British Railway Co.* v. *Dumbarton Harbour Board*, 2 F. (J. C.) 28; *Simpson* v. *Corporation of Glasgow*, 4 F. 611; *Braid* v. *Swan & Sons, Limited*, 5 F. 579, *followed.*

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. Ld Stormonth-Darling.

ON 20th August 1904, Hurst, Nelson, & Company, Limited, waggon-builders, Motherwell, were cited to appear in the Sheriff Court at Hamilton, on 30th August, to answer to a complaint under the Summary Jurisdiction (Scotland) Acts, 1864[1] and 1881,[2] and the Criminal Procedure (Scotland) Act, 1887,[3] at the instance of William Beith Lauder, inspector of factories, Glasgow, setting forth that the accused had contravened section 10 of the Factory and Workshop Act, 1901, by failing to maintain in an efficient state the fencing of certain dangerous parts of the machinery in their factory, "whereby the said Hurst, Nelson, & Company, Limited, as occupiers of the said factory, are liable for said contravention to a fine not exceeding ten pounds (Factory and Workshop Act, 1901, section 135), together with the reasonable costs and charges of conviction."

The complaint prayed the Sheriff "to grant warrant to cite the said Hurst, Nelson, & Company, Limited, to appear before you to answer to this complaint, and thereafter to convict them of the aforesaid contravention, and to adjudge them to suffer the penalties provided by the said Factory and Workshop Act, as the same may be modified or affected by the Summary Jurisdiction (Scotland) Act, 1881."

On 30th August, Hurst, Nelson, & Company's secretary appeared on their behalf and stated certain objections to the relevancy of the complaint, including "(Fourth) The specification of statutory penalties is erroneous, misleading, and ambiguous."

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* Decided Nov. 7, 1904.

[1] 27 and 28 Vict. cap. 53.

[2] 44 and 45 Vict. cap. 33.

[3] 50 and 51 Vict. cap. 35.

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The Sheriff-substitute (Brown) sustained the fourth objection and dismissed the complaint.

The prosecutor appealed to the High Court of Justiciary on a stated case.

The question of law was,—"Is the complaint as laid relevant?"

The respondents objected to the competency of the appeal on the ground that the jurisdiction was civil within the meaning of section 28 of the Summary Procedure (Scotland) Act, 1864, and consequently that the appeal, under section 7 of the Summary Prosecutions Appeals (Scotland) Act, 1875,[1] ought to have been to the Court of Session, and not to the Court of Justiciary.

Argued for the respondents in support of their objection to the competency of the appeal;—Upon a construction of section 28 of the Summary Procedure Act, 1864, and section 7 of the Summary Prosecutions Appeals Act, 1875, it had been decided by this Court in *North British Railway Co.* v. *Dumbarton Harbour Board*,[2] and by the First Division of the Court of Session in *Simpson* v. *Corporation of Glasgow*,[3] that where imprisonment could not follow upon a summary complaint by reason of the respondents being an incorporated company and therefore incapable of imprisonment, the jurisdiction was civil, not criminal, in the sense of section 28 of the Act of 1864, and therefore that an appeal in such a case must under section 7 of the Act of 1875 be to the Court of Session, and not to this Court. It was said that the distinction between civil and criminal jurisdiction, as defined by section 28 of the Act of 1864, had in effect been abolished *quoad* appeals under the Act of 1875, by section 9 of the Summary Jurisdiction Act, 1881, section 44 of the Criminal Procedure Act, 1887, and section 1 of the Statute Law Revision Act, 1894,[4] none of which had been before either Court in deciding the cases just cited, and that all appeals under the Act of 1875 must now be to this Court. But that argument was considered and rejected by the Second Division of the Court of Session in *Braid* v. *Swan & Sons, Limited*.[5] It had therefore been settled by decision that an appeal in a case like the present was incompetent in this Court. The respondents had not prorogated the jurisdiction by acquiescing in the statements made in the case. The Act of 1875, section 3, gave the right of appeal to "either party," and it was for the appellant to see that he chose the right Court to which to appeal.

Argued for the appellant;—The appeal had rightly been taken to this Court. If the question could be regarded as an open one, the true test for distinguishing between criminal and civil jurisdiction as defined by section 28 of the Summary Procedure Act, 1864, was that proposed by Lord Moncreiff in expressing his dissent in the case of the *North British Railway Co.* v. *Dumbarton Harbour Board*,[6] namely, that the question depended, not upon the manner in which the complainer thought fit to frame his complaint, nor upon the position or special circumstances of the respondent, but upon the punishment which was authorised by the special or general statute for the parti-

[1] 38 and 39 Vict. cap. 62.
[2] Jan. 13, 1900, 2 F. (J. C.) 28, 3 Adam, 121.
[3] Feb. 28, 1902, 4 F. 611.
[4] 57 and 58 Vict. cap. 56.
[5] March 4, 1903, 5 F. 579.
[6] 2 F. (J. C.), at pp. 32 and 33.

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cular offence, that in short the punishment which was the test of criminal jurisdiction was a quality of the offence charged, not an accident dependent on the terms of the complaint or the position of the respondent. That construction of section 28 of the Act of 1864 was in accordance with the practice that had up to that time prevailed, as was shewn by the cases that were cited in the subsequent case of *Simpson*,[1] although not in the case of the *North British Railway Co.*[2] It was, however, rejected by a majority in this Court in the latter case, and that decision was followed by the First Division in the case of *Simpson*.[3] But even if it was too late to go back upon the construction of section 28 of the Act of 1864, there remained the question whether the test thus held to have been enacted by section 28 had not been abolished *quoad* appeals under the Summary Prosecutions Appeals Act, 1875—to the effect of making all such appeals competent only to this Court—by section 9, subsection 4, of the Summary Jurisdiction Act, 1881, and section 1 of the Statute Law Revision Act, 1894, which sections had not been under the consideration of the Court in either of the two cases just cited. It was true that the argument founded on these sections was rejected by the Second Division of the Court of Session in the later case of *Braid*,[4] but that decision, which was the decision of a majority, was not binding on this Court, and was inconsistent with the decision in *Lindsay* v. *Low & Co.*,[5] where section 9, subsection (4), of the Act of 1881 was cited, and in which this Court, while not determining the question of jurisdiction, proceeded to decide the merits of the appeal, which the Court would not have done had any serious doubt as to the jurisdiction been entertained on the Bench. The question therefore must be regarded as still open in this Court. On a sound construction of the statutes this appeal was competent. In any view, the respondents had prorogated the jurisdiction by consenting to the stated case.[6]

LORD M'LAREN.—The question as to which of the two, the Court of Session or the Court of Justiciary, has jurisdiction in appeals of this kind was first raised in the Court of Justiciary, and the decision was that the jurisdiction is not of a criminal nature where the prosecution is directed against a company, because a company cannot suffer a sentence of imprisonment. If the question were open, much might be said for the other construction, because it is more convenient that the jurisdiction should be determined by the effect of the enactment contravened rather than by the *status* of the person who is accused of the contravention. In both Divisions of the Court of Session the judgment in the Court of Justiciary has been followed. It is true that in the case of *Lindsay* v. *Low & Co.*,[5] this Court gave a judgment which is said to be inconsistent with the previous decisions, but I rather infer that in the particular case the objection to the jurisdiction had been waived or was not insisted on. In the state of the authorities we cannot come to a contrary conclusion unless we were to refer the question

[1] See 4 F., at p. 616, note 2.
[2] 2 F. (J. C.) 28.
[3] 4 F. 611.
[4] 5 F. 579.
[5] Feb. 20, 1902, 4 F. (J. C.) 45, 3 Adam, 578.
[6] *Per* Lord Young, 4 F. (J. C.), at p. 49.

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to a larger Court, and in my opinion the question is not of sufficient moment to make a rehearing necessary or expedient. On the contrary, it is better to follow the authorities, because once the rule is fixed there is no difficulty in applying it. No doubt can be raised in the mind of the prosecutor, for there never can be any doubt as to whether a sentence of imprisonment can follow the conviction of a trading company. I think, therefore, that the objection should be sustained.

The LORD JUSTICE-CLERK and LORD STORMONTH-DARLING concurred.

THE COURT dismissed the appeal as incompetent.

CROWN AGENT—P. GARDINER GILLESPIE, S.S.C.—Agents.

No. 15.

July 12, 1905.*
Paterson v. Cowie's Executor.

MISS ISABELLA PATERSON, Pursuer (Respondent).—*Malcolm.*
WILLIAM COWIE DONALD (Cowie's Executor), Defender (Appellant).—*Chree.*

*Sheriff—Small-Debt Court—Proof—Reference to oath—Refusal to hear statement by deponent on oath—Appeal—Deviation from statutory enactments—Small-Debt (Scotland) Act*, 1837 (1 *Vict. cap.* 41), *sec.* 31.—In an action in the Small-Debt Court the pursuer's claim was referred to the defender's oath. After the defender had made his deposition on oath, his agent proposed to cross-examine him, and, in the hearing of the defender, stated what he expected to prove by the cross-examination. The Sheriff-substitute refused to allow the cross-examination. The defender, who was still in the witness-box, then volunteered to make a statement. The Sheriff-substitute refused to allow the defender to make this statement, and after hearing the parties' agents, gave decree against the defender.

In an appeal by the defender under sec. 31 of the Small-Debt (Scotland) Act, 1837, *held* that the refusal of the Sheriff-substitute to allow the defender to make a statement in supplement to his deposition on oath constituted a "deviation in point of form from the statutory enactments" such as had or might have "prevented substantial justice from being done" within the meaning of sec. 31 of the Act. Appeal therefore *sustained* and cause *remitted* to the Sheriff-substitute to rehear the defender in the reference to oath.

HIGH COURT. Lord Justice-Clerk. Lord M'Laren. LdStormonth-Darling.

ON 12th January 1904, Miss Isabella Paterson, Main Street, Clackmannan, took out a summons in the Small-Debt Court at Alloa, concluding for decree for £12, against William Cowie Donald, High Street, Clackmannan, executor-nominate and universal legatory of the late Miss Mary Cowie, North Back Street, Clackmannan, under her general disposition and settlement, dated 12th August 1898.

The ground of the alleged debt was stated in the claim produced with the summons as follows:—"1903, February 26th. The late Miss Cowie having on or about this date endorsed a deposit-receipt for £325, and delivered the same to the said William Cowie Donald, with instructions to cash it and pay to the said Isabella Paterson out of the contents thereof a legacy of £20, and the defender having failed to make payment of such legacy:—To amount thereof, £20; restricted to £12."

The claim having been referred to the oath of the defender, the Sheriff-substitute (Dean Leslie), on 27th January 1904, found the defender, as executor-nominate foresaid, liable to the pursuer in the sum of £12, with 4s. 11d. of expenses.

* Decided December 9, 1904.

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The defender appealed under the 31st section of the Small-Debt (Scotland) Act, 1837, to the High Court of Justiciary.*

The appellant stated;—At the first calling of the case on 20th January 1904 the defence stated was a general denial that the amount was due, in respect that the deceased Miss Cowie was, on account of her state of health, not responsible for her actions, or capable of making a valid bequest at the date alleged. The case was continued for proof to 27th January 1904, and on the motion of the respondent's agent the Sheriff-substitute appointed the appellant to lead in the proof. At the second calling of the case, on 27th January 1904, the appellant's agent objected to lead in the proof, and argued that the respondent, who was the pursuer in the case, should prove her case in the usual way. The Sheriff-substitute repelled the objection. The Sheriff-substitute then, "of his own motion, in which the respondent's agent concurred, referred the respondent's claim to the oath of the appellant. The appellant's agent objected to the competency of this proceeding, on the ground that the respondent's claim being in respect of an alleged nuncupative legacy, and the deceased having died testate, a reference to the appellant's oath was incompetent, but the Sheriff-substitute repelled this objection.

"The appellant having been put on oath, admitted, in reply to the respondent's agent, that the deceased Miss Mary Cowie had verbally instructed him to pay whatever balance should be over of the said deposit-receipt to the respondent, after settling the provisions of the deceased's will. The respondent's agent having put no further question to the appellant, and having stated that his case was closed, the appellant was about to add an explanation qualifying his statement, but the Sheriff-substitute refused to allow him to do so. The Sheriff-substitute also refused leave to the appellant's agent to cross-examine the appellant, and put no questions to the appellant himself, but at once pronounced decree against the appellant for £12, with 4s. 11d. of expenses.

"The explanation which the appellant desired to make was to the effect that the deceased had subsequently recalled the instruction which he admitted she had given him, the same having been extorted from her by the respondent against her will; that the deceased at the time of giving the said instruction was seventy-five years of age, and was not in a fit state of mind, as certified by her doctor, to give any valid instructions as to the disposal of her estate, and died four days thereafter; that under the deceased's will the appellant, as executor-nominate, was directed to pay the deceased's debts and funeral expenses, and certain legacies amounting to £300, and that after having given effect to these directions, and paying the expenses of executing the trust, there was no balance available of the said

* The Small-Debt Act, 1837 (1 Vict. c. 41), sec. 31, enacts,—"It shall be competent to any person conceiving himself aggrieved by any decree given by any Sheriff in any cause or prosecution raised under the authority of this Act to bring the case by appeal before" the High Court of Justiciary. "Provided always that such appeal shall be competent only when founded on the ground of corruption or malice and oppression on the part of the Sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done, or on incompetency, including defect of jurisdiction of the Sheriff. . . ."

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deposit-receipt for £325. The appellant had the deceased's doctor in attendance at the Court, and he and the appellant were prepared to prove these facts; but the appellant was not allowed an opportunity either of stating them himself or of proving them by leading evidence, so the defence that the deceased was not responsible for her actions, as stated by the appellant at the first calling, was never before the Court as evidence, and without this it was not possible for the Sheriff-substitute to arrive at the full facts of the case."

The appellant maintained that he was entitled to relief by appeal under the 31st section of the Small-Debt (Scotland) Act, 1837, in respect that "the Sheriff-substitute acted oppressively (1) in referring the respondent's claim to the appellant's oath; (2) in refusing to allow the appellant to lead evidence to rebut the respondent's claim; (3) in refusing to allow the appellant to add any qualifying explanation of his admission on oath; and (4) in giving decree for the sum of £12 in respect of a nuncupative legacy; whereby substantial injustice was done to the appellant."

The appellant therefore prayed the Court "to sustain the appeal; to recall the judgment or decree complained of; to assoilzie the appellant from the conclusions of the said summons; or otherwise to order a rehearing."

The respondent lodged answers, in which she stated:—At the first calling of the case on 20th January 1904, "the defence stated was a general denial that the amount was due." At the second calling of the case on 27th January 1904, the agent for the respondent "maintained his right (1) to refer the whole claim to the appellant's oath inasmuch as it rested on the allegation that the appellant was trustee for payment to the respondent of the sum sued for, or (2) to prove by parole evidence a nuncupative legacy of £8, 6s. 8d. The Sheriff-substitute allowed the reference to the appellant's oath.

"The appellant having been put on oath, deponed that on or about the date libelled the deceased Miss Cowie handed to him a deposit-receipt for £325, directing him, after payment of funeral expenses and certain provisions in her settlement, amounting together to £305 or thereby, to pay the balance in said deposit-receipt to the respondent. Admitted that on the respondent's agent objecting to the appellant's agent being allowed to cross-examine the appellant, the Sheriff-substitute sustained the objection, and explained that thereafter the appellant's agent made no suggestion for questions to be put by or through the Sheriff-substitute. The proof was then closed and the agents heard.

"Thereafter, for the first time, the appellant suggested making an addition to his deposition, but the Sheriff-substitute held that the suggestion was not timeously made, and held further that the appellant's oath established the respondent's claim, and gave decree accordingly."

The respondent submitted that the appeal should be refused, in respect—"(1) That it is incompetent, in respect that it seeks to review the judgment of the Sheriff-substitute on questions of law and on the merits; (2) that the Sheriff-substitute did not act oppressively in any of the matters stated in the appeal; (3) that the judgment of the Sheriff-substitute is right."

On 19th July 1904 the Court (the LORD JUSTICE-CLERK, LORD TRAYNER, and LORD MONCREIFF), after a hearing, pronounced this interlocutor:—"Remit to the Sheriff-substitute to report as to the

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facts averred by the appellant and disputed by the respondent in her answers."

The Sheriff-substitute reported as follows:—"Whether at the first calling of this case on 20th January 1904 more than a general denial was stated as the defence I am unable to recollect, but on 27th January the defence was that the deceased Miss Cowie was not responsible for her actions and incapable of making a valid bequest at the date alleged, besides a general denial." [The Sheriff-substitute then adverted to a point not now reported.] "The full amount recoverable under the claim . . . was at this time expressly referred to by both parties as £8, 6s. 8d. The respondent was thereupon allowed to refer the claim to the appellant's oath on the footing of his being the trustee of the deceased.

"The appellant having been put on oath deponed that on the date libelled the deceased Miss Cowie handed him a deposit-receipt for £325, that she did not indorse or put a date upon the deposit-receipt, that she told him to pay a sum to the respondent, that respondent was to get the balance of the whole after the provisions of her will had been carried out, that he was not told to go to the bank, that she did not say what the provisions of the will were, that no specific sum was mentioned, that the provisions in the will amount to £300, that the balance would be £25, but that did not allow for the expense of the executry. Permission to cross-examine was refused to the appellant's agent, who did not suggest any questions. During a discussion as to the competency of cross-examination, the appellant's agent made a statement of what he expected to prove by cross-examination. This was in the hearing of the appellant, who was still in the witness-box. The appellant on his own account then intervened and volunteered a statement. I declined to receive his statement. After hearing the procurators I found that the appellant's oath had established the respondent's claim, and granted decree. The respondent's agent mentioned the sum of £12. No objection was made by the appellant's agent, and I assented."

The parties were then further heard.

The undernoted authorities were cited.[1]

At advising,—

LORD STORMONTH-DARLING.—The statutory grounds on which this Court can entertain an appeal from a decree in the Small-Debt Court are very limited, and certainly do not include any ordinary mistake in law. Some of the reasons for which we are asked to recall this decree by the Sheriff-substitute at Alloa are nothing more than alleged mistakes in law of an ordinary kind—but there is one ground which goes a good deal further, and which I think requires us to exercise the power of review conferred upon us by the Small-Debt Act of 1837, section 31.

With the Sheriff-substitute's proceedings at the first calling of the case on 20th January 1904, and again at the second calling a week later, we have nothing to do, down to the point at which, as we learn from the

[1] *By the Appellant*:—Gordon v. Mulholland, Jan. 26, 1891, 18 R. (J. C.) 18, 2 White, 576; Reid & Son v. Sinclair Brothers, Nov. 23, 1894, 22 R. (J. C.) 12, 1 Adam, 500; Renfrew v. Hall, Nov. 26, 1901, 4 F. (J. C.) 27, 3 Adam, 517. *By the Respondent*:—Paterson v. Mackay, Sept. 27, 1872, 2 Coup. 327, 45 Scot. Jur. 5; Nisbet v. Cameron, June 4, 1873, 10 S. L. R. 458.

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learned Judge's report, he allowed the respondent "to refer the claim to the appellant's oath on the footing of his being the trustee of the deceased." So far the proceedings were either regular, or if there was any irregularity it was not of a sort cognisable by us. But then it appears from the same report that after the Sheriff had, rightly enough, refused permission to the appellant's agent to cross-examine his client, and while the appellant was still in the witness-box, the appellant on his own account "intervened and volunteered a statement," and the Sheriff "declined to receive his statement." The Sheriff then heard the procurators, found that the appellant's oath had established the respondent's claim, and granted decree. About this the Sheriff adds—"Respondent's agent mentioned the sum of £12, no objection was made by appellant's agent, and I assented." He mentions that at an earlier stage of the proceedings both parties had referred to the amount recoverable under the amended claim as £8, 6s. 8d. It may be doubted whether the decree for what was alleged to be a nuncupative legacy ought to have been for more than £8, 6s. 8d. But if that were the only ground of appeal I should regard it as falling within the category of a mere ordinary mistake in law, and not therefore appealable.

It is otherwise, I think, with the Sheriff's refusal to hear the statement volunteered by the appellant on a reference to his oath. When the respondent referred her claim to her adversary's oath, and was allowed to do so, all other probation was excluded; the question then became *non quid verum sed quid juratum est.* It is of the essence of that mode of investigating the facts of a case that the fullest opportunity should be given to the deponent to tell his own story. Anything like judicial refusal to hear what the deponent has to say, even if it be not in answer to questions put by his adversary, but by way of explanation coming from himself, is or may be so fatal to the proper understanding of his deposition that it seems to me clearly to fall within the category of objections for which we are bound to give redress.

Having regard to the decisions on section 31 of the Act of 1837, we should be justified in holding this objection as constructive "oppression." But it is better, I think, to put it on the ground of a "deviation in point of form from the statutory enactments" which has "prevented substantial justice from having been done." No doubt the details of procedure under a reference to oath are not prescribed by statute; but the thing itself is recognised by the 13th section of the Small-Debt Act, which requires the Sheriff to put the parties or any of them upon oath "in case of a reference being made." And this, of course, involves that the procedure must be conducted according to law.

I am therefore of opinion that we should sustain the appeal, recall the decree complained of, and remit to the Sheriff to rehear the appellant in the reference to his oath, and to proceed in terms of law. It will then be for the Sheriff to decide whether the oath, as fully taken, is affirmative or negative of the reference.

The LORD JUSTICE-CLERK and LORD M'LAREN concurred.

THE COURT pronounced this interlocutor:—"Find that the Sheriff-substitute should have received the statement tendered

by the appellant in supplement of the deposition given by him under the reference to his oath: Sustain the appeal: Recall the decree appealed against, and remit to the Sheriff-substitute to rehear the appellant in the reference to his oath and to proceed in terms of law, and decern."

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WILLIAM BROTHERSTON, W.S.—J. P. WATSON, W.S.—Agents.

No. 16.
July 12, 1905.*
H. M. Advocate v. Hunter.

HIS MAJESTY'S ADVOCATE.—*Younger, A.-D.—Blackburn, A.-D.*
GRAEME HUNTER.—*Young.*
GAVIN COWPER.—*Spens.*

*Proof—Witness—Commission to examine witness abroad—Act* 1587, *cap.* 91.—The Court of Justiciary will not grant a commission to examine a witness abroad with a view to his deposition being read to the jury at the trial, such evidence being contrary to the Act 1587, cap. 91, and to the practice of the Court of Justiciary since its institution.

HIGH COURT. Lord Justice-Clerk. Ld. Kyllachy. Lord Kincairney.

GRAEME HUNTER, 9 Kelvinside Gardens East, Glasgow, and Gavin Cowper, 51 Cecil Street, Hillhead, Glasgow, were indicted at the instance of His Majesty's Advocate, the charge against them being that, having obtained an agency from the Canadian Pacific Railway Company entitling them to sell on commission steamboat and railway tickets available over the said company's system, they induced certain persons specified to purchase from them their passages to certain places in Canada, and to pay the accused the sums specified, on the pretence that the accused had obtained employment for the said persons at the said places, the accused well knowing that they had not provided, and could not provide, employment for any of said persons at said places.

The trial was fixed to take place before the High Court of Justiciary at Glasgow on 27th December 1904, but that diet was deserted *pro loco et tempore* to allow the panels to bring evidence from Canada. A new indictment was thereafter served, and a diet for trial was fixed for 28th February 1905, at Glasgow.

On 18th February 1905 Hunter presented a petition to the High Court of Justiciary praying for a commission to examine witnesses in Canada.

The petitioner stated that the witnesses in question were to depone as to the state of the labour market in Canada at the time of the offences libelled.

Argued for the petitioner;—What the Act 1587, cap. 91,[1] struck at was the private communication of evidence to the Assize; it did not strike at evidence taken on commission, as was shewn by cases that had occurred in practice.[2] To construe an Act passed more than three centuries ago as absolutely excluding evidence taken on commission would be to ignore the altered conditions of the times. If the proposed evidence had related to the proper *res gestæ* of the alleged offence it might have been different, but here the demeanour of the witnesses was of no importance. A witness originally on the Crown list had been allowed to return to Canada. It was important for the petitioner that the evidence of this witness should be laid before the jury, and

* Decided Feb. 18, 1905.
[1] Quoted in the opinion of the Lord Justice-Clerk.
[2] Hume on Crimes, II., pp. 405-6.

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it was unreasonable to expect that the petitioner should be at the expense of bringing him to this country even if he was willing to come.

Argued for the Crown;—The petition should be refused. The Act 1587, cap. 91, was imperative in its terms, and if in early times there had been irregularities in the application of the Act, there had been none since the institution of the present Court of Justiciary.[1] Even if a relaxation of the Act was permissible in exceptional cases, this was not a case for such relaxation. A diet had already been deserted to allow witnesses to be brought from Canada, and the evidence which it was proposed to adduce was really irrelevant to this indictment.

LORD JUSTICE-CLERK.—The law of the land as regards the leading of evidence at criminal trials is fixed by the Act of 1587, c. 91, which declares "that in all tyme cuming, the haill accusatioun, ressoning, writtis, witnessis, and uthir probatioun and instructioun quhatsumever of the cryme, sall be allegit, resonit, and deducit to the assyze in presence of the partie accusit in face of judgment and na uthirwayes."

That law has regulated the practice up to the present day. As Hume expresses it, the witnesses "must be produced to tell their own story themselves, and say what they know concerning those matters of their own proper knowledge." The only exception (which is not truly an exception at all) is that where a person has died before the trial, what he said can be proved *quantum valeat.*

The petition now before us asks the Court to grant a commission to examine witnesses abroad with a view to their depositions being read to the jury at the trial. That, it appears to me, would be in direct breach of the statute and contrary to the practice since the establishment of the Court of Justiciary, and accordingly I am of opinion that the prayer must be refused.

I only desire to add this—that it is a different question whether in such a case as this the difficulties of the defence in bringing witnesses from a great distance may not be a legitimate matter for consideration of the jury in making up their minds upon the case.

LORD KYLLACHY and LORD KINCAIRNEY concurred.

THE COURT refused the petition.

The trial took place before the Lord Justice-Clerk and a jury at Glasgow on 28th February to 3d March 1905.

The Jury returned the following verdict:—"The Jury unanimously find the pannels not guilty," and the Court accordingly assoilzied them *simpliciter*, and dismissed them from the Bar.

CROWN AGENT—ST CLAIR SWANSON & MANSON, W.S.—A. C. D. VERT, S.S.C.—Agents.

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[1] Hume on Crimes, II., p. 406.

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July 12, 1905.*
Kessack v. Smith.

ALEXANDER KESSACK, Appellant.—*Dewar, K.C.—A. M. Anderson.*
ROBERT MACAULAY SMITH (Burgh Prosecutor, Edinburgh), Respondent.—*Younger, K.C.—Spens.*

*Public-house—Breach of Certificate—Licence-holder drunk on premises after hour of closing—Licensing (Scotland) Act*, 1903 (3 *Edw. VII. cap.* 25) *Sixth Schedule.*—The form of certificate for public-houses set forth in the Sixth Schedule to the Licensing (Scotland) Act, 1903, provides that the licence-holder shall be empowered to sell exciseable liquor on condition, *inter alia*, that "he do not himself be in a state of intoxication on the premises."

*Held* (by a Full Bench) that this condition applied at all hours, and not merely during the hours when the public-house was open to the public, and consequently that a publican who was found drunk in his public-house at 3 A.M. had committed a breach of his certificate.

*Public-house—Breach of Certificate—Knowingly permitting drunkenness within licensed premises—Proof—Onus—Licensing (Scotland) Act*, 1903 (3 *Edw. VII. cap.* 25), *sec.* 98.—The Licensing (Scotland) Act, 1903, sec. 98, enacts,—"Where a licensed person is charged with permitting drunkenness on the premises, and it is proved that any person was drunk on his premises, it shall lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises."

The holder of a public-house certificate was charged with knowingly permitting drunkenness within the licensed premises in breach of his certificate, by allowing R. S. to remain in the premises when in a state of intoxication.

It was proved that the accused and R. S., who were friends, were both found in the licensed premises at 3 A.M., asleep, and intoxicated.

*Held* (by a Full Bench, *dub.* Lord Kincairney), that the accused had failed to discharge the *onus* imposed on him by sec. 98 of the Act, and consequently that he had rightly been convicted of the breach of certificate charged.

HIGH COURT. Full Bench. Lord Justice-General. Lord Justice-Clerk. Lord Adam. Lord M'Laren. Lord Kinnear. Ld. Kyllachy. Lord Kincairney.

ON 26th October 1904 Alexander Kessack, publican, Edinburgh, was charged in the Edinburgh Police Court on a summary complaint at the instance of the Burgh Prosecutor, setting forth that "Alexander Kessack, residing at 64 Marchmont Crescent, Edinburgh, who holds a public-house certificate for the premises occupied by him at 19 Cockburn Street, Edinburgh, is summarily complained against by," &c., "and the charges against him are that, contrary to the terms of his said certificate, and of section 53 of the Licensing (Scotland) Act, 1903,† upon the night of 30th September and the morning of 1st

* Decided June 27, 1905.

† The Licensing (Scotland) Act, 1903 (3 Edw. VII., cap. 25), sec. 53, enacts,—"Every certificate to be granted under the authority of this Act shall be and be held on the terms, provisions, and conditions therein contained; and in case any person holding such certificate, and having any excise licence for the sale of exciseable liquors, to him in that behalf granted, shall offend against any of the terms and conditions contained in such certificate, every person so offending shall for every such offence forfeit and undergo the several penalties and disabilities hereinafter mentioned; that is to say," &c.

The form of certificate set forth in the Sixth Schedule, No. 2, to the Act, which was the form of the certificate in the present case, empowers *A.L.* to keep a public-house at the place specified, "Provided that the said *A.L.* shall be licensed and empowered to sell such liquors under the authority and per-

No. 17. October 1904, (1) he was found in his said premises at 19 Cockburn Street aforesaid in a state of intoxication; further (2) time and place libelled he did knowingly permit drunkenness within said premises, by allowing Robert Smeaton, residing in Cockburn Street foresaid, who was then in a state of drunkenness to remain within said premises; and each of such offences is a first offence: Whereby," &c.

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Kessack pleaded not guilty, and the case went to trial on 8th November.

On 14th November the Judge of Police, in respect of the evidence adduced, convicted Kessack of each of the two contraventions charged, and imposed the penalty of £2, 10s. with the alternative of five days' imprisonment, in respect of each contravention.

Kessack obtained a case for appeal. The case set forth that the following facts were proved:—

"1. That the appellant was the holder of a public-house certificate in the form prescribed by the Licensing (Scotland) Act, 1903, for the premises referred to in the complaint, for the current year ending 15th May 1905 next.

"2. That on the date first libelled the appellant closed his premises for business at ten o'clock in the evening, being the hour fixed by the magistrates for the closing of public-houses in Edinburgh under the powers conferred on them by the Licensing (Scotland) Act, 1903, and inserted as the closing hour in the appellant's certificate. At the time of closing there were present the appellant's two shopmen and two friends, the said Robert Smeaton and Donald Morrison, a soldier, on furlough from, and shortly to return to, Malta.

"3. That no contravention of the appellant's certificate was committed during the hours in which the appellant was entitled to keep

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mission of any excise licence to him in that behalf granted, on the terms and conditions following (that is to say): that the said *A.L.* do not fraudulently adulterate the bread or other victuals or liquors sold by him, or sell the same, knowing them to have been fraudulently adulterated; and do not sell any groceries or other uncooked provisions in the said house or premises, to be consumed elsewhere; and do not knowingly permit any breach of the peace, drunkenness, or riotous or disorderly conduct, within the said house or premises and do not himself be in a state of intoxication on the premises; and do not permit or suffer men or women of notoriously bad fame, or girls or boys, to assemble and meet therein; and do not sell or supply exciseable liquor to girls or boys apparently under fourteen years of age, or to persons who are in a state of intoxication, and do not receive or take in, as the price or for the supply of exciseable liquors, any wearing apparel, goods, or chattels; and do not permit or suffer any unlawful games therein; and do not keep open house, or permit or suffer any drinking in any part of the premises belonging thereto, or sell or give out therefrom any liquors, before eight of the clock in the morning of any day, or after such hour at night of any day not earlier than ten and not later than eleven as the Licensing Court may direct; and do not open his house for the sale of any liquors, or permit or suffer any drinking therein, or on the premises thereto belonging, or sell or give out the same, or any other goods or commodities, on Sunday; and, lastly, do not transgress or commit any breach of the conditions of any permission to sell on a public or special occasion within his own house or elsewhere; and do maintain good order and rule within his house and premises."

open his licensed premises on either of the dates specified in the complaint.

"That at about twenty minutes past ten o'clock of the evening referred to, the appellant's two shopmen left the premises, closing the door thereof behind them, leaving in the premises the appellant and his aforesaid two friends, the said Robert Smeaton and Donald Morrison. That they having all been members of the Royal Highlanders, and Morrison and the appellant comrades in that regiment, the appellant invited them to partake of his hospitality, and accordingly provided whisky and cigars. At this point neither the appellant nor his friends were in a state of intoxication. That Morrison left the appellant's premises shortly after 10.30 P.M., having been let out by the appellant, who duly closed the door after him.

"5. That about thirty minutes past twelve of the morning of the second date above libelled a police-constable observed that the electric light in the appellant's shop had not been switched off, but returning shortly afterwards found that the light had been turned off and the premises duly secured.

"6. That shortly before three o'clock of the second date libelled, sounds were heard proceeding from the aforesaid premises, and the attention of the other police-officers, examined as witnesses, was directed to that circumstance. The witness Macpherson, with a key which he had in his possession, without the knowledge or consent of the appellant, opened the door of the appellant's premises, when there were found therein the appellant and his friend, the said Robert Smeaton, both in a state of intoxication. The police officer in charge having made a note of the case, and the appellant having closed his premises, the appellant and his friend proceeded home.

"7. Any exciseable liquor consumed was given gratuitously by the appellant, and in no way associated with the business carried on in said premises, which, as hereinbefore stated, terminated at ten o'clock P.M. of the first date libelled."

The following question of law was, *inter alia*, stated:—"(2) Was the fact that in the circumstances set forth the appellant and his friend became intoxicated, and were found in the appellant's premises in that state, sufficient to justify the aforesaid convictions?"

The appeal was heard before a Full Bench.

Argued for the appellant;—The appellant could not, on a sound construction of the Act of 1903 and his certificate, be convicted of a breach of certificate in respect of personal conduct out of business hours and having no relation to the conduct of his business. The Act of 1903, sec. 41, empowered a licensing Court to make bye-laws for, among other things, "Enforcing the non-residence of a certificate-holder upon licensed premises," and such bye-laws, being duly made and confirmed, were in effect conditions of certificates granted by the Licensing Court. The Edinburgh Licensing Court had not made such a bye-law. Consequently the appellant's public-house was after closing hours in the same position as if it was his private residence; he was entitled to put up a bed in the premises and to use it habitually, and he was also entitled to stay in the premises all night on a particular occasion, as in the present instance. He was further entitled to entertain his friends with lodging and liquor, and if he and his friends after business hours got drunk in the premises, he did not commit a breach of his certificate either in respect of his own

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drunkenness or that of his friends.[1] *Lester* v. *Torrens*[2] was a distinct authority for the proposition that a publican did not commit a breach of his certificate by getting drunk on the premises after business hours. No doubt there the premises were the proper residence of the publican and his family, but if the appellant was entitled to use his public-house—habitually or upon occasion—as his residence, then *Lester* v. *Torrens*[2] exactly applied. It was said that *Lester* v. *Torrens*[2] was overruled by *The Queen* v. *Pelly*.[3] That was a mistake. *Lester* v. *Torrens*[2] was approved and distinguished in *The Queen* v. *Pelly*,[3] which was the case of a customer getting drunk in the premises during business hours, and being allowed to remain in the premises after they were closed; and the ratio of the judgment was that if a breach of certificate was committed by allowing the customer to get drunk and to remain on the premises during business hours, it did not cease to be a breach of certificate by reason of the premises being closed. *The Queen* v. *Pelly*[3] therefore had no application to the present case, which did not relate to a customer. The Magistrate expressly found that no contravention of the appellant's certificate was committed during business hours; that neither the appellant nor his friend were in a state of intoxication even at 10.30 after closing, when Morrison, the other friend, left; and that any excisable liquor consumed was given by the appellant gratuitously and not in the way of business. In short, it was just the case of a man entertaining his friend in his own residence and both of them getting drunk there, which was not an offence of any sort against the Licensing Acts.

Argued for the respondent;—The questions here raised depended on the construction of the Licensing (Scotland) Act, 1903, and particularly the form of certificate scheduled to that Act. The certificate did not express any limitation as to the time within which the publican was not to be drunk himself, or knowingly to permit others to be drunk, on the premises; the prohibition in both respects was absolute as regarded time. The only limitations as regarded time in the certificate had reference to keeping open house, or permitting or suffering drinking, or selling or giving out liquor, *i.e.*, the limitations had reference to the time within which the publican might carry on his business. Be it that he was entitled to take liquor himself, or to give it to a friend gratuitously, after the hour of closing, it was an absolute condition that he neither became drunk himself nor knowingly allowed his friend to become drunk. If the limitation to the hours when the premises might be open for business was held to be implied as regarded drunkenness, then the same limitation must equally be implied with reference to permitting or suffering "men or women of notoriously bad fame, or girls or boys, to assemble therein," which would consequently be legal, although obviously much more objectionable, if only done after closing time. Further, the form of certificate for inns and hotels was in this respect in identically the same language as the form of certificate for public-houses, and the appellant's construction if put on the certificate for inns and hotels would make that certificate almost a dead letter. The English decisions

[1] Smith v. Stirling, March 6, 1878, 5 R. (J. C.) 24, 4 Coup. 13; Overton v. Hunter, 1859, 1 L. T. R. (N. S.) 366.
[2] 1877, L. R., 2 Q. B. D. 403.
[3] L. R. [1897] 2 Q. B. 33.

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cited by the appellant depended on the construction of the English statutes. *Lester* v. *Torrens*,[1] in so far as it laid down that licensed premises when closed to the public ceased to be under the Licensing Acts and became the private house of the publican, had been over-ruled by *The Queen* v. *Pelly*.[2]

At advising,—

LORD JUSTICE-GENERAL.—This is an appeal at the instance of Alexander Kessack, bringing under review a conviction which was obtained against him for the contravention of one of the terms of his certificate, he being a public-house keeper, in respect, first, that on a certain day in October 1904, he was found in his public-house premises in Edinburgh in a state of intoxication; and, secondly, that he did knowingly permit drunkenness upon his said premises by allowing a friend of his, Robert Smeaton, who was then in a state of drunkenness, to remain within the said premises. The facts set forth are, that the premises were closed in the ordinary way on that occasion, but two old friends of the appellant, who had been members of the same regiment, came in, and after the premises were closed sat having refreshments together. These refreshments were admittedly given as matter of hospitality by the appellant, and were not in any way paid for. One of the friends left and the other remained, and at an early hour in the morning the police who passed and heard what are called certain noises, which I understand to have been the snoring of these two persons who had gone to sleep, entered the premises with a key which they had and found these two persons in a state of intoxication, and also it seems asleep. The question is, whether such conduct constitutes a breach of the conditions contained in the certificate. A number of authorities have been quoted to your Lordships for the appellant, but I do not think that anything that has been cited is really applicable to the case before us. Many of them are cases dealing with "allowing drinking" and "giving out liquor." These are different questions. Also there have been cases, English cases, quoted as illustrating the meaning of the term "found drunk" on licensed premises under statutory provisions applying to any individual other than the publican. But here the question is necessarily narrowed down to a breach of certificate, a breach of a particular condition of the certificate, which is in these terms—"[Provided that (the licence-holder) . . . do not knowingly permit any breach of the peace, drunkenness, or riotous or disorderly conduct within the said house or premises, and do not himself be in a state of intoxication upon the premises, and do not permit or suffer men or women of notoriously bad fame, or girls or boys, to assemble or meet therein, and do not sell or supply exciseable liquor to girls or boys apparently under fourteen years of age, or to persons who are in a state of intoxication,"—and then afterwards comes a clause as to keeping open house or permitting drinking between certain hours. It has been strenuously argued to your Lordships that all these provisions only apply when the premises are being used as licensed premises, and have no application to the hours after closing. I have not been able to come to that view of the statute. In the first place, it is noticeable that the clause I have quoted is precisely a replica of the clauses

[1] L. R., 2 Q. B. D. 403. [2] L. R. [1897] 2 Q. B. 33.

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which deal with a hotel licence, and it is evident that if your Lordships were to hold the argument good in the case of a hotel licence it would render the conditions altogether nugatory. Secondly, the clause in question occurs within the fasciculus of the clauses which seem to me to be independent of any particular time, in contradistinction to the fasciculus of clauses dealing with giving out drink. Thirdly, I cannot disguise from myself the fact that this measure is intended to meet such a case as the present, when I compare the form of certificate under the Act of 1903 with the form of certificate under the Act of 1862, which it replaces, in which these words are not present. For these reasons I am of opinion that the conviction ought to be upheld, and that although it is a hard case for the appellant the conviction is right and cannot be disturbed. Upon the facts I should have had considerable doubts on the second branch of the conviction, namely, as to allowing the man Smeaton to get drunk, were it not for the 98th section of the Act of 1903, which is in these terms—"Where a licensed person is charged with permitting drunkenness on the premises, and it is proved that any person was drunk on his premises, it shall lie on the licensed person to prove that he and the persons employed by him took all reasonable steps for preventing drunkenness on the premises." That seems to me to shift the *onus*—an *onus* which in this case, so far as I have seen, has not been discharged. Accordingly I think the conviction must stand upon both its branches.

LORD JUSTICE-CLERK.—The facts which have to be dealt with in this case are very simple. The complainer holds a public-house certificate. On a certain night, after the premises were closed to the public at the hour fixed by the licensing authority, he entertained a friend within the premises, with the result that he and the friend both exceeded the bounds of moderation, and on the police entering the premises both were found to be intoxicated. In consequence a complaint was instituted in the Police Court charging him with two offences against the conditions of his licence —(1) that he himself was intoxicated on the premises for which he held the licence, and (2) that he knowingly permitted drunkenness within the premises.

In defence it is maintained that no contravention is relevantly charged, because the contravention alleged was not within the hours when the premises were open under the conditions of the licence, and it was urged that "licensed premises" means "licensed premises while open to the public for licensed purposes." In my opinion that contention is unsound as applied to this case. It is quite settled that it is not a breach of certificate to entertain a friend after closing hours, provided there is no sale or trafficking in drink. But I am unable to see how that can form any argument in support of the complainer's case. The licencee of a public-house obtains the licence upon the footing that he is authorised to do certain things in the premises, and is liable to prosecution if he does certain other things specified in the certificate. And he may commit such an offence after the hours when the premises have been closed to the public. It is only necessary to refer to one or two illustrations to shew that this is so. Had the complainer in this case after shutting up the house sold liquor to

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his friend, who remained with him in it, he would undoubtedly have committed a breach of his certificate. It would not be a case of shebeening—of selling without a licence; it would be selling contrary to the terms of his certificate; the offence would be breach of the certificate. Another thing which he is forbidden to do is to suffer any gaming to be carried on in the licensed premises. Could it be said that if he did this after closing hours, even although he supplied no liquor to those engaging in gaming, say playing roulette, that he would not be committing a breach of his certificate? It seems to me clear that it could not.

Now, by the recent Act of 1903 it is made an offence for a holder of a licence to be intoxicated on the premises licensed. I can see no ground for holding that that prohibition applies only during the hours that the premises may be lawfully open for the sale of liquor. The Legislature might well consider that a person licensed to sell liquor, whether hotelkeeper or publican, should be liable to punishment if he became intoxicated on the premises. For the evils which might follow from a licensed person being in that condition on his premises might be serious. It cannot, I think, be successfully argued that no such thing could have been intended. That being so, the language of the statute seems to me to be quite clear and unambiguous, and that only two things are necessary to constitute the offence—first, that the person holding the licence was intoxicated, and second, that the place where he was so intoxicated was the house for which he held the licence. I am therefore unable to hold that any error in law was committed by the Magistrate in convicting the complainer if he was satisfied that these two facts had been established by the evidence, and that it was of no consequence to the legality of the conviction that the time at which the complainer was so intoxicated was a time at which the house could not be open for business under the conditions of the licence.

Upon the second count of the charge I have equally no doubt. If the Magistrate was satisfied that it was proved that the complainer allowed his friend to remain in the licensed house when he was in a state of intoxication, then he was entitled to pronounce against him the conviction which he did, that he had knowingly permitted drunkenness within the premises. It is to be noted that under section 98, if it be the fact that a person was intoxicated in the premises, it lies on the licence-holder to clear himself of the imputation of knowingly permitting such a person to remain in the premises.

I am of opinion that this appeal should be refused.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

LORD KYLLACHY.—I concur with your Lordship in the chair.

LORD KINCAIRNEY.—I concur. I think the judgment on the first charge is very much clearer than that on the second, on which I have some doubt, but not sufficient to induce me to dissent.

THE COURT answered the second question of law in the affirmative, and dismissed the appeal.

D. HILL MURRAY, S.S.C.—THOMAS HUNTER, W.S.—Agents.

No. 18.

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Forte v. Dewar.

Ogilvie v. Benigno.

PAUL FORTE, Appellant.—*Crabb Watt, K.C.—Lippe.*
DAVID DEWAR (Burgh Procurator-Fiscal, Dundee), Respondent.—*Guthrie, K.C.—Macmillan.*

JOHN OGILVIE (Burgh Prosecutor, Peebles), Appellant.—*Dewar, K.C.—Wilton.*
ANTONIO BENIGNO, Respondent.—*Crabb Watt, K.C.—Sandeman.*

*Statutory Offence—Gaming—Hazard—Implement for practising game of hazard—Element of skill in Game—Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 406.—In a prosecution under sec. 406 of the Burgh Police (Scotland) Act, 1892, against a confectioner, for exhibiting in his shop a machine or implement for playing a game of hazard in order to induce persons to play thereat, it was proved that the machine was put in motion by placing a penny in a slot, that this enabled a spring to be worked which propelled a ball into the upper part of the machine, whence it descended past pins (which caused irregularity in its course) to the bottom of the machine, unless it was intercepted by a sliding cup manipulated by the player, who, if he succeeded in intercepting the ball, received a metal disc entitling him to twopenceworth of goods in the shop, and, if he failed, forfeited his penny. There was no part of the machine where the ball could descend that the manipulator could not reach with the sliding cup. It was found by the magistrate that, although a certain amount of success in working the machine could be acquired by practice, yet that to an ordinary member of the public having no special opportunity of acquiring skill at it, its working depended on chance.

*Held* that the machine or implement was an implement for playing a game of hazard within the meaning of the section.

*Held* also—in a case relating to another machine of the same type—that it was not sufficient to prevent a conviction under section 406 that the player, irrespective of success or failure, received an article of some value, but of less value than the sum paid for playing.

HIGH COURT. Lord Justice-Clerk. Ld. Kyllachy. LdStormonth-Darling.

FIRST CASE. FORTE v. DEWAR.

DAVID DEWAR, Procurator-fiscal of the burgh of Dundee, presented a complaint under the Burgh Police (Scotland) Act, 1892, in the Police Court at Dundee, against Paul Forte, confectioner, Dundee, in which the prosecutor alleged that the accused on 29th October 1904 had been found in possession of, and had exhibited in his shop at 84 Dura Street, Dundee, in order to induce or entice persons to play at a game of hazard, a machine which was an implement for playing a game of hazard (described in the complaint), and did induce or entice certain persons named to play at said game, all contrary to section 406 of the Burgh Police (Scotland) Act, 1892.*

The accused pleaded not guilty.

On 20th December 1904 the Magistrate found the accused guilty of the contravention charged, and fined him £5, with the alternative of one month's imprisonment.

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts, sec. 406:—"All persons who shall be found in possession of or shall exhibit implements or articles for practising games of hazard, in order to induce or entice, or who shall induce or entice, any person to play at any game of hazard, or who, by any fraudulent act or device, shall cozen and cheat or attempt to cozen or cheat any person out of any money or property, on conviction shall be imprisoned for any term not exceeding sixty days . . ."

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Forte appealed upon a stated case.

In the case the Magistrate stated as follows:—"It was proved (1) that the accused occupies a shop at 84 Dura Street, Dundee, and carries on in said shop the business of a confectioner; (2) that on the date libelled, accused kept on the counter of said shop, exposed and available to customers, the machine mentioned in the complaint; (3) that this machine is put into action by any person inserting a penny in the slot, whereupon such person is enabled to work a lever attached to a spring, which propels a ball into the upper part of the machine, from which said ball descends past a number of pins (which cause irregularity in the course of the ball) to the bottom of said machine, unless the ball is intercepted by being caught in a cup attached to a moving slide situated between the top and bottom of said machine, and manipulated by the player, who receives out of the machine, in the event of a ball being so intercepted, a metal disc entitling him to buy in said shop articles of the value of 2d., and in the contrary event, forfeits his penny, which is retained in the machine; (4) that although a certain amount of success in working the machine could be acquired by practice, yet that to an ordinary member of the public having no special opportunity of acquiring skill at it, its working depended on chance; (5) that the interception of the ball thus depended on chance or hazard so as to constitute the game one of hazard; and (6) that on the date and at the place libelled, the appellant induced or enticed to play at said game of hazard" two persons "named and designed in the complaint, all in contravention of section 406 of the Burgh Police (Scotland) Act, 1892.

"It was admitted that there was no part of the machine where the ball could descend that the manipulator could not reach with the sliding cup."

The question of law was:—"On the facts held by me as proved, was I right in holding that the said machine was an implement or article for playing a game of hazard; in finding the accused guilty of the contravention charged, and in convicting him as I did?"

### SECOND CASE. OGILVIE v. BENIGNO.

JOHN OGILVIE, Burgh Prosecutor, Peebles, presented a complaint under the Burgh Police (Scotland) Act, 1892, in the Police Court at Peebles against Antonio Benigno, ice-cream vendor, Peebles, in which the prosecutor alleged that the accused on 28th December 1904 was found in possession of and did exhibit in his shop at 22 High Street, Peebles, in order to induce or entice a person or persons to play at a game of hazard, a machine or implement for playing a game of hazard (described in the complaint), and did induce or entice certain persons named to play at said game, all contrary to the Burgh Police (Scotland) Act, 1892, section 406.* It was stated in the complaint that the machine was worked by putting a penny in the slot, and that in the event of failure at the game the player forfeited his penny.

The accused pleaded not guilty.

On 5th January 1905 the Magistrates found the charge not proven, and discharged the accused.

The prosecutor appealed upon a stated case.

In the case the Magistrates described a machine and a game

* Quoted *supra*, p. 82.

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similar to the machine and game described in the previous case. The only differences were (1) that in this machine out of five spaces in which the ball could descend there were two where the ball could not be reached by the player with the sliding cup, his chance of catching it being limited to the case of the ball descending in one or other of the three middle spaces; and (2) that irrespective of success or failure at the game the player on putting a penny in the slot of the machine received out of it a cigarette of less value than one penny. It was found that Benigno exhibited the machine in his shop in order to induce persons to play at the game described, and did induce certain persons named to play at it.

The Magistrates stated the grounds of their decision as follows:—"The prosecutor charged in the complaint, and undertook to prove, the game to be one of hazard within the meaning of the statute, in respect that in the event of the player failing to catch the ball with the cup his penny was forfeited. The Court, while holding that the game played with the machine was one of chance, yet inasmuch as in every case the player, according to the evidence led, receives out of the machine a cigarette, although of less value than a penny, held that the penny was not forfeited, and that the charge as libelled was not proven."

The question of law was,—"Whether on the facts proved the Magistrates were right in holding the charge not proven?"

The two cases were heard together.

FORTE v. DEWAR.

Argued for the appellant;—This was not a game of "hazard." The expression "hazard" was not defined in the Burgh Police (Scotland) Act, 1892. The Act 12 Geo. II. cap. 28, which was the only Act which defined the game of hazard, shewed that it was a game played with cards or dice. The expression "hazard" was at least ambiguous, and it must be interpreted in its narrowest sense. But even if "hazard" was to be read as meaning "chance," this was not a game of chance, but a game of skill. This followed from finding (4) in the stated case. There was an element of chance in nearly all games, especially when played for the first time. In this game if sufficient skill were exhibited it was always possible to win. In none of the cases where convictions had been obtained was there such a large element of skill as there was here. The games in these cases were practically pure games of chance.[1] If the presence of an element of chance was enough, then all games were struck at by the section. That was not the intention of the Legislature. What was really intended to be put down was swindling, cozening, and cheating. Something of that nature was essential to a conviction.[2] There was nothing of that kind here.

Argued for the respondent;—"Hazard" had two distinct meanings—(1) a technical sense, in which it meant a particular game played with dice; (2) a general sense, in which it was equivalent to "chance" or "venture." In the Burgh Police (Scotland) Act, 1892, sec. 406,

[1] Fielding v. Turner, L. R. [1903] 1 K. B. 867; Thompson v. Mason, March 1, 1904, 60 Law Times, 649; Santongeli v. Neilson, Dec. 6, 1900, 3 F. (J. C.) 10, 3 Adam, 234.

[2] Melvin v. Lamb, Nov. 3, 1890, 18 R. (J. C.) 10, 2 White, 555.

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the word was used in its general sense. It might be conceded that in this game there was an element of skill, but not enough to take it out of the scope of the section. This was still in the main a game of chance. For the ordinary man who had not practised at it it was purely chance. The introduction of an element of skill into a machine originally designed for a game of pure chance was not sufficient to save it if a material element of chance remained, especially if sufficient skill to win often could only be acquired by considerable practice.[1] This was a mere attempt to evade the statute.

OGILVIE v. BENIGNO.

The appellant (the prosecutor) adopted the argument for the respondent in the previous case as regarded the question whether the game was a game of hazard, and maintained that the giving of a cigarette in any event made no difference, so long as a chance of more was offered as well.[2]

Argued for the respondent;—A game of skill was just a game which could be learned by practice at it, whereas a game of chance could not. This was a game of skill. They adopted the argument for the appellant Forte. Here the player got a cigarette for certain. The certainty of the cigarette balanced the chance of the ball falling where the cup could not reach it. There was no risking of money. The Magistrates found that there was no forfeiture of the penny in the event of failure, and forfeiture of a stake in the event of failure was of the essence of the charge.

LORD JUSTICE-CLERK.—If I thought the question under this statute was simply whether the game is one of skill at all or partly of skill and partly of chance, the decision would be very easy. But the intention of the Legislature was to put down the use of such machines as are to be used for playing games of hazard. The amount of hazard may be modified; nevertheless the games here have been found to be games of hazard, which, the Act says, it shall be punishable to entice people to play at. I think the Magistrates had materials on which they could so find. It is quite true that, in the first of the two cases at any rate, a certain amount of skill might be acquired by which the person using the machine might frequently be successful. But I am unable to say that in spite of this the Magistrate was not entitled to find that the game was one of hazard.

In the second case, viz., *Ogilvie* v. *Benigno*, the Magistrate has acquitted the accused on the ground that, while the game played with the machine was one of chance, the player in every case received something, and the penny which he put in the machine was not therefore forfeited. I think it is plain that the giving of a cigarette for the penny is a mere attempt to evade the statute. That the cigarette is given for the purpose of getting the machine used, no one can doubt, and that it is a game of hazard which is played I have no doubt whatever.

[1] Santongeli v. Neilson, 3 F. (J. C.) 10; Fielding v. Turner, L. R. [1903] 1 K. B. 867, *per* Lord Alverstone, C. J., at p. 871; Jenks v. Turpin, 1884, L. R., 13 Q. B. D. 505, *per* Hawkins, J., at p. 523-4; Thompson v. Mason, 60 Law Times, 649.

[2] Taylor v. Smetten, 1883, L. R., 11 Q. B. D. 207, *per* Hawkins, J., at p. 212; Maxwell on Interpretation of Statutes (3d ed.), p. 157.

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LORD KYLLACHY.—In these cases our only duty is to construe the statute. Endeavouring to do so, I am unable to hold—having regard to the findings in fact, by which we are bound—that in either of the two cases before us the games in question were substantially games of skill, or were other than substantially games of chance.

LORD STORMONTH-DARLING.—I think it is important to bear in mind that in neither of the cases before us was the accused charged with attempting to cozen or cheat anyone. There is provision for a charge of that kind in the section of the statute, but it is not under that part of the section that the complaints are brought. The only question is whether the machines which were found on the premises of the accused were for the purpose of practising games of hazard in order to induce or entice any person to play at such a game. Now, the finding of the Magistrate in *Forte* v. *Dewar* is, that to an ordinary member of the public having no special opportunity of acquiring skill at it, its working depended on chance, and he held that the machine was for practising a game of hazard. The Magistrate in the other case, *Ogilvie* v. *Benigno*, had an even stronger opinion to the same effect, and his reason was that owing to the construction of the machine there was no possibility of learning to win on every occasion by any amount of skill. It seems to me there is no reason for making the smallest distinction between the two machines. Both are for playing games of hazard. I think it most undesirable that we should attempt to lay down any rule as to what amount or admixture of skill is requisite to exclude the case from the operation of the statute. Both magistrates found a sufficient element of chance to bring the machines under the statutory description; and the mere fact that something was given back to the unsuccessful player does not detract from the character of the game.

THE COURT pronounced the following interlocutors:—

*In Forte* v. *Dewar*:—"Answer the question in the case in the affirmative: Dismiss the appeal, and decern."

*In Ogilvie* v. *Benigno*:—"Answer the question in the case in the negative: Find that the Magistrates ought to have convicted the respondent: Sustain the appeal, and decern."

LINDSAY COOK & DICKSON, Solicitors—DAVID R. M'CANN, S.S.C.—W. M. MORRIS, S.S.C.—CORNILLON, CRAIG, & THOMAS, S.S.C.—Agents.

No. 19.

July 13, 1905.
Peters v. Olsen.

DAVID PETERS (Procurator-Fiscal of Sutherlandshire), Appellant.—*Sol.-Gen. Salvesen—Younger, K.C., A.-D.—Blackburn, A.-D.*
MARTIN OLSEN, Respondent.—*Campbell, K.C.—Hunter.*

*Jurisdiction—River, Loch, Sea—Territorial Waters—Three-mile limit—Fishing—Trawling—Herring Fishery (Scotland) Act*, 1889 (52 *and* 53 *Vict. cap.* 23), *sec.* 6, *and Schedule.—Held* that sec. 6 of the Herring Fishery (Scotland) Act, 1889, prohibiting otter-trawling in, *inter alia*, the Dornoch Firth as defined by the Act, applied to foreign trawlers.

No. 19.

July 18, 1905.
Peters v. Olsen.

HIGH COURT.
Lord Justice-Clerk.
Ld. Kyllachy.
Ld Stormonth-Darling.

ON 28th February 1905 Martin Olsen, 26 Hart Street, Grimsby, was charged in the Sheriff Court at Dornoch, on a summary complaint at the instance of the Procurator-fiscal of Sutherlandshire, setting forth "that Martin Olsen, of 26 Hart Street, Grimsby, did, on 19th February 1905, in a part of the Dornoch Firth situated four and a quarter miles south quarter east (magnetic) from Brora Point, in the parish of Clyne and county of Sutherland, while acting as master or the person for the time being in command of the steam trawler 'Catalonia,' S.R. 9, of Stavanger, Norway, use the method of fishing known as otter-trawling in the foresaid part of the Dornoch Firth, which firth is part of the waters specified in the schedule annexed to the Herring Fishery (Scotland) Act, 1889, and bye-law No. 2, made by the Fishery Board for Scotland, under the powers conferred on said Board by the Sea Fisheries (Scotland) Amendment Act, 1885, dated, said bye-law, at Edinburgh on 18th April 1887, and confirmed by the Secretary for Scotland on 27th June 1887, contrary to the Herring Fishery (Scotland) Act, 1889, section 6, whereby he has rendered himself liable, in terms of said Act, as amended by section 3 of the Herring Fishery (Scotland) Act Amendment Act, 1890,* to a fine not exceeding £100,

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* The Herring Fishery (Scotland) Act, 1889 (52 and 53 Vict. cap. 23), enacts:—

Sec. 6. "(1) It shall not be lawful to use the method of fishing known as beam-trawling or otter-trawling within three miles of low-water mark of any part of the coast of Scotland, nor within the waters specified in the schedule hereto annexed, save only between such points on the coast or within such other defined areas as may from time to time be permitted by bye-laws of the Fishery Board for Scotland, and subject to any conditions or regulations made by those bye-laws. . . .

"(2) The Fishery Board may from time to time make, alter, and revoke bye-laws for the purposes of this section, but a bye-law shall not be of any validity until it is confirmed by the Secretary for Scotland."

Subsec. (3) was repealed by the Herring Fishery (Scotland) Act Amendment Act, 1890 (53 and 54 Vict. cap. 10), sec. 3, and the following substituted:—"Any person who uses any method of fishing in contravention of the 6th section of the Herring Fishery (Scotland) Act, 1889, or of any bye-law of the Fishery Board duly confirmed, shall be liable, on conviction under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds, and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or arrestment, if no imprisonment has followed on the conviction; and every net set or attempted to be set, in contravention of this section, shall be forfeited, and may be seized and destroyed or otherwise disposed of by any superintendent of the herring fishery or other officer employed in the execution of the Herring Fishery (Scotland) Acts."

The schedule to the Act of 1889, under the heading "As specified in the existing bye-laws of the Fishery Board," sets forth, *inter alia*, the "Dornoch Firth."

Bye-law (No. 2) made by the Fishery Board for Scotland under the powers conferred on the Board by the Sea Fisheries (Scotland) Act, 1885, dated 18th April 1887, and duly confirmed by the Secretary for Scotland, 27th June 1887, provided as follows:—

"I. This bye-law shall extend and apply to that part of the sea inside of a line drawn from the Ord of Caithness, along the coast at a distance of three miles to a point opposite Brora, thence to Tarbet Ness Lighthouse, thence along the coast at a distance of three miles to a point opposite Balintore, thence to a point a mile west of the mouth of the Findhorn river, and

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and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, and further, to forfeiture of every net set or attempted to be set by him at the time and place libelled in contravention of the Act and section last above mentioned."

The accused objected that he was not subject to the jurisdiction of the Court, and under reservation of that objection pleaded not guilty.

The Sheriff-substitute (Mackenzie), after evidence had been led in support of the complaint, pronounced this judgment:—"Finds, as regards the contravention charged, that the accused is not subject to the jurisdiction of this Court, and dismisses the complaint."

The Procurator-fiscal obtained a case for appeal, which set forth as follows:—

"The respondent stated, as a preliminary objection, that said steam trawler being registered in Norway, and Norway not being one of the Powers signatory to the International Convention relating to Fisheries, dated 6th May 1882,* he was not subject to the jurisdiction of Dor-

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thence along the coast at a distance of three miles to a point due north (magnetic) from Kinnairdhead Lighthouse.

"II. Within the foresaid limits, no person, unless in the service of the Fishery Board for Scotland, shall at any time from the date when this bye-law comes into force use any beam trawl for taking sea fish; and the master or the person actually in command of any vessel acting in contravention of this bye-law shall, on conviction, be liable to a fine not exceeding £100; and failing immediate payment of the fine, to imprisonment for a period not exceeding sixty days, without prejudice to diligence by poinding or imprisonment, if no imprisonment has followed on the conviction, all in terms of the said Act.

"III. This bye-law shall come into force on Monday, the 4th of July next."

* The Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), entitled "An Act to carry into effect an International Convention concerning Fisheries in the North Sea and to amend the laws relating to British Sea Fisheries," enacts:—

Sec. 2. "The Convention set out in the first schedule to this Act (referred to in this Act as the Convention) is hereby confirmed, and the Articles thereof shall be of the same force as if they were enacted in the body of this Act."

Sec. 7. "(1) A foreign sea-fishing boat shall not enter within the exclusive fishery limits of the British Islands, except for purposes recognised by international law, or by any convention, treaty, or arrangement for the time being in force between Her Majesty and any foreign state, or for any lawful purpose.

"(2) If a foreign sea-fishing boat enters the exclusive fishery limits of the British Islands,

"(*a*) The boat shall return outside of the said limits so soon as the purpose for which it entered has been answered;

"(*b*) No person on board the boat shall fish or attempt to fish while the boat remains within the said limits;

"(*c*) Such regulations as Her Majesty may from time to time prescribe by Order in Council shall be duly observed.

"(3) In the event of any contravention of this section on the part of any foreign sea-fishing boat, or of any person belonging thereto, the master or person for the time being in charge of such boat shall be liable on summary conviction to a fine not exceeding in the case of the first offence, ten pounds, and in the case of the second or any subsequent offence, twenty pounds."

Sec. 28. "In this Act," *inter alia*,

"The expression 'exclusive fishery limits of the British Islands' means

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noch Sheriff Court, and, under reservation of said preliminary objection, pleaded not guilty.

"It was proved that said steam trawler was registered in Stavanger, Norway.

"It was further proved that the respondent did on 19th February 1905, in a part of the Dornoch Firth situated four and a quarter miles south quarter east (magnetic) from Brora Point, in the parish of Clyne and county of Sutherland, while acting as master or the person for the time being in command of the said steam trawler, use the method of fishing known as otter-trawling; and there was produced by one of the appellant's witnesses the accompanying official Admiralty chart, having laid down thereon a blue cross shewing the foresaid position of said steam trawler.

"It was proved that the Dornoch Firth is part of the waters specified in the schedule annexed to the Herring Fishery (Scotland) Act, 1889, and said bye-law No. 2, by the production by another of the appellant's witnesses of the accompanying copy of a 'Manual of Sea Fisheries (Scotland) Acts and Statutory Bye-laws in force at 31st December 1900,' containing said bye-law No. 2 at page 254.

"The Sheriff-substitute, giving effect to the respondent's preliminary objection, found, as regards the contravention charged, that said steam trawler being registered in Norway (and Norway not being signatory to said International Convention), and being outside the three-mile limit while engaged in trawling, the respondent was not subject to the jurisdiction of Dornoch Sheriff Court, and dismissed the complaint."

The question of law was:—"Whether, in view of the facts stated as proved, and having regard to the enactments in section 6 of the Herring Fishery (Scotland) Act, 1889, as amended by section 3 of the Herring Fishery (Scotland) Act Amendment Act, 1890, the respondent was subject to the jurisdiction of Dornoch Sheriff Court?"

Argued for the appellant;—From the finding of the Sheriff-substitute, as expressed in the case, it was not clear whether he held that

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that portion of the seas surrounding the British Islands within which Her Majesty's subjects have, by international law, the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any foreign state, includes, as regards the sea-fishing boats and officers and subjects of that state, the portion so defined."

The parties to the Convention confirmed by sec. 2 of the Act were Her Majesty; His Majesty the Emperor of Germany; His Majesty the King of the Belgians; His Majesty the King of Denmark; the President of the French Republic; and His Majesty the King of the Netherlands.

Article II. of the Convention was in the following terms:—

"The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

"As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles.

"The present article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs."

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no Court in Scotland had jurisdiction to try a Norwegian for an offence against sec. 6 of the Herring Fishery (Scotland) Act, 1889, or merely that the Sheriff Court at Dornoch had not such jurisdiction. The case did not raise any question of that sort. If the respondent was subject to the jurisdiction of the Scots Courts, it was plain that the Sheriff Court at Dornoch had jurisdiction. Nor was it clear whether the Sheriff-substitute proceeded on the ground that it was *ultra vires* of the Legislature to subject Norwegians to the jurisdiction of the Scots Courts since Norway was not a party to the International Convention scheduled to the Sea Fisheries Act of 1883; or on the ground that sec. 6 of the Herring Fishery (Scotland) Act, 1889, could not, upon its construction, be held to apply to Norwegians, Norway not being a party to the International Convention. If the former was the Sheriff-substitute's ground of judgment he was plainly wrong. It was a settled constitutional principle in this country that the Courts of law had no jurisdiction to determine that an Act of Parliament was *ultra vires* of the Legislature. The jurisdiction of the Courts was limited to construing the Act, and if the construction which the language of the Act required in the judgment of the Court caused, or was likely to cause, international complications, that was a matter for legislative action, for diplomacy, or, in the last resort for war, but not for the Court. The Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 687, and the Act 48 Geo. III. cap. 110, sec. 60, were examples of statutes which conferred a wide extra-territorial jurisdiction on the Courts of this country. If, on the other hand, the Sheriff-substitute meant that sec. 6 of the Herring Fishery (Scotland) Act, 1889, while it might apply to foreigners belonging to a country which was a party to the International Convention, did not apply to foreigners like Norwegians, whose country was not a party to the Convention, then the Sheriff-substitute mistook the question at issue, which was as to the construction of sec. 6 of the Herring Fishery Act of 1889, and on that question the International Convention and the Sea Fisheries Act of 1883, to which the Convention was scheduled, had only an indirect bearing. Sec. 6 of the Act of 1889 was expressed in absolutely general terms as regarded the persons to whom it applied, and the question was—Did the section, notwithstanding the generality of its terms, apply only to British subjects, or was it to be construed according to its language taken literally, and therefore as applying also to foreigners? But if it applied to foreigners at all, it applied to all foreigners; there was nothing to suggest that on this question as to the construction of sec. 6 of the Act of 1889 a distinction was to be drawn between foreigners according as they did or did not belong to a country which was a party to the International Convention. If the British Legislature professed to legislate for the high seas—if, for example, sec. 6 of the Act of 1889 had been absolutely general in its terms, not only as to the persons to whom it was to apply, but also as regarded the area to which it was to apply—then it was conceded that the Legislature was presumably legislating for its own subjects only, and that foreigners were presumably excluded; but if the Act was confined to waters which were *prima facie* territorial waters, the presumption was the other way, and foreigners were presumably included. The question here was as to whether the latter presumption had been rebutted, for obviously sec. 6 of the Act of 1889 was not legislation for the high seas. In order to rebut this

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presumption, it was not sufficient to shew that the area which was declared to be the area of the enactment was not within, or wholly within, territorial waters according to the rules of international law; or, to take the present case, that the rule as regarded bays of Art. II. of the International Convention was an arbitrary rule agreed to by the parties to the Convention, and not a rule of international law; or that a line drawn in accordance with bye-law No. 2 of the Fishery Board would not comply with the rule of Art. II. of the Convention. If the words of the Act shewed that the Legislature had in view only what it regarded, or chose to regard, as territorial waters, the presumption in favour of the inclusion of foreigners applied. If foreign nations took a different view as to the character of the waters, that, as already pointed out, was not a matter for the Courts of this country. Plainly in the present instance the Legislature regarded bye-law No. 2 of the Fishery Board as an application of the rule of international law in regard to bays—the rule embodied in Article II. of the Convention. The question of law ought therefore to be answered in the affirmative.

Argued for the respondent;—(1) The Sheriff-substitute had no jurisdiction to try this complaint even if the *locus* was within the three-mile limit, because the respondent was a foreigner, and the offence took place on board a foreign vessel. Apart from international convention, there was no restriction of the right of foreign fishermen to fish even within the three-mile limit, not being *intra fauces terræ*.[1] In the case of the "*Franconia*"[2] it was held that the foreign master of a foreign vessel which had run down another vessel within the three-mile limit was not subject to the jurisdiction of the Criminal Courts of this country on account of the collision. In consequence of that decision the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict. cap. 73), was passed to give the Courts of this country criminal jurisdiction over foreigners within the three-mile limit; but that Act had nothing to do with fishing offences like the present. But (2) if foreign trawlers had, by international law, no right to fish within the three-mile limit that did not affect the respondent in the present case, because the *locus* of the alleged offence was not within the three-mile limit. *De facto* the *locus* was not within the three-mile limit in this sense that it was more than three miles from any land. It might be that it was within the three-mile limit as defined with respect to bays by Art. II. of the International Convention, but Norway was not a party to that convention, and Norwegian subjects would be bound by the rule there laid down only if the rule was in accordance with international law, which it was not. It was an arbitrary rule which the signatories to the convention had seen fit to make for themselves. That this was the opinion of the Legislature was plain from sec. 7 of the Sea Fisheries Act of 1883 to which the International Convention was scheduled, taken along with the definition of "the exclusive fishery limits of the British Islands" in sec. 28 of the same Act. If the Acts of 1883 and of 1889 were read together could it be said that the Legislature intended sec. 6 of the Act of 1889 to apply to foreigners? The International Convention might bring subjects of the signatory Powers within sec. 6 of the Act of 1889, but it plainly excluded the

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[1] Lord Advocate v. Clyde Trustees, Nov. 25, 1891, 19 R. 174.
[2] The Queen v. Keyn, 1876, L. R., 2 Exch. Div. 63.

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subjects of a Power which was not a signatory. This prosecution was simply an attempt to treat Norway as if it were a signatory.

LORD JUSTICE-CLERK.—The question in this case is whether the respondent was subject to the jurisdiction of the Dornoch Sheriff Court under a complaint that he had committed a breach of the Herring Fishery laws. Now, that question seems to me to come to depend very much on the interpretation to be put on bye-law 2 of the Fishery Board, which has the authority of an Act of Parliament—whether, taking such a line crossing the Dornoch Firth as is given in that part of the bye-law, the place was within or without the limit which was so statutorily fixed. The bye-law itself is not very well drawn. It is rather blundered, for I have not the slightest doubt in my own mind that the intention of the bye-law was, that coming down the coast from the north at three miles from the shore, you were to stop at the point at which on that line you were exactly three miles from Brora, and that you were then to draw a line across to the other side of the Firth to where the line coming from the south three miles off from the coast was exactly three miles from Tarbet Ness. I think that was the intention, but the bye-law is not so expressed. The bye-law is expressed that it "shall extend and apply to that part of the sea inside of a line drawn from the Ord of Caithness, along the coast at a distance of three miles to a point opposite Brora, thence to Tarbet Ness Lighthouse, thence along the coast at a distance of three miles to a point opposite Balintore." So that the point at which the line was to run across from the direction of Tarbet Ness was a line drawn straight from Tarbet Ness to the point opposite Brora, as being the point which was three miles from Brora. Of course that will make a difference, because a line so drawn will be, on the south end, considerably further inwards of the Firth than a line drawn from a point which is reached exactly three miles from Tarbet Ness on the line three miles from the coast coming from the south. But I think we are relieved altogether from any difficulty in regard to that, because of course in a case of this kind one must look to the chart in order to make things intelligible, and I am perfectly satisfied on examination of the chart that were you to draw a line from a point three miles outside Brora to Tarbet Ness or to a point three miles outside Tarbet Ness—in both those cases the place where the blue cross is is within the line. That seems quite sufficient for the disposal of this case, and accordingly I think that the question in the case should be answered in the affirmative.

LORD KYLLACHY.—I concur. When the case is quite understood, it seems to me to be fairly simple. The position is this: The Legislature has by a certain statute made it an offence cognisable and punishable by the judicatories of this country to fish in a certain manner within certain waters specified in a certain bye-law of the Fishery Board for Scotland. There can be no doubt, for the reasons explained by your Lordship, that the defender, a foreigner, did fish in the prohibited manner within those waters. The question is whether the fact that he is a foreigner excludes him from the operation of the enactment.

It is not disputed that if the statute, upon its just construction, applies

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to foreigners, and does so without qualification express or implied, the Court of the Sheriffdom of Ross and Sutherland, and this Court by way of review, have full jurisdiction to try and to punish foreigners equally with British subjects for offences of the nature specified. To affirm the contrary would be to affirm that His Majesty's Judges, inferior or superior, are at liberty to canvass or question the authority of Acts of Parliament on the ground that they contain enactments to which other nations may take exception as contrary to international law.

It was, however, contended by the respondent that the enactment in question did not upon its just construction apply to foreigners, at least as regards any part of the waters specified in the bye-law, which, upon the doctrines of international law, are outside territorial limits. And it was in that view submitted to us, as a proposition justifying the Sheriff-substitute's declinature to exercise jurisdiction as against the respondent, that the particular place where the offence here is said to have been committed was, although within the waters specified in the bye-law, yet, on the principles of international law, outside territorial waters.

I am quite unable to sustain this contention for two reasons, each of which is I think conclusive.

In the first place I cannot put upon the enactment the limited construction which is suggested. It appears to me that its language is quite general, and that it makes no exception, express or implied, such as the respondent suggests.

But in the next place I am equally unable to hold that there was, or is, here involved any question of extra-territorial waters. The place where the offence was committed was—as I understand the doctrines of international law applicable—well within territorial limits. In other words it was, in my opinion, well within the three-mile limit as generally interpreted, and particularly within the definition of that limit expressed (I think in entire consonance with international law) by article 2 of the International Convention of 1882. So soon as the chart put before us and referred to in the Sheriff-substitute's judgment was understood, it appeared to me, and I think did so to all your Lordships, that that was quite manifest.

LORD STORMONTH-DARLING.—We are told in this case that the respondent did, on 19th February 1905, use the method of fishing called otter-trawling in a part of the Dornoch Firth, at a point marked by a blue cross on the accompanying Admiralty chart. It is said that this was not within three miles of low-water mark of any part of the coast of Scotland, but if it was within the waters specified in the schedule annexed to the Act, it was equally a contravention of the 6th section. Now, the schedule specifies the Dornoch Firth, and it refers to the existing bye-laws of the Fishery Board as defining the Dornoch Firth. When we turn to bye-law No. 2, issued by the Board and confirmed by the Secretary for Scotland in June 1887, we find a line drawn, which as your Lordship in the chair has explained, includes the point marked by the blue cross.

The method of fishing therefore used by the respondent on the day charged in the complaint constituted a contravention of the 6th section of the Herring Fishery (Scotland) Act, 1889. The section makes no distinc-

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tion between British subjects and foreigners, or between British ships and foreign ships. It is not for a Court of law to make a distinction which Parliament has not seen fit to make. While the three-mile limit may be taken in ordinary circumstances as defining the territorial waters within which every State has the same jurisdiction and right of absolute regulation as it has over its own land territory, a modification of this rule has always been recognised to meet the case of land-locked estuaries, lochs, and bays. The Loch Long case[1] is conclusive as to land-locked waters. The seaward limit of a bay on the open coast may be more difficult to define, but where (as here) Parliament has assumed the responsibility of defining it, the Courts of this country are bound to carry out its behests, and for that purpose to exercise their jurisdiction. I therefore agree that the question of law should be answered in the affirmative.

LORD JUSTICE-CLERK.—I should have said that in my opinion I had no doubt on the question whether under the statute and regulation this place —for it falls within the line fixed by the bye-law—was a place as to which the Court was bound to hold that everybody must be deemed to be subject to the law regulating the fisheries, whether British subject or foreigner.

THE COURT answered the question in the affirmative, and sustained the appeal.

CROWN AGENT—ANDREW GORDON, Solicitor—Agents.

No. 20.
July 14, 1905.
Todd v. Priestly.

HUGH TODD (Procurator-Fiscal of Wigtownshire at Wigtown), Appellant.—*Sol.-Gen. Salvesen—Deas, A.-D.*
THOMAS PRIESTLY, Respondent.—*Garson.*

*Proof—Witness—Evidence of youth released under First Offenders Act,* 1887 (50 *and* 51 *Vict. cap.* 25)—*Competency.*—A, B, and C having been charged with theft the charge was not proceeded with against A and B. C pleaded guilty, and was conditionally released under the First Offenders Act. The prosecutor having brought a new complaint against A and B tendered C as a witness. *Held* that C's evidence was admissible.

HIGH COURT. Lord Justice-Clerk. Ld. Kyllachy. Ld Stormonth-Darling.

ON 21st March 1905 Thomas Dickson, butcher, Newton-Stewart; James Kelly, grandson of and residing with William Kelly, labourer, King Street, Newton-Stewart; and Thomas Priestly, postrunner, residing in Newton-Stewart, were charged in the Sheriff Court at Wigtown on a summary complaint at the instance of the Procurator-fiscal, setting forth that the accused had broken into coachbuilding premises in Newton-Stewart, and stolen therefrom six brass carriage cups and twelve brass nuts.

When the complaint was called in Court only Kelly appeared, Dickson and Priestly being then in jail. Kelly pleaded guilty, and was conditionally released under the First Offenders Act.

The deliverance was in the following terms:—"At Wigtown, the 21st day of March 1905. The Sheriff-substitute, in respect of the judicial confession of the said James Kelly, finds the said James Kelly guilty of the crime charged; and in respect of his being only

[1] 19 R. 174.

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seventeen years of age, and of the trivial nature of the offence, and he having engaged to appear and receive judgment when called upon at any time during six calendar months from this date, and in the meantime to keep the peace and be of good behaviour, directs him to be released."

Thereafter, in April 1905, another complaint containing the same charge was brought against Dickson and Priestly.

Dickson and Priestly both pleaded not guilty.

The Procurator-fiscal having called Kelly, proposed to tender him as a witness for the prosecution.

The agent for Priestly objected on the ground that Kelly had already been charged with and convicted of the offence, and had been sentenced under the First Offenders Act.

The Sheriff-substitute (Watson) sustained the objection.

Evidence having been led in support of the complaint and in exculpation, the Sheriff-substitute, in respect of the evidence adduced, found Dickson guilty, and sentenced him to be imprisoned for ten days; and assoilzied Priestly.

The Procurator-fiscal appealed against the decision assoilzieing Priestly.

The case for appeal set forth the foregoing facts.

The question of law stated by the Sheriff-substitute was:—"Whether, in the circumstances, I was right in holding that the evidence of the said James Kelly was not admissible?"

The appellant argued that the Sheriff-substitute was plainly wrong in rejecting the evidence of Kelly.[1]

The respondent argued;—The Sheriff-substitute was right. A person who had been conditionally released under the First Offenders Act was not in the same position as a person who had been convicted and sentenced, or as a person who had consented to give King's evidence.

LORD JUSTICE-CLERK.—There can be no doubt that it is quite competent for a prosecutor to call as a witness anyone who was guilty of the crime along with the accused. There is a condition attached to this to the effect that he cannot afterwards prosecute such person for the crime. But here there is no case of that kind. This person whom the prosecutor sought to adduce as a witness had been already brought up, had pleaded guilty, and had been dealt with, although that took the form, not of imprisonment but of giving him the benefit of the First Offenders Act. But when another person was brought up, I cannot see what possible objection there could be to receiving the evidence of the person whose case had been disposed of, and why it should not have been held competent I am unable to understand.

If the Sheriff thought it required authority to decide the question, the inquiry should have been directed to see whether there was any authority against the competency of the evidence. There is no law in this country, either common law or statute, which places any restriction on the competency of anyone to give evidence except in certain well-defined cases. In the present case there is certainly no practice, and the tendency of recent statutes is all in the direction of removing the disabilities of witnesses,

[1] Dickson on Evidence, 3rd ed., sec. 1560.

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where such had been established either by statutory enactment or by practice.

LORD KYLLACHY concurred.

LORD STORMONTH-DARLING.—I am of the same opinion. I should only like to add that it has never, so far as I know, been doubted that, when a man is accused of a crime with another, and that other has been tried and convicted, he may be adduced as a witness. I have seen that done not long ago, when he was put into the witness-box by the accused. If he is competent as a witness for the accused, he must be equally so as a witness for the Crown. I cannot see what possible objection there can be.

THE COURT answered the question in the negative, and sustained the appeal.

CROWN AGENT—SIMPSON & MARWICK, W.S.—Agents.

# CASES

DECIDED IN

# THE COURT OF SESSION, &c.

## 1904–1905.

## WINTER SESSION.

No. 1.

Oct. 25, 1904.
Turnbull v. Inland Revenue.

STEWART ROBERTSON TURNBULL, Appellant.—*T. B. Morison.*
SOLICITOR FOR INLAND REVENUE, Respondent.—*Sol.-Gen. Dundas—A. J. Young.*

*Revenue—Income-Tax—Residence in United Kingdom—Income-Tax Act*, 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2—*Income-Tax Act*, 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 39.—A British merchant carried on business in Madras, and usually resided there, but his wife, with the children, lived for a number of years in the United Kingdom, occupying latterly a house belonging to her and purchased with his and her money, and he resided with them for months at a time when he came to the United Kingdom, as he did nearly every year. In the year of assessment ending 5th April 1903 he was never in the United Kingdom. In a question as to his liability to be assessed for income-tax for that year, *held* that he was not a person "residing in the United Kingdom" within the meaning of the Income-Tax Act, 1853, and therefore not liable to assessment.

2D DIVISION. Court of Exchequer.

STEWART ROBERTSON TURNBULL, merchant, Madras, and of 2 Corrennie Gardens, Edinburgh, appealed to the Commissioners of Income-tax, against an assessment upon £720 for the year ending 5th April 1903 made upon him under Schedule D of the Income-Tax Acts in respect of profits received in the United Kingdom from his business in Madras. The ground of appeal was that he was not a person resident within the United Kingdom during the year of assessment within the meaning of section 2, Schedule D, of the Income-Tax Act, 1853.*

The Commissioners refused the appeal, and confirmed the assessment.

At the instance of the appellant they stated a case for appeal, in which they found that the following facts were admitted or proved:—"(*a*) The appellant is a subject of His Majesty. He has carried on business for forty years as a merchant in Madras, where, besides his business premises, he has a residence, in which he usually resides. His wife has for a number of years resided with their children in the

* Under section 2, schedule D, of the Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), duty is payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere."

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United Kingdom, and the appellant has latterly visited them for a shorter or longer period nearly every year. (*b*) He did so for six months in the year ending 5th April 1901, and for eight months in the year ending 5th April 1902. (*c*) For a number of years prior to Whitsunday 1900 the appellant's wife rented furnished houses in this country, in which she and the children resided, but in that year she purchased a dwelling-house, known as No. 2 Corrennie Gardens, Edinburgh, the money being provided partly by the appellant and partly by his wife. The conveyance to the house was taken to the appellant's wife and her heirs and assignees. (*d*) The appellant and his wife were not in the United Kingdom at any time during the year of assessment, that is the year ending 5th April 1903, but during the whole of that year the children (except the eldest daughter), and the servants, in charge of a lady superintendent, who also lived in the house, occupied the house at No. 2 Corrennie Gardens, Edinburgh. (*e*) The amount received in the United Kingdom from the profits of the business in Madras for defraying the cost of his household expenses and the education of his children in this country was estimated to be £720, on an average of three years preceding the 5th April 1902."

Argued for the appellant;—This was a case where there was no residence in the United Kingdom. As a matter of fact the appellant had not been within the United Kingdom at all during the year of assessment. Even if other years were considered his occasional residence there would not, under the provisions of section 39 of the Income-Tax Act, 1842,* render him liable for duty. The mere fact that a man's wife and children resided in the United Kingdom could not make him resident there. Residence was a question of fact, and in fact the appellant was resident in Madras. The case of *Lloyd*[1] was distinguishable, because there the appellant had in fact resided in the United Kingdom during a great part of the year of assessment. In that case he had two residences, one in the United Kingdom, one in Italy. In the present case there was only one residence—in Madras.

Argued for the respondent;—The duty was payable because the

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* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), enacts (section 39), —"Any subject of Her Majesty whose ordinary residence shall have been in Great Britain, and who shall have departed from Great Britain and gone into any parts beyond the seas, for the purpose only of occasional residence, at the time of the execution of this Act, shall be deemed, notwithstanding such temporary absence, a person chargeable to the duties granted by this Act as a person actually residing in Great Britain . . . Provided that no person who shall on or after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at one time or several times for a period equal in the whole to six months in any one year,-shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain in respect of the profits or gains received from or out of any possessions in any of Her Majesty's dominions or any foreign possessions or from securities in any of Her Majesty's dominions or foreign securities, but nevertheless every such person shall, after such residence in Great Britain, for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the sixth day of April preceding."

[1] Lloyd v. Solicitor of Inland Revenue, March 12, 1884, 11 R. 687.

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appellant had a fixed residence here. The fact of a residence made a man liable to assessment, whether he was actually there or not.[1]

LORD JUSTICE-CLERK.—I think that the deliverance of the Commissioners here is wrong. We are dealing with a case in which during a whole year, the year of assessment, the person who was to be assessed as residing in this country was never in this country. The only case that has been quoted to us is a case in which the person was residing in this country for a certain time during the year, and that completely differentiates the circumstances from those in this case. This gentleman has a usual residence in Madras, where he carries on business, and he was in that usual residence for the whole of the year of the assessment. It seems to me in these circumstances that it is not according to the sound reading of the statute to hold that his usual residence during the whole of that year was in the United Kingdom.

LORD YOUNG concurred.

LORD TRAYNER.—I concur. I think the sections of the statute quoted to us along with the admission in the statement by the Commissioners afford an answer to the question put to us. It is admitted that this gentleman has a residence and place of business in Madras where he usually resides. I take it, and it was conceded at the Bar, that when you talk of a man's usual residence you talk of his "ordinary residence." If that is so, then section 39 of the Act of 1842 covers the case, "Any subject of Her Majesty whose ordinary residence shall have been in Great Britain" shall be liable; but this gentleman had not his ordinary residence in Great Britain, for *ex confesso* his ordinary residence was in Madras. Section 2 of the Act of 1853, which is the charging section, says duties shall be payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom." The test of liability is not having a residence in the United Kingdom, it is residing in the United Kingdom. I think that to suggest that this gentleman was residing in the United Kingdom is contrary to the plain meaning of the admission to which I have already referred, and is contrary to the fact, for during the whole year of assessment he was residing in Madras, and not in Great Britain at all. I therefore think with your Lordships that the Commissioners were wrong.

LORD MONCREIFF.—I am of the same opinion. During the year of assessment ending 5th April 1903, this gentleman was not residing in this country at all. I do not think that that fact taken by itself would be by any means conclusive, because if he had been travelling, or had been a mariner and had been absent the whole of the year, I do not think that would have prevented him from having a residence in this country. But, then, in addition to that, we find that his business is in Madras, and that I take to be his usual place of residence. It is quite true that between the years 1899 and 1901 he occasionally visited this country for longer or

[1] Rogers v. Solicitor of Inland Revenue, June 28, 1879, 6 R. 1109; Lloyd v. Solicitor of Inland Revenue, *supra*; Attorney-General v. Coote, 1817, 4 Price, 183.

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shorter periods. That was for the purpose of seeing his wife and children, who, I presume, resided here because they were unable to stand the climate of India. Looking to the whole of the facts taken together, I think the fair inference is that his residence in the sense of the statute was not in this country.

THE COURT reversed the determination of the Commissioners.

WEBSTER, WILL, & Co., S.S.C.—PHILIP J. HAMILTON GRIERSON, Solicitor for Inland Revenue—Agents.

No. 2.

Oct. 26, 1904. M'Gilp v. Caledonian Railway Co.

ALEXANDER M'GILP, Pursuer.—*Dewar, K.C.—A. M. Anderson.*
THE CALEDONIAN RAILWAY COMPANY, Defenders.—*Guthrie, K.C.—MacRobert.*

*Expenses—Jury Trial—Modification.*—In an action raised in the Court of Session by an inspector of police against a railway company for £500 of damages for assault, the jury awarded £10 of damages. The defenders had made no tender.

The defenders moved that expenses to the pursuer should be subject to modification, in respect that the case should have been tried in the Sheriff Court.

The Court *refused* the motion.

1ST DIVISION. ALEXANDER M'GILP, inspector of police, Greenock, raised an action in the Court of Session against the Caledonian Railway Company in which he claimed £500 as damages for assault committed upon him by three servants of the Company, acting within the scope of their employment.

The case was tried before the Lord President and a jury.

The jury awarded the pursuer £10 of damages. The defenders had made no tender.

The pursuer having moved the Court to apply the verdict and find him entitled to expenses, the defenders moved that expenses to the pursuer should be modified, and argued;—The case should have been raised and tried in the Sheriff Court. The Court would modify expenses when the trifling sum awarded shewed that the case should have been tried in the Sheriff Court.[1] [LORD KINNEAR.—Is there any case in which expenses have been modified, under circumstances similar to the present, in an action raised in the Court of Session?] It was true that the cases quoted had originated in the Sheriff Court, but here the argument in favour of modification was even stronger because of the increased expense unnecessarily incurred in the initial stages of the action.

Counsel for the pursuer were not called upon.

LORD PRESIDENT.—I see no ground for modification in this case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT refused the defenders' motion, and applied the verdict, with expenses to the pursuer.

ALEX. RAMSAY, S.S.C.—HOPE, TODD, & KIRK, W.S.—Agents.

[1] Shearer v. Malcolm, Feb. 16, 1899, 1 F. 574; Brennan v. Dundee and Arbroath Joint Railway, May 26, 1903, 5 F. 811; Lafferty v. Watson, Gow, & Co., Limited, June 3, 1903, 5 F. 885.

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THOMAS LENNOX BRYCE, Pursuer (Appellant).—*Salvesen, K.C.—Macmillan.*
BENZION EHRMANN, Claimant (Respondent).—*Mackenzie, K.C.—M'Clure.*

*Sale—Right in Security—Sale on Approbation—Goods pawned by retail dealer—Title of pawnbroker—Loss arising by fraud on two innocent parties—Sale of Goods Act*, 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 18, *Rule* 4 (*a*).—Ehrmann, a wholesale jeweller, was in the habit of sending goods to Anderson, a retail jeweller, with the wholesale prices marked, with power to sell and deliver on his own account and for his own profit any articles he might sell, Anderson being liable only for the wholesale price. At the same time Ehrmann sent a printed notice headed "approbation note," stating that the goods were to remain the property of the sender till invoiced by him to Anderson. Anderson having retained a diamond necklace for several months, Ehrmann in April 1903 urged Anderson to purchase the necklace himself, and offered to take bills for the price. Anderson agreed to do so, and the necklace was invoiced to him, and the bills were granted by him.

Anderson having subsequently become bankrupt, Bryce, a pawnbroker, with whom Anderson had in December 1902, without Ehrmann's knowledge, pledged the necklace, raised an action of multiplepoinding to determine the right thereto.

Claims were lodged by Ehrmann, by Bryce, and by Anderson's trustee, but the claim by the last was not insisted in.

*Held* (1) that as in December 1902 Anderson had been put by Ehrmann in a position to give a good title to a purchaser, he could validly pledge the necklace, and had validly pledged it to Bryce; (2) that as Anderson's trustee did not insist in his claim Ehrmann was entitled to delivery of the necklace after satisfying Bryce's claim.

*Brown* v. *Marr, Barclay, &c.*, 7 R. 427, *approved.*

2D DIVISION. Sheriff of Lanarkshire.

IN August 1903 an action of multiplepoinding was raised in the Sheriff Court at Glasgow by T. L. Bryce, pawnbroker, Glasgow, for the purpose of determining the right to a diamond necklace which had been pledged with him on 18th December 1902 by Robert Anderson, jeweller, 13 South Exchange Street.

The circumstances in which the action was raised were stated in a joint minute of admissions by the three claimants after-mentioned. "(1) The claimant, Benzion Ehrmann, is a wholesale jeweller in London, and he was in the habit of sending articles of jewellery on sale or approbation to Robert Anderson, manufacturing jeweller, Glasgow. The terms on which the goods were so sent were that Robert Anderson was to endeavour to effect a sale of the same, and in the event of his doing so he was to be entitled to purchase them from Ehrmann at a price specified by the latter in an approbation note which accompanied each parcel of goods. It was further agreed that all such goods should remain the property of Ehrmann until invoiced by him to Anderson, and that until so invoiced such goods were to be returned to Ehrmann on demand. Each approbation note bore a printed memorandum to the effect that the foregoing were the terms on which the goods were supplied. (2) The claimant, Thomas L. Bryce, is a licensed pawnbroker and money-lender, and carries on business at 67 Oswald Street, Glasgow. A common and recognised branch of business among pawnbrokers and money-lenders consists in the occasional assistance of watchmakers and jewellers in the conduct of their business by the advance of money upon the pledge or

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pawn of goods to the extent of adequate security. For some years past Anderson has dealt with Bryce."

It was further stated that on 13th December 1902 Ehrmann sent to Anderson the necklace in question "on approbation on the terms before set forth." "(5) On 18th December 1902 Anderson, without the knowledge or consent of Ehrmann, pledged the necklace with Bryce against a loan. (6) Between 16th December 1902 and 24th April 1903 a correspondence took place between Anderson or his firm of Robert Anderson & Co. and Ehrmann. During the whole of the period covered by said correspondence the necklace was pledged with Bryce as aforesaid, but Anderson concealed this fact from Ehrmann, and led him to believe by his letter that he still had it and was endeavouring to sell it to a customer."

The correspondence produced included the following letters :—

Ehrmann to Anderson.

"London, E.C., April 21st, 1903.

"With reference to the two dd. necklaces, £64 and £110 [the one in question], and two pendants, £31 and £30=£235 in all, which has been so long in abeyance, I have to make the following proposal to you :—

"If you will accept invoice for these goods, I am prepared to draw for the amount at 3, 4, 5, or 6 months. This will enable you to take your own chance with your customer.

"As far as I am concerned, I will on no account leave the matter longer in abeyance.

"If you cannot get your customer to decide forthwith, or are not willing to agree to the above terms, I must ask you to return my goods without further delay."

Anderson to Ehrmann.

"Glasgow, 22nd April 1903.

"Dear Sir,—Send the bills, and I will accept them. . . ."

"(7) On or about 23d April 1903 Ehrmann invoiced the said necklace to Anderson as his absolute property along with certain other goods which had been sent to him on approbation by Ehrmann in the same manner. Bills of exchange were accepted by Ehrmann from Anderson in payment of the price of said goods, but the said bills have since been dishonoured and are still unpaid. (8) Anderson's estates were sequestrated under the Bankruptcy Acts on or about 9th July 1903, and the defender, William Brodie Galbraith, was thereafter elected and confirmed trustee thereon."

The printed approbation note bore :—"On approbation from B. Ehrmann, diamond merchant, wholesale and manufacturing jeweller.

"The goods specified below remain my property until invoiced by me, you in the meantime being responsible for loss or damage. All uninvoiced goods to be returned on demand."

Claims were lodged for Bryce, for Ehrmann, and for Anderson's trustee in bankruptcy.

Bryce claimed to be entitled to retain the necklace till his claim was paid.

Ehrmann made the following alternative claims:—"To be ranked and preferred to the subject *in medio* as his absolute property; or, alternatively, to be ranked and preferred to the subject *in medio* as his property, subject to his repaying the amount advanced on the security of the same by the pursuer, with interest thereon to date of payment, in exchange for an assignation by the pursuer in favour of

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the claimant of his (pursuer's) claims against the said William Brodie Galbraith and Robert Anderson."

He pleaded, *inter alia*;—(1) The subject *in medio* not having been the property of the said Robert Anderson when he pledged the same with the pursuer, the said pledge was invalid, and the pursuer acquired no rights thereby. (2) This defender, having been induced to invoice the said necklace to the said Robert Anderson through material misrepresentations on his part, is entitled to repudiate the pretended sale.

For the purposes of this report it is unnecessary to specify the claim for Anderson's trustee, as he did not ultimately insist on it.

On 19th February 1904 the Sheriff-substitute (Boyd) pronounced an interlocutor, by which he repelled the claim for Anderson's trustee, and sustained the alternative claim for Ehrmann.

On an appeal by Anderson's trustee, the Sheriff (Guthrie), on 13th June 1904, pronounced this interlocutor:—"Finds that on 13th December 1902 the claimant Ehrmann, a wholesale jeweller in London, sent to Robert Anderson, jeweller, Glasgow, a diamond necklace, the subject *in medio*, on the terms specified in an 'approbation note,' viz. —That Anderson was to endeavour to effect a sale of the same, and, in the event of his doing so, he was to be entitled to purchase it from Ehrmann at a specified price; that the necklace should remain Ehrmann's property till invoiced by him to Anderson; and that, till so invoiced, it should be returned to Ehrmann on demand: Finds that on 18th December Anderson pledged the necklace and other articles as he had done when it was previously in his possession on the same terms—for a loan—to the claimant Bryce; and that without the knowledge or consent of Ehrmann: Finds that after much correspondence, in which Ehrmann asked for the return of the necklace, and Anderson, falsely alleging that he was about to effect a sale of it, delayed to comply with Ehrmann's demands, an arrangement was made whereby the necklace was invoiced (along with other goods) to Anderson on 23d April 1903, Anderson granting bills for the price: Finds that these bills were dishonoured, and that Anderson became bankrupt, the claimant, Galbraith, being the trustee on his sequestrated estate: Finds that the said transaction on 23d April was entered into by Ehrmann in ignorance occasioned by Anderson's fraudulent concealment of the fact that he had fraudulently pledged the necklace to Bryce: Finds that Ehrmann is entitled to have the said transaction set aside, and to have it found, as it is hereby found, that the property in the necklace did not pass to Anderson: Finds that Anderson, having no property in the necklace, did not validly pledge it to the claimant Bryce: Therefore recalls the interlocutor of 19th February last; repels the claims of the party Galbraith, Anderson's trustee, and of the party Bryce, and prefers the claimant Ehrmann, to the subject *in medio*."*

Bryce appealed to the Court of Session. At the hearing of the appeal no appearance was made for Anderson's trustee in bankruptcy.

Argued for the appellant;—(1) On a fair construction of the correspondence between Ehrmann and Anderson, and the admissions in the case, the property in the necklace had passed to Anderson by

* In the course of his note the Sheriff said, "I apprehend that *Brown* v. *Marr*, 7 R. 427, has not been authoritative since *Macdonald* v. *Westren*, 15 R. 988."

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being invoiced to him, and therefore, even if there were any defect in the original title of the pawnbroker, it was cured by accretion. That invoice stood, and must have effect until it was reduced. Further, there was no ground for reduction, because, although no doubt Anderson had made false statements to the effect that he was negotiating with a purchaser, these statements were not the inducing cause of the invoice. What Ehrmann desired was to make Anderson liable for the price of the necklace. (2) Assuming that the necklace had never been invoiced by Ehrmann to Anderson, still the pawnbroker was entitled to the advance he had made on it. For this *Brown* v. *Marr, Barclay, &c.*[1] was a direct authority. The principle there laid down was that when one of two innocent parties must suffer for the fraud of a third, the one whose conduct made this fraud possible must bear the loss. The authority of *Brown* v. *Marr, Barclay, &c.*,[1] was not in any degree weakened by *Macdonald* v. *Westren*,[2] or *Mitchell* v. *Heys & Son*.[3] *Macdonald* v. *Westren*[2] was a question between the wholesale dealer and the retail dealer's trustee in bankruptcy, where no question of apparent authority to dispose of the subject was involved. The circumstances of *Mitchell* v. *Heys*[3] were also entirely different. That was a case of rollers hired out for use, not the case where a person placed another in a position to dispose of goods, and with apparent authority to dispose of them. In such cases the true owner was barred from disputing the right of the pledgee.[4] In *Helby* v. *Matthews*,[5] the circumstances were different, and did not involve any apparent authority to dispose of the article. (3) The contract, fairly construed, and read in the light of the correspondence, conferred on Anderson a right to sell the goods. If he had done so, Ehrmann could not have disputed the purchaser's right. At common law, a right to sell involved the minor right to pledge,[6] or, if the case was to be considered under the provisions of section 18, rule 4 (*a*), of the Sale of Goods Act,* Anderson, by pledging the necklace, had done "an act adopting the transaction" within the meaning of the subsection.[7]

Argued for the respondent;—Admitting the authority of *Brown* v. *Marr, Barclay, &c.*,[1] it was not applicable to the present case. It was a case of an ordinary contract of sale and return, whereas here there was a contract of an exceptional character, under which the retail dealer had no authority even to sell, far less to pledge, the necklace, until it was invoiced to him by the wholesale dealer. If Anderson had sold the necklace, Ehrmann would still have been entitled to

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[1] Jan. 8, 1880, 7 R. 427.

[2] July 19, 1888, 15 R. 988.

[3] Feb. 27, 1894, 21 R. 600.

[4] Lee v. Butler, [1893], 2 Q. B., 318; Henderson & Co. v. Williams, [1895], 1 Q. B. 521, *per* Lord Halsbury at p. 527: Farquharson Brothers & Co. v. King & Co., [1901], 2 K. B. 697.

[5] [1895], A. C. 471.

[6] Brown v. Marr, Barclay, &c., Jan. 8, 1880, 7 R. 427.

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts, sec. 18.—"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. . . ." Rule 4. "When goods are delivered to the buyer on approval, or 'on sale or return' or other similar terms, the property therein passes to the buyer: (*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction."

[7] Kirkham v. Atterborough, [1897], 1 Q. B. 201.

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refuse to part with it. He clearly could and would have refused to invoice it had he known it was pledged. The pawnbroker therefore took no title, as his author had only a conditional right to dispose of the article, and the condition was not purified.[1] (2) The doctrine of holding out did not apply to the present case. That doctrine might apply in the case of documents of title, but had no application to a corporeal moveable, except in a case of personal bar, as, for instance, if Ehrmann had expressly led Bryce to believe that Anderson had authority to dispose of the necklace.[2] *Brown* v. *Marr, Barclay, &c.*,[3] as explained by Lord Kinnear in *Mitchell* v. *Heys & Son*[4] was not an authority to the contrary. (3) The fact that the goods were ultimately invoiced to Anderson was the result of Anderson's fraud. The mere concealment of the fact that he had pledged the goods was fraud.[5] In such a case the pledgee could not take advantage of the pledger's fraud.[6]

At advising,—

LORD JUSTICE-CLERK.—In this case the question to be decided is between Ehrmann, who supplied the necklace in question to Anderson, the bankrupt, and Bryce, the pawnbroker with whom Anderson had pawned the goods a considerable time before his bankruptcy. Anderson's trustee does not now appear, and therefore the question is narrowed down to this—Is Ehrmann entitled to a decerniture to deliver the goods to him unconditionally, or is he only entitled to the goods on the terms on which the pawnbroker is willing to deliver them up, viz., on being recouped the amount which he advanced on them?

The contract in this case is peculiar, as Ehrmann in sending his goods to Anderson stipulates that the goods were to remain his property until invoiced by him, his purpose evidently being to keep up his right to them while they were in Anderson's hands or fell into the hands of his creditors. But it is clear from the documents in process that the purpose of the arrangement was that Anderson should as a retail dealer endeavour to effect a sale of the goods. He had the goods for that distinctly understood purpose. If Anderson could find a purchaser then Ehrmann was bound to let him have the goods at the arranged price of £110. The whole of the correspondence bears this out. Ehrmann's constant complaint is that Anderson does nothing to bring matters to a point with his customer, and he calls upon Anderson to "get your customer to make his decision one way or another." It is quite true that Anderson's side of the correspondence was deceitful, as he was not dealing with a customer, but had put the goods in pawn. But the point is that Ehrmann was in the belief that Anderson was negotiating a sale, as that was the purpose for which the goods were in his hands.

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[1] Helby v. Matthews, [1895], A. C. 471.

[2] Mitchell v. Heys & Son, Feb. 27, 1894, 21 R. 600; London Joint Stock Bank v. Simmons, [1892], A. C. 201, per Lord Herschell, at p. 215.

[3] Jan. 8, 1880, 7 R. 427.

[4] Feb. 27, 1894, 21 R. 613.

[5] Bell's Com. i. 263.

[6] Watt v. Findlay, Feb. 20, 1846, 8 D. 529; Molleson v. Challis, March 11, 1873, 11 Macph. 510.

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The case seems to me to be practically on all fours with that of *Brown* v. *Marr*.[1] Anderson had by his possession a right to sell on his own account and for his own profit. Although Ehrmann put in his written conditions as between him and Anderson a special stipulation, the act which he did in handing over the goods to Anderson that he might sell them for his own profit, placed Anderson in the position to do what he did—to do an act by which loss had been caused—and the loss must fall not upon the innocent party who dealt with Anderson, but upon the party whose actions enabled Anderson to do so. The Sheriff thinks that *Brown* v. *Marr*[1] is no longer an authority, and refers to the case of *Macdonald* v. *Westren*[2] as detracting from it. I do not so read the decision in that case. That was a case in which goods held by a person on sale or return were in his possession at the date of his bankruptcy, and it was held that they could not be claimed by his trustee as against the consignor, the bankrupt never having dealt with the goods as his own, as he had not effected any sale to a third party, or done any other act by which it could be held that he became the purchaser, liable for the price. That is a different case from *Brown* v. *Marr*,[1] and the Lord Justice-Clerk gives an exposition in it of the grounds on which *Brown* v. *Marr*[1] was decided, which are instructive in reference to the present case. He says:—"I desire to say with reference to the case of *Brown* v. *Marr*[1] that that decision did not turn on any question of property, but on the necessary inferences arising from the possession of the goods. There the retail dealer had possession, and he pawned the goods, and we held that as it was through the act of the wholesale merchant in putting him in possession of the goods and allowing him to deal with them as his own that he was enabled to deceive the pawnbroker, the wholesale merchant and not the pawnbroker ought to stand the risk of loss." And he added that that did not conflict with what had been said by Lord Young in giving the leading judgment.

Another case referred to by the Sheriff is the case of *Mitchell* v. *Heys & Son*,[3] but I am unable to see that there is any analogy between that case and the present one.

In the view I take of the case it is unnecessary to consider the effects of the invoicing of the goods to Anderson, which took place after the pawning, although had it been necessary I should have held that the invoicing to Anderson and the granting of the bills made the contention of Ehrmann untenable. My opinion is in accordance with that expressed by Lord Moncreiff in the case of *Brown* v. *Marr*,[1] which I see no ground for holding has been superseded by the subsequent decision.

I am therefore in favour of recalling the interlocutor of the Sheriff, and of finding that Ehrmann can only receive delivery of the goods in question, which Bryce is willing to deliver up, on the condition which Bryce annexes, that the amount of his advance be made good to him.

LORD YOUNG.—I am substantially of the same opinion. The case is an interesting one, but it did not appear to me at first to be a very difficult one, although it has always been with reluctance that I have differed from

[1] 7 R. 427. [2] 15 R. 988. [3] 21 R. 600.

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the judgment of Mr Sheriff Guthrie. I have a very high opinion of his good sense and legal knowledge, and it is only upon careful consideration that I have agreed to reverse a judgment of his. But I have given the present case that careful consideration and reconsideration, and with the result, as I have stated, that I concur with your Lordship in thinking that the judgment ought to be recalled, and another pronounced. I do not think that I can usefully add anything to the observations which were made by me indicative of my opinion, or rather I should say impression, in the course of the argument, but I shall add a few words explanatory, referring to the joint minute of admissions, Article 7, which states,—"On or about 23d April 1903, Ehrmann invoiced the said necklace to Anderson as his absolute property, along with certain other goods which had been sent to him on approbation by Ehrmann in the same manner." That is an admission that the necklace, the fund *in medio* here, was, like the other goods referred to in this article, sent on approbation by Ehrmann. "Bills of exchange were accepted by Ehrmann from Anderson in payment of the price of the said goods, but the said bills have since been dishonoured, and are still unpaid." On that admission it is impossible to doubt that the necklace, which was then in possession of Anderson, was invoiced and declared to be his absolute property, and that bills of exchange were received in payment of the price. There might be grounds upon which this might be set aside. The Sheriff is of opinion that there is a ground for setting it aside or disregarding it in this, that Anderson had previous to 23d April pledged the necklace to Bryce, the pawnbroker, and that he did not disclose that. I cannot agree with the view that this would be any ground for disregarding the legal effect of the facts which are here admitted. It is not doubtful that by this invoice, and by the bills sent in return, Anderson was placed in the position of being able not merely to sell the goods as his own property, but also to pledge them. He was absolutely entitled to pledge the goods which had been invoiced to him, and for which his bills had been taken as payment of the price. And to say that the pledging of the goods subsequent to the invoicing and the declaration that they were his property would be good, and that the pledging before that was invalid to the pledgee—that is, the pawnbroker Bryce—is a proposition which I cannot sustain. I think Ehrmann, who sent the necklace to Anderson, could not maintain that these goods remained his property, and that Anderson was not at liberty to pledge them, upon the ground that he had pledged them already. But irrespective of this, which is conclusive, I may indicate my opinion upon the point that was argued, namely, upon Anderson's position to give a good title of pledge to a pawnbroker upon the contract between him and Ehrmann, irrespective of the invoicing of the necklace. It is not doubtful that a necklace was sent to him as a retail jeweller in order that he might sell it in the course of his trade, he selecting the purchaser, and when he sold the necklace, to any purchaser of his own selection at any price, being only personally liable to Ehrmann for the price stipulated. But the contention was that he could give a title of property to anybody to whom he sold the necklace as his own without any responsibility whatever to Ehrmann, but he could not give a title to a pawnbroker. That is a proposition which I cannot assent to, even considering the stipu-

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lation your Lordship referred to, that the goods were to remain the property of Ehrmann until they were invoiced. I think that means only so long as they were in the possession of Anderson and he had not disposed of them by way of sale to a third party. Neither the purchaser from him, nor the pawnbroker receiving them as a pledge, was bound to investigate into the title by which he held these goods. The purchaser certainly was not bound, and what ground had the pawnbroker for inquiring into the title by which he had them? So that Ehrmann, according to the view I take of the case upon the facts, which are substantially not in dispute, was in this position, that he had put Anderson in the position of keeping the goods at the price stipulated, or if not, of sending them back. Well, Anderson pledged the goods. It was indicated in the argument that that was thought to be inconsistent with a possible transaction with a purchaser to buy them, and to buy, presumably, at a price which would afford a profit to Anderson. I cannot see any inconsistency in that at all. Any jeweller pawning goods is quite at liberty to transact with an intending purchaser of these goods, and if he can agree to terms he may even tell the party with whom he is transacting "they are in pledge at this moment, but if we can agree upon the price, I will get them out of the pledge and hand them over to you." He need not even say anything about the pledge. He may say,—"I will send the goods, or I can get them to shew you, and if you buy them they will be handed to you, if not, send them back." How is the pawnbroker affected? Anderson found it convenient in the course of his business, while expecting to sell the necklace, and to sell it at a profit, to raise £100 by pledging it. What has the pledgee to do with that, except that he is entitled to keep it until the advance has been paid to him, and give it up only on that footing? I think on pledging the goods Anderson became the purchaser himself, and he was entitled to make himself the absolute purchaser, and to make himself absolutely liable upon a contract of sale with Ehrmann to pay the price therein specified, and I think he did so, and would have been dealt with as having done so, had he not become bankrupt, for that bankruptcy alone put him out of the position of being able, or having any interest, to make such a condition, or Ehrmann any interest to make a similar condition on his side. By pledging the goods on the footing that he was the owner—for it is only the owner that can pledge goods—Anderson himself became the purchaser, and he put himself in that position in a question with Ehrmann just as completely and effectually as if he had placed a third party, one of his own customers, in that position. That being so, the only question is whether there is any ground upon which the necklace can be taken from the pledgee without giving him the amount which he had advanced upon it? A question might have arisen if the necklace had been of such value as to make it of any interest to the creditors of Anderson, whose interests are maintained or maintainable by the trustee in bankruptcy. It might have been an interesting question worthy of being argued whether Anderson or his creditors, upon his bankruptcy, were not entitled to get the goods and to become liable to Ehrmann only for the price. But the trustee in bankruptcy, no doubt very prudently, taking a careful view of the subject, although there was a claim, does not appear to support it, and it was explained to us that he took that course

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on the view that he could not, as representing Anderson's creditors, get the necklace from the pawnbroker except upon the footing of paying his advance, and that if he got it upon the footing of paying the advance, he would be liable undoubtedly to Ehrmann for the contract price to him. In the circumstances of the case, the trustee for the creditors was plainly of opinion that it was not in the interest of the creditors to maintain that position, and accordingly assented to the view that Ehrmann might have the goods upon dealing with the pledgee Bryce—that is, paying the advance. My opinion is with your Lordship that Ehrmann cannot have them from Bryce on any other footing than that of paying the advance, and that upon doing so he may receive the goods, there being no claim maintained by the trustee in Anderson's bankruptcy that the goods should be handed over to him to make what he can of them in the interests of the creditors. For these reasons, I arrive at the same result which your Lordship has stated.

LORD TRAYNER.—I gather from what the Sheriff says in the note to the interlocutor appealed against, that his judgment would have been other than it is if he had been of opinion that the decision in the case of *Brown* v. *Marr*[1] was still authoritative. He thinks, however, that it is not; that its authority has been derogated from by the subsequent cases of *Macdonald* v. *Westren*[2] and *Mitchell* v. *Heys & Sons*.[3] I think the Sheriff has here fallen into error, for in my opinion the case of *Brown*[1] is still of authority, and the subsequent cases referred to do not impinge upon its authority at all. These subsequent cases are quite distinguishable from the case of *Brown* v. *Marr*,[1] and the decisions in them all are quite consistent. If this case in its particular circumstances falls within the law laid down in *Brown* v. *Marr*,[1] then in my opinion that case rules the present as an authority. But apart altogether from the case of *Brown*[1] it appears to me that the judgment appealed against is unsound.

I do not regard the contract made between Mr Ehrmann and Mr Anderson as a contract of sale and return, although it has some features in common with such a contract. Nor was it merely a transaction such as usually takes place where goods are sent by one person to another "on approbation." When A sends goods to B on approbation they are sent on the understanding that B if he approves of them may keep them at the price which is notified; if he does not approve he returns them to A. In such a transaction no other person's approval is asked or expected except the approval of B; no other person is or can be interested in the transaction but the sender and the receiver of the goods. But in this case, as is apparent from the correspondence produced, both Mr Ehrmann, the sender, and Mr Anderson, the receiver, intended something quite different. There was no expectation on the part of Mr Ehrmann that Anderson would take or keep the goods because he was pleased with them. He could, of course, have done so, but the primary purpose of both Ehrmann and Anderson was that the latter should be put in possession of goods which he might submit for the approval of purchasers from him, and to whom he might sell the goods at any price he pleased or could obtain. In order to carry out this

[1] 7 R. 427. [2] 15 R. 988. [3] 21 R. 600.

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purpose Ehrmann put Anderson in possession of the goods, with full liberty to sell them to anyone he pleased and at any price he might fix, the only consequence of such a sale being that Anderson would become liable for the price which Ehrmann had fixed, but not bound to account for the price he had received, however much it might exceed the price originally notified by Ehrmann. In these circumstances Ehrmann conferred on Anderson such a right in the goods sent as enabled the latter to give a good title to them to anyone who in good faith purchased them from him—a title which could not have been successfully challenged by Ehrmann. If, however, Anderson could have conferred such a title on a purchaser, I think he could equally confer the lesser title given to a pledgee who in good faith made advances on the security of the goods. If I am right so far, it follows that the appellant is entitled to hold the goods pledged with him by Anderson until his advances thereon are repaid.

The counsel for the respondent based their argument in support of the respondent's right on the terms of the approbation note sent by the respondent to Anderson with the goods in question. That note provides or stipulates that the goods should remain the property of the respondent until "invoiced by" him, and the effect of that, it was said, was to prevent any right of property passing from Ehrmann except in the way provided, namely, the invoicing of the goods by him to Anderson. I think the answer to this contention is twofold. In the first place, the provision was made to secure Ehrmann in his right of property as in a question with Anderson or Anderson's creditors, so long as the goods were in Anderson's possession. It was not intended to continue in Ehrmann a right of property preferably to any right granted by Anderson in favour of some third person, the granting of such a right being, in the contemplation of the parties, one which it was the primary purpose of the contract or transaction to enable Anderson to give. But, secondly, if the invoicing of the goods by Ehrmann to Anderson gave the latter a full right of property that right was so given. In April 1903 the goods in question were invoiced by Ehrmann to Anderson. The Sheriff thinks this transference of property may be set aside on the ground that Ehrmann was induced to make it by the fraud of Anderson. I do not concur in that view. It appears to me that Anderson's repeated statement that he had a customer whom he expected to purchase the goods (statements I assume to be false) was not the inducing cause of the invoicing and transference. It will be observed that Anderson did not ask Ehrmann to invoice the goods to him—that was a proposal which emanated from Ehrmann. And what induced Ehrmann to invoice the goods was his own anxiety to have Anderson personally liable for their price. In effect what Ehrmann said to Anderson was this, Whether you have a customer to take the goods or not I must either have them back or you must take them yourself and become liable for their price, and for that price I will take your bill. Anderson's reply was,—Very well, I will accept your terms and grant the bills—and he did so. I see here no fraud on the part of Anderson inducing the contract of sale which made him the owner of the goods. If that was a good sale, and gave Anderson a perfect title to the goods, that perfect title accrued to the appellant, assuming that prior thereto his title was defective or invalid.

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On the whole matter I am of opinion that the appellant is entitled to hold the goods in question so long as the advances he made on the security thereof remain unpaid. The trustee on Anderson's estates does not appear to contest the judgment by which his claim to the property as part of Anderson's estate has been negatived. As in a question between them, therefore, the right of property must be taken to be in Ehrmann. In these circumstances, the appellant not objecting, it will carry out my view if Ehrmann is preferred to the fund *in medio* in terms of his alternative claim. This is, in effect, a return to the interlocutor of the Sheriff-substitute, in all of whose findings I am not to be considered as concurring.

LORD MONCREIFF.—The Sheriff has repelled the claims of Anderson's trustee and the appellant Bryce, and preferred the claimant Ehrmann to the subject *in medio*.

I understand that Anderson's trustee has acquiesced in this judgment, and he was not represented at the hearing before us. It is therefore only necessary for us to decide on the claims of Ehrmann and Bryce. In my opinion the judgment of the Sheriff is wrong. I think that the claimant Bryce, the pawnbroker, is entitled to retain the necklace until repaid the advances made by him to Anderson, on the security of the necklace; and that the claim for Anderson's trustee now being out of the way, Ehrmann will be entitled to delivery of the subject on his repaying to Bryce the amount advanced to Anderson, with interest.

The Sheriff's judgment proceeds in a great measure upon the assumption that the case of *Brown* v. *Marr*[1] is no longer law, and in particular that it was overruled by the subsequent case of *M'Donald* v. *Westren*.[2] In this I think he is wrong. The facts in the case of *M'Donald* v. *Westren*[2] were different in this respect, that at the date of the retail jeweller's bankruptcy the goods sent to him by Westren on a contract of sale or return were still in his possession. The question arose not between the wholesale jeweller and some one to whom the retail jeweller, Fraser, had sold or pledged the goods, but between the wholesale jeweller and Fraser's trustee. In that case Fraser had not declared his option to buy, and had exercised no right of property in the goods by selling or pledging them. They were still in his possession, and on that ground the Court decided as in a question between Westren and Fraser's trustee that the property in the goods never passed to Fraser, and consequently had not passed from him to his trustee.

That was the true ground of judgment, and although at the close of his opinion Lord Young indicated some doubt of the judgment in *Brown* v. *Marr*,[1] it is plain that his remarks were, and were intended to be, *obiter*.

On the other hand, the Lord Justice-Clerk (Lord Moncreiff), who took part in the judgment in *Brown* v. *Marr*,[1] was at pains to distinguish the two cases.

Again, in the case of *Mitchell* v. *Heys & Sons and Others*,[3] *Brown* v. *Marr*[1] was treated both by the Lord Ordinary and Lord Kinnear as still a binding authority. No better exposition of the ground of judgment in *Brown* v. *Marr*[1] could be given than that of Lord Kinnear in distinguishing that

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judgment. He says (21 R., p. 613) :—"The main ground of judgment was that by such a contract all the substantial rights of ownership pass to the buyer. He has an option to return the goods within a stipulated time instead of paying the price. But whenever he exercises any right of property, as by selling or pledging the goods, the option ceases, and accordingly the title he may give to third persons dealing with him in good faith does not depend upon any authority derived from the vendor on sale and return, but upon his own absolute right of property. . . . The difficulty was that the contract had been obtained by fraud. But the answer is that contracts obtained by fraud are valid until they are rescinded, and therefore that they cannot be rescinded to the prejudice of rights and interests acquired by third parties in good faith and for value."

In *Mitchell* v. *Heys & Sons*[1] the goods came into the possession of Mitchell, Johnston, & Co. not under a contract of sale or return, but under a contract of hiring under which, of course, they had no power to appropriate or dispose of the rollers; and the Court held (I must assume rightly) that Wm. Mitchell, from whom they hired the rollers, had done nothing to induce Heys & Sons, to whom Mitchell, Johnston, & Co. had sent the rollers with cloth to be printed, to believe that the rollers were the property of Mitchell, Johnston, & Co. That is a very different case from the present and *Brown* v. *Marr*,[2] in both of which the goods were placed in possession of the retail dealer in order that he might dispose of them in the ordinary course of his business, there being nothing to shew an intending customer that the goods were held by the retail dealer under conditions which prevented him from disposing of them as his absolute property. It is new to me that a customer going into a jeweller's shop for the purpose of purchasing an article of jewellery is called upon to catechise the jeweller as to whether the goods are his absolute property and as to the conditions on which he is entitled to sell them. For the convenience of trade, I think that the customer in such circumstances is entitled to assume that the jeweller has an absolute power of disposal whatever may be the latent conditions under which the retail dealer holds possession of the goods. I am not aware of any other Scottish decisions which deal with *Brown* v. *Marr*.[2]

If then *Brown* v. *Marr*[2] has not been overruled it must be followed if it applies to the present case; and we must therefore next consider whether this case can be distinguished from it. If the so-called "approbation note" were to be read literally, we should perhaps be bound to hold that it was a condition of the contract that property in the goods should not pass until Ehrmann invoiced the goods to Anderson, although even then I should hold that a customer who did not know of the condition would be entitled to deal with Anderson on the assumption that he had full power of disposal. But when we look at the true nature of the transaction between Ehrmann and Anderson I think it is plain that the contract was one of sale or return. The purpose of the contract admittedly was not merely to give Anderson an opportunity of inspecting the goods and purchasing them himself, but in order that Anderson might endeavour to resell the goods. In point of fact the necklace in question was not in Ehrmann's possession, but

[1] 21 R. 600. [2] 7 R. 427.

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remained with Anderson or with the pawnbroker from 19th December 1902 till 24th April 1903. Thus Anderson was clothed with the ostensible ownership of the goods, and the *bona fides* of the pawnbroker is not impugned. Anderson having thus exercised the right of ownership over the goods by pledging them, I think it is doubtful whether, had it been Ehrmann's interest to do so, he might not, if the fact of pledging had come to his knowledge, have refused to take the goods back and held Anderson liable in the agreed-on price on the ground that in the language of section 18, subsection 4 (a), of the Sale of Goods Act, 1893, Anderson had done an act (viz., pledging) adopting the transaction, and that therefore the property had passed to Anderson to the effect of making him liable in the price.

It is right, however, to notice that *ex facie* of the contract the goods were to remain the property of Ehrmann until invoiced by him to Anderson. It seems to me that the only practical effect of that stipulation is that if (as in *Brown* v. *Marr*[1]) Anderson did not dispose of the goods by selling or pledging them, Ehrmann should be entitled to have them returned notwithstanding the bankruptcy of Anderson.

In any other view no sale could have been effected until an invoice was obtained from London.

If it were necessary for the disposal of the case I should be prepared to hold that even if we read the contract literally, Ehrmann did pass the property to Anderson on 24th April 1903 by invoicing the goods to him and taking bills for the price. This was not done at the request of Anderson, but on the initiative of Ehrmann, who was anxious to bring the thing to a point and fix Anderson with liability for the price of the goods. No doubt Anderson was anxious to conceal from Ehrmann that the necklace was in pawn, and in his letters he falsely alleged that he was in treaty with a customer, but on the other hand, it is plain from the correspondence that Ehrmann was indifferent whether Anderson got a customer or not, and pressed Anderson to take the goods over as his own property, and grant bills for the price. On the effect to be given to such false statements as Anderson made, I may refer to the opinion of Lord Ormidale in *Brown* v. *Marr*,[2] and the cases which he there refers to.

On the whole matter, I am of opinion that the interlocutors of both Sheriffs should be recalled, and the claims of Bryce and Ehrmann sustained to the effect which I have already indicated.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutors of the Sheriff-substitute and Sheriff, dated respectively 19th February and 13th June 1904: Find that on 13th December 1902 the claimant Ehrmann sent to Robert Anderson, jeweller, Glasgow, a diamond necklace, the subject *in medio*, on the terms specified in an approbation note which contained a provision that the said necklace should remain Ehrmann's property until invoiced by him, Anderson being in the meantime responsible for loss and damage, and the necklace while uninvoiced being returnable on demand: That it was the purpose of the said necklace being sent by Ehrmann to Anderson that Anderson

[1] 7 R. 423. [2] 7 R. pp. 443-4.

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should endeavour to effect a sale of the necklace, and that in the event of his doing so he should be liable to Ehrmann for the price specified in said approbation note: Find that on 18th December 1902 Anderson pledged the necklace to the claimant Bryce for a loan without the knowledge or consent of Ehrmann: Find that by letter dated 21st April 1903 Ehrmann proposed that Anderson should himself become the purchaser of the said necklace, and should grant bills in his favour for the price thereof: Find that Anderson agreed to said proposal and accepted bills for the price, whereupon said necklace was invoiced by Ehrmann to Anderson on 23d April 1903: Find that said bills were subsequently dishonoured, and that Anderson became bankrupt on or about 9th July 1903: Find that Ehrmann was not induced to enter into the said transaction with Anderson on 23d April 1903 for the sale of the necklace by Anderson's concealment of the fact that he had pledged the necklace to Bryce; but further find in respect of the terms of the contract between Ehrmann and Anderson that Anderson was in a position to pledge said necklace, and validly pledged the same to Bryce accordingly: Find that the claimant Galbraith not now insisting in his claim, the claimant Ehrmann is entitled to obtain delivery of the subject pledged upon repayment to Bryce of the amount advanced by him upon the security thereof, with interest on said amount at the rate of 15s. per month from 19th August 1903 until the date of said repayment, as stipulated in the contract of pledge: Therefore, subject to said conditions as to repayment of the advance to Bryce, rank and prefer the claimant Ehrmann to the subject *in medio:* Repel the claim of the claimant William Brodie Galbraith: Find it unnecessary to dispose of the claim of the appellant Bryce, and decern."

D. H. MURRAY, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

No. 4.

Oct. 28, 1904.
Black v. United Collieries, Limited.

WILLIAM BLACK AND OTHERS, Petitioners.—*Clyde, K.C.—C. D. Murray—T. B. Morison.*
THE UNITED COLLIERIES, LIMITED, Respondents.—*Ure, K.C.—M'Lennan.*
ALLAN WHYTE AND OTHERS, Respondents.—*Salvesen, K.C.—Horne.*
LORD BELHAVEN AND STENTON AND OTHERS, Respondents.—*Campbell, K.C.—D. P. Fleming.*
THE COLLIERIES TRUSTEE COMPANY, LIMITED, Respondents.—*Lord-Adv. Dickson—Hunter.*

*Company—Winding-up—Objection to intimation of petition for winding-up—Just and Equitable—Companies Act*, 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 79.—The Companies Act, 1862, enacts (sec. 79),—"A company under this Act may be wound up by the Court as hereinafter defined, under the following circumstances—that is to say, . . . (4) whenever a company is unable to pay its debts; and (5) whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Certain holders of fully paid-up preference shares, representing less than one-thirteenth of the share capital of a company, presented a petition for its compulsory winding-up, on the ground that in the circumstances it was just and equitable that it should be wound up.

On a motion being made in the Single Bills for an order for intimation,

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advertisement, and service, appearance was made for the company, for the holders of first and second debentures, and for almost all the creditors whose respective claims exceeded £50. Their counsel moved the Court to dismiss the petition without pronouncing an order, and stated that the intimation craved would be prejudicial to the credit of the company.

The Court, after considering minutes lodged by the petitioners and by the objectors, and coming to the conclusion that the winding-up of the company would be detrimental to all concerned, and having regard to the wishes of the creditors and of the great majority of the shareholders, refused to order intimation, and *refused* the prayer of the petition.

2D DIVISION.

THIS petition was presented by William Black and others, holders of fully paid up preference shares in the United Collieries, Limited, a company having its registered office in Glasgow, praying the Court to order the Company to be wound up by the Court.

Of the thirteen petitioners named in the petition two disclaimed on the day after its presentation. The remaining eleven held preference shares to the extent of £136,488. The total share capital of the company, which was all paid up, amounted to £1,800,572.

On the case being called in the Single Bills counsel for the petitioners moved for an order for intimation, advertisement, and service. Counsel for the Company and others, who appeared as objectors, moved the Court to refuse the order and to dismiss the petition *de plano*.

The Court delayed consideration of the motion for intimation, and allowed the parties interested to lodge minutes. Minutes in opposition to the petition were lodged by the Company, the first and second debenture-holders, and creditors of the Company.

The minuters stated that a compulsory winding-up would result in a forced sale of going concerns, and cause great loss to the creditors and a complete loss of the shareholders' capital. This would be avoided by the issue of income debenture stock to the shareholders as resolved upon by the Company in August 1904.

On 18th October parties were heard in Single Bills upon the petition and minutes. The respective interests of parties and the nature of the objections sufficiently appear from the opinion of Lord Trayner.

Argued for the minuters;—An order for intimation and advertisement and service would injuriously affect the credit of the Company, and the Court would not pronounce it if satisfied that the petition was groundless.[1] In the late case of *Wotherspoon* v. *Brescia Mining and Metallurgical Company, Limited*,[2] where such an order was pronounced in spite of opposition like the present, it was admitted on all hands that there must be a winding-up, and the sole question at issue was whether the winding-up should be voluntary or judicial. In such circumstances the interests of the Company could not be prejudiced by the order. The issue of the income debenture stock was the best method of saving the Company; even if it were not, that did not entitle a small minority of shareholders to stop the Company.[3] The cases cited on the other side were very special, and the facts here were entirely different. If the minority maintained that the resolution was *ultra vires*, their remedy was interdict, not a petition to wind up the Company.[4]

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[1] Macdonell's Trustees v. Oregonian Railway Co., June 12, 1884, 11 R. 912.
[2] Dec. 5, 1896, 24 R. 207.
[3] Suburban Hotel Co. (1867), L. R., 2 Ch. 737.
[4] *Ex parte* Fox (1871), L. R., 6 Ch. 176.

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The undernoted authorities were also cited.[1]

Argued for the petitioners;—There was a case here for inquiry, and therefore the usual order for advertisement should be made. The *Oregonian* case[2] was the only one in which such an order had been refused, and that was a very special case, where the petition was presented by a creditor whose debt when the case came before the Court had been paid. The present case more resembled *Wotherspoon* v. *Brescia Mining and Metallurgical Company*.[3] The case presented by the petitioners was that the whole history of the Company shewed a gradual process by which debenture-holders had obtained the complete control of the Company and were acting in such a way as practically to deprive the shareholders of any interest in the Company. They averred, and were prepared to prove, that the greater part of the debentures were held by one financial group, who were using their influence to wreck the Company. It appeared from the report of the committee of debenture-holders that the Company, though it might be able to pay its debts, was in financial straits. It was not maintained that these difficulties were, taken alone, a ground for winding up the Company, but they formed an element to be taken into account in considering whether it was just and equitable that it should be wound up. In these circumstances shareholders were entitled to have the Company wound up, even although they were a minority, and did not maintain that the Company was unable to pay its debts.[4] In any event, a case for inquiry had been presented.

At advising,—

Lord Trayner.—In this petition we are asked (1) to order intimation and advertisement of its presentation, and (2) thereafter, with or without answers on the part of those called as respondents, to order the United Collieries Company to be wound up by the Court under the provisions of the Companies Acts. Several parties representing different interests (who they are and what their interests I shall notice hereafter) have appeared and object to our making any order in this petition. We have had a full and able debate from both sides of the bar, and we are now to determine whether any, and if so what, order should now be pronounced.

The petitioners are shareholders in the Collieries Company, and the two grounds on which their petition is based are—(1) that the Company is unable to pay its debts, and (2) that it is just and equitable that the Company should be wound up. The first of these grounds was not maintained by the petitioners, and I cannot see how they could have maintained it. If the statement that the Company is unable to pay its debts—that is, that the assets of the Company are insufficient to meet its liabilities—is true, then the petitioners have no interest to insist in the petition, for if the Company has not assets sufficient to meet its liabilities, there can obviously be no reversion for distribution among the shareholders. If, on the other hand, the statement is not true, then as a ground of petition it disappears.

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[1] Anglo-Danubian Steam Navigation Co. (1875), L. R., 20 Eq. 339; Chapel House Colliery Co. (1883), 24 Ch. Div. 259.

[2] Macdonell's Trustees v. Oregonian Railway Co., June 12, 1884, 11 R. 912.

[3] Dec. 5, 1896, 24 R. 207.

[4] Varieties Limited, [1893], 2 Ch. 235; Guttapercha Corporation, [1900], 2 Ch. 665.

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Conceding that this was so, the petitioners maintained that, nevertheless, the financial straits of the Company and its want of ready money with which, if called upon, to discharge all claims that could be made against it, was a circumstance, and a circumstance of weight, to be taken into account in dealing with the second ground, namely, that in the whole circumstances disclosed it was just and equitable that the Company should now be wound up. I concur in that view, and have accordingly taken the present condition of the Company into consideration in making up my mind whether it was just and equitable that the Company should now be wound up. But I have also taken into consideration other circumstances which appear to me to be of at least equal weight.

There are thirteen petitioners named in the petition, but of these, two disclaimed the petition by letter the day after its presentation. The eleven petitioners hold shares (all fully paid) to the extent of £136,488 out of a share capital (all paid up) of £1,800,572—that is, the petitioners represent less than 1/13th of the share capital. The petition is opposed by (1) the Company, which presumably represents the shareholders who are not petitioners—that is, shareholders who represent 12/13ths of the share capital; (2) the first debenture-holders, who are creditors of the Company to the extent of £942,900; (3) the second debenture-holders, who are creditors to the extent of £348,241; (4) the waggon companies mentioned in the petition, who are creditors to the extent of £300,000; and (5) by all the trade creditors of the Company, fifty-two in number (except three or four), whose respective claims exceed the sum of £50. From this it appears that the interests of the opposing respondents far exceed the interests of the petitioners, even taking the shares of the latter as of par value, which at present they are not. It also appears, no doubt, that the Company is deeply indebted, but it is not maintained (as I have already said) that the assets of the Company are not sufficient to meet all claims. That, however, will depend upon whether the assets of the Company are valued or realised as for a going concern. If the Company was ordered to be wound up and its assets separately disposed of under a forced sale, which is what would result from a winding-up, it is pretty evident that a large loss would be incurred. Part, and no inconsiderable part, of the Company's assets consists of the rights they hold under their mineral leases, some of which would or might be rendered valueless as subjects of sale by reason of the provision that they are not assignable. It is plainly therefore in the interests of the creditors, and indeed of all concerned, that nothing should be done which would impair the value of the Company's assets, and a forced realisation of these would necessarily do so. I have not forgotten what was urged upon us by the petitioners' counsel as to the character of the proposal (the issuing of profit debenture stock) by which it was hoped to relieve the Company from its present difficulties, nor as to the past bad management of the Company, nor the control of the Company in future by the debenture-holders or some of them. But I more than question the relevancy of these considerations. Looking to the whole circumstances, and having regard to the wishes of the creditors, and a large majority at least of the shareholders (whose wishes we are by the Companies Acts entitled to give effect to), I have come to the conclusion that there is no case made out for winding up the Company,

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a course which, in my opinion, would be seriously detrimental to the interests of all concerned. That being my opinion, I am against ordering any intimation or advertisement of the application, especially as we were assured by the respondents' counsel that, on his information, it would among business men (and probably I suppose on the Stock Exchange) be injurious to the Company's interests if even an order for intimation were made, such an order being regarded (however erroneously) as an indication that there was a *prima facie* case for a winding-up. In my opinion, therefore, this petition should *de plano* be refused.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF, not having been present at the hearing, gave no opinion.

THE COURT refused the prayer of the petition.

DRUMMOND & REID, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—JOHN C. BRODIE & SONS, W.S.—DUNDAS & WILSON, C.S.—WEBSTER, WILL, & Co., S.S.C.—Agents.

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Nov. 1, 1904.
A B v. C D.

A B, Pursuer (Respondent).—*Shaw, K.C.—J. R. Christie.*
C D, Defender (Reclaimer).—*Jameson, K.C.—R. Scott Brown.*

*Reparation—Slander—Relevancy—Statement affecting credit of solicitor.*—In an action of damages for slander the pursuer, a solicitor in a country town holding several public appointments of trust, averred that the defender had stated that the pursuer had been "cleaned out and lost his all," and that in consequence the pursuer had suffered in his reputation and business.

*Held* that the pursuer was entitled to an issue on the ground that it was not unreasonable to suppose that the statement might have injured his reputation and credit.

1ST DIVISION. Lord Kincairney.

A B, a solicitor in the country town of X, brought an action of damages for slander against C D, manufacturer there.

The pursuer averred that he was a partner in a firm of solicitors, which had for many years carried on business in X, and that he held several important public appointments of trust in X. (Cond. 3) "After his return [from holiday] the pursuer discovered that an extraordinary story of the most damaging character had been put into circulation by the defender of and concerning the pursuer, and had thereby gained currency in and around X to the effect that the pursuer had lost his whole means by speculating, and that the pursuer was a ruined man." (Cond. 4) "In particular . . . the defender in presence of . . . stated that the pursuer was cleaned out and had lost his all by speculation, and that he was a ruined man, or used words of the like import and effect. . . ." (Cond. 6) "The said statements made by the defender as aforesaid were of and concerning the pursuer, and were false and calumnious. They were intended by the defender to represent that the pursuer was a speculator, that by his speculation he had lost his whole means, that he was a ruined man, who as a professional man was discredited, and whom it would be unsafe to trust with money, or with the investment of clients' means or management of their affairs involving trust. The pursuer has among his clients several well-to-do farmers and other residents in the country districts to whom the idea of speculation, or even of ordinary dealings in stocks and shares except for permanent investment, is repugnant. Moreover, owing to the occur-

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rence recently in the West of Scotland of cases in which clients have sustained heavy losses through defalcations by solicitors, who had been engaged in speculation, in which they had lost their means, public opinion is very sensitive to any suggestion that a solicitor has incurred such losses, and a charge of the kind is seriously detrimental to him in his profession." (Cond. 7) "By and in consequence of the said false and slanderous statements the pursuer has suffered greatly in his feelings and reputation. The defender's statement has also injured him in his reputation and business, and he has thereby been subjected to annoyance and loss in connection with his business as a professional man. . . ."

The defender admitted that on the occasion referred to in cond. 4 he had in the course of casual conversation remarked,—"Have you heard the latest?"—meaning the latest gossip from X, and that on being asked by one of the occupants of the railway carriage what it was, he replied,—"It's reported that A B has lost his all." The defender further stated,—"No reference was made by the defender to speculation or any other cause whereby the pursuer might have lost his money. What was said was not stated as fact but merely as rumour, and interrogatively, and the matter was dealt with in the most incidental way."

The defender pleaded, *inter alia*;—(1) The action is irrelevant. (2) The defender not having slandered the pursuer the action should be dismissed with expenses.

On 5th July 1904 the Lord Ordinary (Kincairney) approved of the following issues proposed by the pursuer, and appointed the same to be the issues for the trial of the cause:—"Whether (1) on or about 14th April 1904, in a carriage of a railway train between . . . in presence and hearing of . . . or one or more of them, the defender falsely and calumniously stated of and concerning the pursuer that he was cleaned out and had lost his all, or used words of like import and effect, to the loss, injury, and damage of the pursuer? (2) Whether, on or about 14th April 1904, in a carriage," &c., "the defender falsely and calumniously stated of and concerning pursuer that he was cleaned out and had lost his all by speculation or used other words of the like import and effect, to the loss, injury, and damage of the pursuer? Damages laid at £2500."

The defender reclaimed, and argued;—The words complained of did not imply that the pursuer had lost his money in any discreditable way, or that he was bankrupt and unable to pay his debts, and there was therefore nothing defamatory or injurious in the statement.[1] [LORD KINNEAR referred to Ersk. Inst. iv. 4, 81.]

Argued for the pursuer;—In considering whether the statement complained of was defamatory regard must be had to the position of the person concerning whom the statement was made. It was not unreasonable to suppose that such a statement might injuriously affect the business reputation and credit of a country solicitor, holding responsible offices.[2] The language used was therefore actionable, and the pursuer was entitled to an issue.

[1] Outram v. Reid, Feb. 28, 1852, 14 D. 577; M'Laren v. Robertson, Jan. 4, 1859, 21 D. 183; Wright & Greig v. Outram & Co., July 17, 1889, 16 R. 1004; Macrae v. Sutherland, Feb. 9, 1889, 16 R. 476; Anderson v. Hunter, Jan. 30, 1891, 18 R. 467; Bruce v. Leisk, Feb. 20, 1892, 19 R. 482.

[2] Cox v. Lee, 1869, L. R., 4 Exch. 284; Anderson v. Hunter, Jan. 30, 1891, 18 R. 467.

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LORD PRESIDENT.—It appears to me that both issues proposed by the pursuer should be allowed.

In considering whether the use of particular words may or may not have an injurious effect on the character of a person, it is very material to have regard to the position of the person in regard to whom the words were used, and the business he is carrying on. If the pursuer had been living on his private means the statement in a railway carriage that he was reported to have "lost his all" might have excited compassion, but it would not have injured him in his public reputation or purse. But the case is very different when the man is carrying on a business or profession by which he lives, and which requires that he shall possess such a character that people may safely trust him with their money. We know the nature of the business of a writer in a country town. It is quite common for women and other clients, where property belonging to them has been sold or a bond paid up, to leave the price or the money paid up in the hands of their law-agent until another investment is found for it. In other words, local solicitors frequently act as practically bankers of their clients. Now, the question is whether it is so certain that to say of a man in that position that he was cleaned out and had lost his all could not damage him that we should not allow the pursuer an opportunity of proving that it could and did. If it were proved that as a result of the statements made clients removed their money from his keeping, or took their papers out of his hands, this would shew very distinctly that the words were injurious. I am of opinion, then, that the pursuer should have an opportunity of proving his averments of injury.

What I have said with reference to the first issue applies *a fortiori* to the second issue. Experience proves that where an agent loses his own money in speculation, he not infrequently uses his clients' money in the same way, no doubt generally intending to replace it, but not infrequently being unable to do so. I therefore think that the issues should be allowed.

LORD ADAM.—The words complained of as being defamatory are that the pursuer "was cleaned out and had lost his all."

I agree with your Lordship that these words may not be libellous in certain circumstances, and in other circumstances may be extremely injurious. In this case the person of whom the words were spoken is a writer in a country town holding several important public appointments of trust. The pursuer avers that the statement has injured him in his reputation and business, that many of his clients were seriously alarmed by the rumours put into circulation by the defender, and that these things were the natural and direct results of the defender's statements. The question is whether the pursuer should be allowed to prove this, if it is the fact. Mr Jameson says that there is nothing defamatory in the actual words. But the passage from Erskine,[1] referred to by Lord Kinnear, is authority for the view that to impute bankruptcy to a man is a ground of action not because it reflects on his moral character, but because such an imputation may have the effect of ruining his credit. That is exactly the position here, and accordingly I think the issues should be allowed.

[1] IV. 4, 81.

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LORD M'LAREN.—There is no doubt that in the law of Scotland defamatory words affecting the credit of the person spoken of are actionable—that is, the law recognises that injury to commercial credit is a wrong for which reparation is granted. If anything were needed the passage in Erskine,[1] to which Lord Kinnear called attention, is sufficient. It is not necessary to lay down a criterion as to what words fall within this character and what words would fall outside. It has been decided that it is defamatory to say of a trader, or indeed of any person, that he is "insolvent." It has not been decided that you may make statements affecting the financial credit of an individual if you stop short of attributing insolvency. The distinction between an imputation of insolvency or bankruptcy and the present case is a very thin one. In the case of a writer or a merchant, to say that he had lost all his money would certainly be injurious to his credit. No solicitor can carry on a business worth having without credit, because in the ordinary course of business clients' money necessarily comes into his hands. To say of a solicitor that he was "cleaned out" and had lost his all is certainly calculated to injure his business. It is for a jury to say whether the words have had an injurious effect in this case.

If these words were not actionable I fail to see how the addition of the words "by speculation" would make a difference. Speculation is a word of very indefinite meaning. There is legitimate and illegitimate speculation. Thus in my view the one issue is merely a variation of the first.

LORD KINNEAR.—I agree. I should assent to Mr Jameson's observation that it is not a sufficient reason to ground an action of defamation that the pursuer alleges injury. That is not enough if, in the opinion of the Court, it is clear that the words are not calculated to cause such injury. But then the pursuer describes his position as a professional man in a country town, so that his means of subsistence are dependent on the confidence of his neighbours in his capacity and credit as a man of business. It is not an unreasonable construction of the words used to say that they may have injured his means of subsistence and credit, and that being so he is entitled to an issue.

THE COURT adhered.

MACPHERSON & MACKAY, S.S.C.—LISTER SHAND & LINDSAY, S.S.C.—Agents.

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Nov. 1, 1904.
Hope Johnstone v. Sinclair's Trustees.

ADELAIDE OLIVIA HOPE JOHNSTONE AND OTHERS, Pursuers (Reclaimers).—*Wilson, K.C.—J. H. Millar.*

CHARLES CECIL GORDON HOPE JOHNSTONE AND OTHERS (Miss Sinclair's Trustees) AND OTHERS, Defenders (Respondents).—*Smith, K.C.—M'Clure.*

*Succession—Legacy to a class—Direction "to hold"—Period of distribution.*—A testator directed his trustees "to hold" a fund in trust for all the children of A who, being sons, should attain twenty-one, or being daughters, should attain that age or marry. During A's lifetime, certain of his children who had attained majority claimed payment of their shares. *Held* that as the class of beneficiaries could not be ascertained till after the death of A, no child was entitled to payment of a share before that event.

*Andrews* v. *Partington*, 1791, 3 Brown Ch. Cas. 401, *commented on.*

[1] IV. 4, 81.

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1st Division. Lord Pearson.

Miss Olivia Sophia Sinclair, residing at Thurso Castle, died on 24th January 1894, leaving a last will and testament dated 20th May 1892, with codicil, dated 11th May 1893, both registered in the Sheriff Court Books of Caithness on 6th February 1894. Miss Sinclair by her will bequeathed to her trustees and executors (Charles Cecil Gordon Hope Johnstone, William James Hope Johnstone, and George Felix Standish Sinclair) "the sum of £6000 . . . upon trust that they . . . shall invest the same in their or his names or name . . . and shall pay one-third part of the annual income of the said sum of £6000, or the investments for the time being representing the same to the said Emelie Johnstone, the wife of my nephew William James Hope Johnstone, during her life, or until she shall marry again. And I declare that, subject and without prejudice to the trust in favour of the said Emelie Johnstone, lastly hereinbefore declared and contained, my trustees and trustee shall hold the capital and income of the said trust premises in trust for all the children or any the child of the said William James Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age, or marry under that age, and if more than one, in equal shares. . . . Provided always, and I declare that my trustees or trustee may at any time or times raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any child of the said William James Hope Johnstone . . . under the trusts of this my will, and pay or apply the same for his or her advancement or benefit as my trustees or trustee shall think fit, but so that no such part or parts shall be raised and applied as aforesaid during the existence of any prior interest or interests therein under this my will —without the consent in writing of the person or persons—having such prior interest or interests. . . ."

The codicil contained the following declaration:—"I declare that my said trustees or trustee shall hold my said residuary estate upon the trusts following—(that is to say) . . . as to another equal third part or share thereof, upon the like trusts and with and subject to the like powers, provisoes, and declarations in all respects, for the benefit of Emelie Johnstone, the wife of my said nephew William James Hope Johnstone and the issue of the said William James Hope Johnstone as are in my said will declared and contained in their favour concerning the sum of £6000 and the investments for the time being representing the same."

On 12th March 1903 William James Hope Johnstone and his wife, Mrs Emelie Johnstone were both alive, and had six children, three of whom had attained majority, and three of whom were still in minority.

On 12th March 1903 the three children who had attained majority (Adelaide Olivia Hope Johnstone, George Granville Hope Johnstone, and Wentworth Francis Hope Johnstone), brought the present action against (1) the trustees and executors under Miss Sinclair's will; (2) the three minor children of William James Hope Johnstone; and (3) the said William James Hope Johnstone as their curator-in-law. The summons concluded, *inter alia*, for declarator that under Miss Sinclair's will and codicil "there was conferred on, and became vested in and payable to each of the pursuers at the dates of their respectively attaining majority, but subject always as hereinafter set forth, to the liferent of their mother, Emelie Johnstone, wife of the said William James Hope Johnstone, at least one-sixth share of the sum

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of £6000, and one-sixth share of one-third of the residue of the estate of the said Miss Olivia Sophia Sinclair." There was also a conclusion against the trustees and executors for payment to the pursuers of the shares claimed by them.

Defences were lodged by Miss Sinclair's trustees.

The pursuer pleaded, *inter alia*;—(2) In respect that a right to the testamentary provision in their favour under Miss Sinclair's will and codicil has vested in the pursuers, the defenders, the said Miss Sinclair's trustees and executors, are bound to denude and make payment thereof to the pursuers, subject to the retention of a sum sufficient to satisfy the liferent of the liferentrix.

The defenders pleaded, *inter alia*;—(2) The pursuers, on a sound construction of said last will and testament and codicil, not being entitled to the shares of the trust-estate claimed by them, decree of absolvitor should be pronounced as regards the conclusions for declarator and conveyance.

On 17th March 1904 the Lord Ordinary (Pearson) dismissed the action.*

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* "OPINION.—(After narrating the facts)—The rule of construction to which the pursuers appeal as entitling them to this declarator is that which received effect in the cases of *Buchanan's Trustees* (1877, 4 R. 754), and *Ross* v. *Dunlop* (1878, 5 R. 833); and in the English cases of *Emmet* (1880, 13 Ch. Div. 484), and *Knapp* v. *Vassall* (1895, 1 Ch. 91). The principle is thus stated by Lord President Inglis in the case of *Ross*:—'The general proposition is, that if a testator desires that a fund should be distributed in equal or different proportions among a class of children at a particular day, only the children in existence when that day arrives can receive a share; for they are the only children in existence at the day when payment is to be made. . . . The general rule is based on no stronger foundation than this—that you cannot carry out the direction to distribute at the particular time specified without giving the benefit solely to those who are in existence at that time; but if the testator has indicated with sufficient clearness that he intended others to participate, you must give effect to that intention.' The rule as settled by the English authorities is thus stated (2 Williams' Executors, 9th ed. 944):—'No child born after the period of distribution has any claim . . . and the children are excluded who are born after the fund becomes distributable in respect of any object or member of the class, or after the vesting in possession of any of the shares.'

"The same test was applied in all the cases I have mentioned. The date sought for in all of them was the date contemplated by the deed for the division of the fund—the date when it, or any share of it, was distributable or payable. In the case of *Buchanan's Trustees* the deed provided that on the death of the liferentrix the trustees should hold and apply the fund and the income thereof to and for behoof of all the lawful children of A., 'payable the several children's shares to the sons on their attaining twenty-five, and to the daughters on attaining that age or being married.' In the case of *Ross*, the trustees were directed to *divide and apportion* the fund among nephews and nieces and their descendants, declaring that the provisions of minors *should not vest and be payable* until they respectively attained majority. In *Emmet's* case the shares were directed to be *conveyed, assigned, paid, or transferred* to sons on their respectively attaining twenty-one, and to daughters on their respectively attaining that age or being married. And in *Knapp* v. *Vassall* it was declared that the shares of the settled fund should be for the portions of such younger children as should attain twenty-one, or being daughters should marry, the share of each

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The pursuers reclaimed, and intimated at the discussion that a minute had been lodged by Mrs Emelie Johnstone consenting to the release of the fund so far as her liferent was concerned, except to the extent of one-third.

Argued for the pursuers;—It was settled law in England that where a fund was to be distributed among a class of children who should attain twenty-one, only those children were entitled to participate who were in existence when the eldest child attained twenty-one.[1] The same rule had been applied in Scotland.[2] The period of distribution had arrived when the eldest child attained twenty-one, and the trustees were not entitled to hold for *nascituri*.[3]

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child *to be paid* on vesting or the death of the survivor of A and B, whichever should first happen.

"The question then is, what is the period of distribution or payment under this will? Has it yet arrived as to any of the shares? In my opinion it has not. I think the will clearly indicates that for anything that has yet happened, there is to be no payment or division at present. In the first place, the trust is for all the children of Mr Hope Johnstone who shall attain the age of twenty-one, or being daughters shall marry under that age, in equal shares. This, of course, is not conclusive, but it is a strong indication, to begin with, that the pursuers' view would not further, but would defeat, the intention of the testatrix. Then the trust is 'to hold,' not even 'to hold and apply,' as it was in the case of *Buchanan's Trustees*, and there is an entire absence of any words which could be construed into a direction to divide or to pay, in any of the events which have yet happened. In the third place, it is expressly declared that the trustees may at any time or times raise any part or parts not exceeding in the whole one-half of the then expectant or presumptive or vested share of any child . . . under the trusts of this my will, and pay or apply the same for his or her advancement or benefit, as my trustees shall think fit, but so that no such part or parts shall be raised and applied as aforesaid during the existence of any prior interest therein under this my will without the consent in writing of the person having such prior interest.' This clause negatives the idea that a vested share, any more than an expectant or presumptive share, is payable as matter of right to any child so long as any prior interest subsists; and it clearly contemplates that, subject to the trustees' discretionary power to make advances, all such shares are to remain in the hands of the trustees until the death or second marriage of Mrs Hope Johnstone, or possibly the death of Mr Hope Johnstone. I apprehend that this is a purpose which will receive effect, as it is in furtherance of the original intention expressed in the will, namely, that all the children of Mr Hope Johnstone who may attain twenty-one, or being daughters may marry, shall benefit in equal shares. It is true that the trustees, in making advances to a child under the clause just quoted, are restricted to one-half of the child's share, and this involves a calculation as to the amount of the child's share. But I apprehend that the trustees, in making this calculation for the purpose of any given advance, would simply take account of the number of children in existence when the advance was made, leaving any excess or defect to be rectified when the balance of the share becomes payable.

"I hold that no shares are presently payable to the pursuers, and therefore that the action must be dismissed."

[1] Andrews v. Partington, 1791, 3 Brown's Ch. Cas. 401; Gimblett v. Purton, 1871, L. R., 12 Eq. 427; Emmet v. Emmet, 1880, L. R., 13 Ch. Div. 484; Knapp v. Vassall, L. R. [1895], 1 Ch. 91.

[2] Buchanan's Trustees v. Buchanan, May 26, 1877, 4 R. 754; Ross, &c. v. Dunlop, May 31, 1878, 5 R. 833.

[3] Wood v. Wood, Jan. 18, 1861, 23 D. 338.

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Argued for the respondents;—The rule followed in England had never been adopted in Scotland. There was here no direction to pay or apply, but a direction "to hold." The clear intention of the testatrix was that the trustees should hold the fund until the class entitled to succeed was definitely ascertained on the death of the father.

At advising,—

LORD PRESIDENT.—Everything has been said which could be advanced in support of this reclaiming note, but the argument has failed to satisfy me that the position contended for the reclaimers is tenable. The Lord Ordinary has given a very clear statement of the clauses upon which the question in the case depends, and on the grounds stated by his Lordship I am prepared to affirm his judgment. The proposal is, the trustees should pay a share of the fund in their hands to certain beneficiaries before it is known who will constitute the class entitled to participate in the fund. To accede to that proposal might cause grave injustice, and I am clearly of opinion that the Lord Ordinary was right in refusing to comply with it.

LORD ADAM.—I am of the same opinion. I agree with the Lord Ordinary when he says that we must look to the date contemplated by the deed for the division of the fund. That is the real question. If the direction in the deed is to divide at a particular time, for example, upon the eldest child attaining twenty-one, that is a perfectly distinct direction, and it does not matter that other children may subsequently come into existence, because the instruction is to pay at a particular date. That is not the case here. The direction is not to pay, apply, or distribute, but to hold in trust for all the children of William James Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age, in equal shares. I cannot see how it can be consistent with that direction to ask the trustees now to pay to certain children when others may come into existence. If the trustees were to pay now, what could they say to *post nati*? There is here no question of vesting, and I can see no difficulty in the question. The trustees cannot tell who are the members of the class entitled to share, and therefore they cannot pay in equal shares.

LORD M'LAREN.—I base my opinion on the grounds developed in the Lord Ordinary's note, but as the judgment has been brought under review, and the question is put forward as one of general importance, I shall make some further observations. There are two bequests in the present case, but the question to be decided regarding them is one and the same. I shall consider the terms of the bequest of £6000. With regard to the income of this fund, a life interest is given to Mrs Hope Johnstone, and the trustees are directed to hold the capital and income (I presume the income after Mrs Hope Johnstone's death) in trust for all the children or any child of Mr Hope Johnstone, who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry under that age.

There are cases where under a direction in general terms to pay at majority

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the question arises whether these words import a condition of the right of the legatee, or only amount to an administrative direction to pay. In this case it is not disputed that the direction quoted is a condition of the gift, the question is as to the meaning of the condition. Now, the gift is to a class of persons which is subject to increase or diminution. Mr Hope Johnstone survives, and we cannot assume that his existing children are the only children he will have. We are then met by the difficulty that until the class of beneficiaries is complete we cannot know what is the amount of the share of any individual beneficiary. With regard to the suggestion of a payment to account, that is a matter for the trustees' consideration. We have here only to consider the question of right. If there were no authorities to guide us, I should hold that since the class is not ascertained payment is not due. Certain cases, however, have been referred to which, proceeding on Lord Chancellor Loughborough's opinion in *Andrews* v. *Partington*,[1] lay down the rule that where a legacy is given to children when they shall attain the age of twenty-one, and one of the class has attained majority, the number of the class is fixed as at that date. This is a purely arbitrary rule. It has never been defended as affording a correct construction of testamentary provisions. But whenever the rule has been contested the Judges have said that Lord Loughborough's decision must be followed. This rule, however, has not been adopted into our legal system. On the contrary, in the passage from the judgment of Lord President Inglis in the case of *Ross* v. *Dunlop*,[2] referred to in the Lord Ordinary's judgment, the true principle of construction is very distinctly affirmed. If, as his Lordship points out, there is no direction to pay on the attainment of majority, but only a general right to share in the fund, and the class remains undetermined, then payment must be delayed until the class is determined. There have, indeed, been cases where there was an express direction to pay on attainment of majority, and we in this Division have authorised payment to the beneficiaries one by one. Here, however, in the event that has happened, there is a virtual trust to hold until the attainment of majority by all the children, and the trustees must therefore keep up the trust until the death of the father, when the class will be definitely ascertained.

LORD KINNEAR.—I concur.

THE COURT adhered.

FORMAN & BENNET CLARK, W.S.—LINDSAY, HOWE, & Co., W.S.—Agents.

No. 7.

Nov. 3, 1904. Duffy v. Young.

MICHAEL DUFFY, Pursuer (Appellant).—*J. B. Young.*
WILLIAM YOUNG, Defender (Respondent).—*Orr.*

*Process—Appeal for Jury Trial—Proof or Jury Trial—Judicature Act*, 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.—In an action of damages at common law for £500 for personal injuries in the Sheriff Court, the pursuer appealed for jury trial. The Court *refused* a motion by the defender to remit the case to the Sheriff Court for proof on the ground that there was nothing to shew that the pursuer had not a genuine claim for an amount exceeding £40.

[1] 3 Brown, Ch. Cases, 401. [2] 5 R. 833.

No. 7.

Nov. 3, 1904.
Duffy v. Young.

1st Division.
Sheriff of Renfrew and Bute.

MICHAEL DUFFY, labourer, 55 Causeyside, Paisley, brought an action in the Sheriff Court at Paisley against William Young, carriage-hirer, Paisley, concluding for payment of £500.

The pursuer averred, *inter alia*, that on 13th June 1904 while crossing Sunnyside, Paisley, he was knocked down and run over by an omnibus and three horses belonging to the defender, and in charge of a servant of the defender. (Cond. 3) "At the time of the accident the horses to which said omnibus was attached were being driven in a furious and reckless manner by defender's said servant. The driver had no proper control over the animals, and failed to keep a proper outlook, or give any warning to the pursuer of the approach of said omnibus." (Cond. 5) "In consequence of said accident the pursuer sustained serious injuries to his chest, ribs, and over the body generally. He also sustained a severe shock to his nervous system. It is believed and averred it will be a considerable time before he is able to resume work."

On 11th October 1904, the Sheriff-substitute (Lyell) allowed a proof.

The pursuer appealed to the Court of Session for jury trial.

The defender moved the Court to remit the case to the Sheriff Court for proof.[1]

Argued for the pursuer;—There was here a genuine claim for a sum exceeding £40, and the pursuer was entitled to have his case tried by a jury.

LORD PRESIDENT.—No doubt we have sent cases back to the Sheriff Court, when it appeared, upon the face of the record, that the pursuer could only recover a very small sum. Although the averments in this case are somewhat narrow I cannot say that sufficient cause has been shewn for sending it back to the Sheriff Court. The pursuer avers that he was knocked down and run over by three horses and an omnibus, that he sustained serious injuries to his chest, ribs, and to his body generally, and that he also suffered a severe shock to his nervous system. At this stage we must assume that the pursuer may prove his averments, and, though they are somewhat vague, they contain allegations which shew that serious injuries might be proved. It appears to me therefore that the pursuer is entitled to have the case tried before a jury here.

LORD ADAM.—I have more than once expressed my opinion in this kind of case. The Legislature has laid it down that when the claim is above £40, the pursuer has a right to appeal for jury trial. No doubt we have sent cases back to the Sheriff for proof, but in my opinion we should only do so when it appears upon the face of the pleadings that the pursuer cannot possibly recover £40. In this case the pursuer claims £500, and on reading the record I cannot say that it is of the character to which I have referred. That being so, I am of opinion that we are not entitled to send the case back to the Sheriff.

LORD M'LAREN.—I concur. I do not think that the argument for sending these cases back to the Sheriff Court has much strength or substance in

[1] M'Nab v. Fyfe, July 5, 1904, 6 F. 925.

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it. My impression is that the 40th section of the Judicature Act, with its analogue in the Court of Session Act, was intended for the benefit of defenders. It was quite unnecessary for the protection of a pursuer, who might raise his action in the Court of Session if he pleased. Where a trivial sum of damages is awarded in an action which has been removed from the Sheriff Court to the Court of Session, the true remedy would be arrived at by applying a proper scale of expenses in the Court of Session. The difficulty which exists in dealing with this class of cases has arisen not from a difference of opinion as to the desirability of dealing with expenses, but from a difference of construction of our powers on the part of the two Divisions of the Court.

LORD KINNEAR.—I agree with Lord Adam. I think the pursuer has a right by statute to bring his case before a jury in this Court, provided his claim exceeds £40; and we cannot deprive him of that right unless it appears from his own statement that his true claim is for less than £40. I can recall a case where the pursuer's counsel summing up the items of his claim to the jury brought out a sum considerably less than £40 as the full amount of his demand, and made it clear enough that he had never expected to get more. That appeared to me to be an abuse of process, because it shewed that the pursuer was making a claim which he knew he could not sustain, in order to obtain a benefit which the statute would not have given him if he had made an honest statement. In the present case there is nothing to shew that there is not a perfectly genuine claim for £40, and therefore the pursuer is entitled to exercise his right to appeal for jury trial.

THE COURT refused the defender's motion and approved of the issue.

M'NAB & MACHARDY, S.S.C.—INGLIS, ORR, & BRUCE, W.S.—Agents.

No. 8.
Nov. 4, 1904.
M'Daid v. Coltness Iron Co., Limited.

PATRICK M'DAID, Pursuer (Appellant).—*Gunn.*
THE COLTNESS IRON COMPANY, LIMITED, Defenders (Respondents).—*Hunter.*

*Expenses—Modification—Jury Trial—Appeal from Sheriff Court—Small amount awarded.—Held* that a pursuer, who had appealed for jury trial and had obtained a verdict for £25 of damages, was entitled to expenses without modification, on the ground that, though the Court had power to relieve the losing litigant of any part of the expenses which might have been unnecessarily or unreasonably incurred by his successful opponent, no special reason for modification had been shewn in this case.

1ST DIVISION. Sheriff of Lanarkshire.

PATRICK M'DAID, 37 Manse Street, Coatbridge, brought an action in the Sheriff Court of Lanarkshire at Glasgow against the Coltness Iron Company, Limited, concluding for £250 at common law, or, alternatively, £156 under the Employers Liability Act, as damages for personal injuries caused by a piece of coal falling upon him while in their employment and on their premises.

On 24th February 1904 the Sheriff-substitute (Strachan) allowed a proof.

The pursuer appealed to the Court of Session for jury trial. The defenders did not move to have the case remitted to the Sheriff Court for proof.

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A jury, sitting with Lord Kinnear, awarded the pursuer £25. The defenders had made no tender.

On the pursuer's motion to apply the verdict and for expenses, the defenders moved the Court to modify the expenses, looking to the small amount of damages awarded.

Argued for the defenders;—The Court would modify expenses in a case which should never have been appealed for jury trial.[1] It was true that the appeal was taken under section 40 of the Judicature Act,[2] but the case was really one under the Employers Liability Act, 1880,[3] and the provisions of that Act with regard to the removal of cases under the Act to the Court of Session[3] applied here. This was clearly an action which might properly have been tried in the Sheriff Court, and expenses should only be allowed to the pursuer on the Sheriff Court scale, or at least subject to substantial modification.[4]

Argued for the pursuer;—The pursuer had a statutory right to appeal for jury trial, and he had obtained a substantial award of damages, which was very much larger than the limit of £5 prescribed by section 40 of the Court of Session Act, 1868,[5] with regard to the recovery of expenses. Expenses should therefore be given without modification.[6]

At advising,—

LORD KINNEAR.—I do not think it necessary to express any opinion on the general question which was argued with so much citation of authority except this, that the power of the Court to relieve the losing litigant of any part of the expenses which may have been unnecessarily or unreasonably incurred by his successful opponent appears to me to be beyond question. Whether the mere fact that the sum awarded by the jury is a very small one is sufficient to shew that the expense of a jury trial was unnecessary and unreasonable is a very different matter. My own view is, that when that question arises it must be determined, not merely by reference to the amount awarded by the jury, but after taking into account all the circumstances of the particular case, except perhaps in the case which is specially regulated by the only statutory enactment which deals with this matter, I mean the

[1] Jamieson v. Hartil, Feb. 5, 1898, 25 R. 551, *per* Lord Trayner, at p. 554; Brennan v. Dundee and Arbroath Joint Railway, May 26, 1903, 5 F. 811; Lafferty v. Watson, Gow, & Co., Limited, June 3, 1903, 5 F. 885.

[2] 6 Geo. IV. cap. 120.

[3] The Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), enacts,—Sec. 6, subsec. (3). "In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, sec. 9 of the Sheriff Courts (Scotland) Act, 1877."

Sec. 9, subsec. (2), of the Sheriff Courts (Scotland) Act, 1877 (40 and 41 Vict. cap. 50), enacts,—"The Court of Session, or either Division thereof, or any Lord Ordinary therein, may, if of opinion that the action might have been properly tried in the Sheriff Court, allow the defender who removed the action to the Court of Session, in the event of his being successful therein, such expenses only as they may consider that he would have been entitled to if successful in the action in the Sheriff Court."

[4] Kane v. Singer Manufacturing Co., May 21, 1904, 6 F. 658.

[5] 31 and 32 Vict. cap. 100.

[6] Casey v. Magistrates of Glasgow, May 24, 1902, 4 F. 811.

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40th section of the Court of Session Act of 1868. That enactment does not apply to the present case, because the pursuer recovered a much larger sum than £5, and taking the whole circumstances into account I think that the pursuer in this case ought to have his expenses as taxed without further deduction. It is quite true that the amount of damages awarded him is small, and is below the sum of £40, which is the lowest sum for which he can appeal to this Court for jury trial under the Judicature Act; but I see no reason to suppose that he and his advisers—because this is a matter which is considered by the advisers of a man in the circumstances of the pursuer rather than by himself—did not honestly believe that he should have a larger sum than £40. I think he might fairly maintain to the jury that a larger sum than that was due to him, and indeed, although I am perfectly satisfied as to the sum given by the jury, I should not have been surprised if it had been somewhat larger. Juries differ on that question; and I see no reason to doubt that a demand for something more might honestly have been made. I think the case must be looked at in this way, because in my opinion the action is founded on a liability at common law, and was properly appealable under the Judicature Act. It is true that the pursuer made an alternative claim under the Employers Liability Act, but in my opinion it is clear that the case, as established by the verdict of the jury, was a valid case at common law, and therefore we do not require to consider the effect of the special clauses in the Employers Liability Act regulating the conditions under which an appeal under that statute may be taken. Accordingly I deal with the case as an appeal under the Judicature Act.

Now, the sum actually awarded is small, but I do not think the question between the parties as it went to the jury was really a question of amount at all. The defenders might have made it a question of amount by making a tender. They did not think fit to do so, but, on the contrary, they maintained vigorously, as they were quite entitled to do, that they were not answerable for any fault whatever, but that they had exercised all reasonable care and prudence in taking precautions for the safety of their workmen. That was the question, and on that the jury found a verdict against them. That was a question of fact well fitted for jury trial, because it depended on conflicting evidence which was mainly circumstantial, and although I am quite satisfied with the verdict of the jury, the facts as presented to them might have suggested different views to different minds. It is therefore quite possible that if the case had gone to the Sheriff, his judgment might have been appealed to the Sheriff-Depute, and his judgment again to this Court, so that there might have been three discussions instead of one. It is therefore by no means certain that the course now recommended to the pursuer would have been less expensive than that which he chose for himself. But then I am of opinion that it was for his advisers to consider which course should be taken, and that the pursuer had a right under the statute, if so advised, to say whether he preferred the verdict of twelve average jurymen to settle the matter once for all, or to have the judgment of a single Judge subject to a first and second, and possibly even to a third appeal, if any question of law could have been extracted from the findings of fact.

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On the whole case, therefore, I am of opinion that there is not sufficient ground for depriving the pursuer of the small amount of damages awarded to him by the jury by the process of depriving him of the expenses of obtaining the award. I think the pursuer has been successful, and is therefore entitled to his expenses, and that there is no special reason for diminishing his claim.

The LORD PRESIDENT, LORD ADAM, and LORD M'LAREN concurred.

THE COURT applied the verdict and found the pursuer entitled to expenses.

MACKAY & YOUNG, W.S.—W. & J. BURNESS, W.S.—Agents.

No. 9.
Nov. 8, 1904.
M'Dowall & Neilson's Trustee v. J. B. Snowball Co., Limited.

ROBERT REID (M'Dowall & Neilson's Trustee), Claimant (Reclaimer).—*Clyde, K.C.—MacRobert.*
J. B. SNOWBALL COMPANY, LIMITED, Claimants (Respondents).—*C. N. Johnston, K.C.—R. S. Horne.*

*Sale—Stoppage in transitu—Duration of transit—Sale of Goods Act*, 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 44, 45.—By c.i.f. contract dated 11th February 1903, J. B. Snowball Company, Limited, Chatham, Miramichi, New Brunswick, sold a quantity of timber to M'Dowall & Neilson, Glasgow, at certain prices "including freight and insurance to Glasgow." The contract bore—"The goods are deliverable in the usual and customary manner at Miramichi with all reasonable despatch, according to the season of the year, and agreeably to the custom of the port during the shipping season 1903." "Should the vessel or vessels fixed for this contract be lost previous to loading, and after the name being declared to the buyer, then sellers to have the option of substituting another vessel or vessels, or cancelling the contract."

The timber was shipped at Miramichi by the sellers, and the bill of lading taken in their own name. The bill of lading bore that the cargo was to be delivered in Glasgow to their order or assigns.

On the ship's arrival at Glasgow the sellers stopped the goods *in transitu*.

In an action of multiplepoinding brought in name of the shipmaster, the trustee of M'Dowall & Neilson, who had been sequestrated, contended that the place of delivery was Miramichi, and that the *transitus* there ended.

*Held* on a construction of the contract that the port of delivery was Glasgow, and not Miramichi, and that the goods were *in transitu* when stopped.

*Bill of Exchange—Payment—Approved Acceptance—Stoppage in transitu—Custom of trade.*—An "approved acceptance" in a mercantile contract means an acceptance to which no reasonable objection can be taken, and it is not competent to prove that by the custom of a particular trade it means an acceptance to which no objection has in fact been taken.

A contract of sale provided for payment by "approved acceptance." The seller on 18th September took the buyer's acceptance. On 25th September the seller stopped the goods *in transitu*. The buyer was sequestrated on 1st October. *Held* that the acceptance did not operate as payment so as to deprive the seller of his right to stop the goods *in transitu*.

2D DIVISION. Ld. Kyllachy.

BY contract, dated 11th February 1903, J. B. Snowball Company, Limited, timber merchants, Chatham, Miramichi, New Brunswick, through their agents, Messrs Farnworth & Jardine of Liverpool, sold a quantity of wood to Messrs M'Dowall & Neilson, timber merchants, Glasgow. The contract was embodied in an agreement which, so far as material to the present report, was in the following terms:—

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"C.i.f. Memorandum of agreement made this 11th February 1903 between M'Dowall & Neilson, of Glasgow, and J. B. Snowball Company, Limited, of Chatham, N.B. Whereby the former purchase, and the latter sell, through the agency of Farnworth & Jardine, of Liverpool, the under-mentioned wood goods as classified at port of shipment, and all foreign measure. The prices stated below are in British sterling money, including freight and insurance to Glasgow, or so near thereto as she may safely get always afloat. . . .

"The goods are deliverable in the usual and customary manner at Miramichi with all reasonable dispatch, according to the season of the year, and agreeably to the custom of the port during the shipping season 1903. . . .

"Should the vessel or vessels fixed for this contract be lost previous to loading, and after the name being declared to the buyer, then sellers to have the option of substituting another vessel or vessels, or cancelling the contract, but in the latter case the buyers to have the option of taking the goods at an equivalent f.o.b. price, and usual f.o.b. conditions calculated at the date of this contract, such option to be declared without delay.

"*Payment.*—Buyers to adopt usual charter-party, and pay freight in accordance therewith, balance of invoice to be by approved acceptance to sellers' or sellers' agents' draft, payable in London at one hundred and twenty days from sight of and in exchange for bill of lading, policy of insurance, and other shipping documents. . . .

"Should any difference arise under this contract, or should the shipment be delayed beyond the time named in this contract, the buyer shall not reject the wood if shipped, nor refuse payment for same in the manner stipulated, but such difference shall be referred to arbitrators. . . ."

The goods were duly shipped at Chatham on the steamer "Angelo Padre," chartered by the J. B. Snowball Company on 3d September 1903, and arrived in Glasgow, from Miramichi, on 23d September.

The bill of lading for the goods was taken in favour of the J. B. Snowball Company, and bore that the goods were to be delivered at Glasgow. The Snowball Company forwarded it to Messrs Farnworth & Jardine, their agents in Liverpool. On 15th September Farnworth & Jardine drew bills for the price of the wood on M'Dowall & Neilson, and forwarded them with the indorsed bills of lading and shipping documents through the agency of Messrs Singleton, Dunn, & Company, timber brokers. On 18th September M'Dowall & Neilson returned the bills accepted.

On the arrival of the "Angelo Padre" at Glasgow, Farnworth & Jardine, having learnt that M'Dowall & Neilson were insolvent, served upon the master of the ship a notice that they stopped the goods *in transitu*. In consequence of this notice the master of the "Angelo Padre" landed the wood in neutral custody, and it was afterwards sold under orders from the Court. Messrs M'Dowall & Neilson were sequestrated on 1st October 1903, and the bills granted by them for the price of the wood were dishonoured.

In these circumstances the present action of multiplepoinding was raised by the J. B. Snowball Company, as real raisers, in the name of A. Girardi, the master of the "Angelo Padre," as nominal raiser, the fund *in medio* being the amount received for the wood when it was sold under the orders of the Court.

Claims were lodged for the real raisers, the J. B. Snowball Com-

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pany, and for Robert Reid, C.A., Glasgow, trustee on the sequestrated estate of M'Dowall & Neilson.

The J. B. Snowball Company claimed the fund *in medio* to the extent necessary to satisfy the price of the wood.

They averred that they had validly stopped the wood *in transitu*. With regard to the acceptance of the bills by M'Dowall & Neilson they made the following averment:—"The said M'Dowall & Neilson were at the date of receiving drafts and documents from Messrs Singleton, Dunn, & Company, insolvent, and aware of their insolvent position. The acceptances which they purported to grant to Messrs Singleton, Dunn, & Company of said drafts were not at the time they were granted capable of being discounted in the course of business on the acceptors' credit, and were not approved acceptances in the sense of the contract."

Reid claimed the whole fund *in medio*. With regard to the transit of the goods he averred:—"The said goods were duly delivered by the sellers to the buyers at Miramichi, the place of delivery mentioned in said agreement, and the *transitus* from the sellers to the buyers was thereupon ended. It was necessary for the buyers to give fresh instructions as to the destination of the goods, and the said M'Dowall & Neilson accordingly instructed J. B. Snowball Company, Limited, as their agents in that behalf, to ship the said goods to Glasgow. The said J. B. Snowball Company, Limited, in fulfilment of these instructions, chartered on behalf of the said M'Dowall & Neilson the vessel 'Angelo Padre' for the conveyance of the said goods from Chatham to Glasgow."

With regard to the acceptance of the bills he made the following averment:—"The said two drafts of M'Dowall & Neilson were accepted and approved of by J. B. Snowball Company, Limited, and are approved acceptances in terms of said agreement. They were accepted by J. B. Snowball Company, Limited, in full payment and satisfaction of and in substitution for their claim for the price of the goods under the contract of sale. The said J. B. Snowball Company, Limited, thereafter intended to rely, and did rely solely on the credit of the said two approved acceptances. In any event, by the usage and custom of the wood trade, an 'approved acceptance' is understood to mean a bill accepted in full payment and satisfaction of the price of the goods in respect of which the bill is granted. The said usage and custom is well known to the said J. B. Snowball Company, Limited, and both parties to the contract of sale had such usage and custom in contemplation when they entered into said agreement."

He pleaded, *inter alia*;—(2) The goods in question having reached their destination under said agreement, and having been taken possession of by the buyers, there was no stoppage *in transitu*. (3) In any event, the goods in question having been paid for, stoppage *in transitu* was not competent.

On 19th March 1904, the Lord Ordinary (Kyllachy) pronounced an interlocutor, by which he sustained the claim for the J. B. Snowball Company.*

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* "OPINION.—The first question in this case is whether the goods were in fact *in transitu* when the sellers stopped delivery on board ship at Glasgow.

"The trustee in bankruptcy of the purchasers avers that the goods were

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Reid reclaimed, and argued;—The *transitus* here was at an end when the goods arrived at Miramichi. That was named in the contract as the place of delivery, and the mere fact that both parties contemplated that the goods should be forwarded beyond the port of delivery did not entitle the seller to stop them during their further voyage.[1] After that the master acted as the agent of the buyers, not of the sellers. Alternatively, it was relevantly averred that delivery had been made at Miramichi to the sellers in the capacity of agents for the buyers. That ended the transit.[2] A proof should be allowed, *inter alia*, of this averment. [In answer to the Court the reclaimer declined to amend his record by making more specific averments regarding the alleged delivery at Miramichi.] (2) The stoppage was ineffectual, because at its date the respondents were not unpaid sellers. They had taken the buyers' acceptance for the price, and that, in the circumstances of the present case, operated as payment. The con-

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delivered to them at Miramichi, and that the *transitus* as between seller and buyer then came to an end, and that the shipment of the goods by the sellers from Miramichi to Glasgow was carried out by the latter, not as sellers of the goods, but as agents whom the buyers employed for that purpose.

"If Miramichi was the destination for the goods under the contract between the sellers and the buyers, and if the buyers or their agents actually took delivery of the goods there, and then entered into a new contract with the sellers to carry the goods to Glasgow, I do not think that the voyage between Miramichi and Glasgow would be part of the *transitus* as between buyer and seller, because it would not be a *transitus* in pursuance of the contract of sale, and for the purpose of conveying the goods from the seller to the buyer.

"The averments of the buyers, however, are extremely bare. I do not think that, in the particular circumstances of the case, they are sufficiently specific to be remitted to probation.

"The circumstances, so far as admitted or established by the documents founded upon, are as follows:—J. B. Snowball Company, Limited, timber merchants in New Brunswick, sold through their agents, Farnworth & Jardine of Liverpool, a quantity of timber to M'Dowall & Neilson, timber merchants, Glasgow, conform to memorandum of agreement, dated 11th February 1903. The timber was shipped by Snowball Company on board the 'Angelo Padre' at Chatham, New Brunswick, for carriage to Glasgow. The 'Angelo Padre' was chartered by Snowball Company by charter-party, dated 15th December 1902, whereby it was provided that the ship should 'load at Miramichi for four consecutive trips, commencing first open water 1903,' a cargo of deals and battens, and therewith proceed to 'a direct safe port on the west coast of England, Glasgow, east coast of Scotland, London, or a safe port between Bordeaux and Havre.' The bills of lading of the cargo in question were granted by the master to Snowball Company, and the cargo was thereby made deliverable to their order or assigns. The vessel arrived in Glasgow on the 25th September 1903, and immediately upon her arrival, and before any of the cargo was discharged, a notice of stoppage *in transitu* was served upon the master on behalf of Snowball Company. The master then unloaded the cargo and put it into neutral

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[1] Morton v. Abercromby, January 7, 1858, 20 D. 362, 30 Scot. Jur. 193; Cowdenbeath Coal Co. v. Clydesdale Bank, June 15, 1895, 22 R. 682; Valpy v. Gibson, 1847, 4 C. B. 837; *Ex parte* Gibbes, 1875, 1 Ch. D. 101; *Ex parte* Watson, 1877, 5 Ch. D. 35; *Ex parte* Miles, 1885, 15 Q. B. D. 39.

[2] Dixon v. Baldwen, 1804, 5 East, 175.

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tract here was in a form supplied by the sellers, and they had chosen to stipulate for payment by bill. When a seller had the option to take payment by bill or not, and elected to do so, it operated as payment.[1] The definition of an "approved" bill as a bill to which no reasonable exception could be taken only applied to cases where the question was whether the seller was bound to accept a bill as payment. (3) There was a relevant averment that by the custom of the wood trade—known to both parties—the fact that a bill was taken without objection made it an approved bill.

Argued for the respondents;—The goods were *in transitu* till they reached Glasgow. Until then they were not delivered to the buyers. The reclaimer's averments relating to delivery at Miramichi were too vague to be admitted to probation, and, on the most favourable construction, only amounted to an averment that the sellers delivered to themselves there as agents for the buyers. It was clear both on the

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custody, to hold for the true owners after payment of freight and charges. On the 15th of September the bill of lading, indorsed by Snowball Company, had been sent to M'Dowall & Neilson. The estates of the latter firm were sequestrated under the Bankruptcy Acts on 1st October 1903, and the claimant Mr Reid was appointed trustee in the sequestration.

"The contention of the trustee, that the goods were not *in transitu* when on the voyage from Miramichi to Glasgow, is founded, in the first place, upon the terms of the agreement for the sale of the timber.

"That agreement is partly printed, and appears to be a form of agreement used by Farnworth & Jardine, the agents of Snowball Company in England.

"The agreement bears that M'Dowall & Neilson purchase, and J. B. Snowball Company, Limited, sell, through the agency of Farnworth & Jardine, the under-mentioned wood goods, and then it proceeds:—'The prices stated below are in British sterling money, including freight and insurance to Glasgow, or so near thereto as she may safely get always afloat. Lighterage, if any, to be at expense and risk of buyers. The goods are deliverable in the usual and customary manner at Miramichi with all reasonable despatch, according to the season of the year, and according to the custom of the port during the shipping season 1903.'

"There then follow provisions which seem to me to shew very clearly that it was contemplated that in any case the goods would require to be sent by ship by the sellers from Miramichi to their final destination. For example, it is provided that 'should the vessel or vessels fixed for the contract be lost previous to loading, and after the name being declared to the buyer, then sellers to have the option of substituting another vessel or vessels, or' (subject to certain conditions) 'cancelling the contract.'

"M'Dowall & Neilson's trustee founded upon the provision that the goods were deliverable at Miramichi, and argued that that established that the *transitus* as between seller and buyer terminated there. I am unable so to read the contract, because, as I have said, it contemplates that in order to carry it out it will be necessary for the sellers to send on the goods by ship from Miramichi, and the conditions upon which that is to be done are enumerated.

"I do not know precisely why the clause making the goods deliverable at Miramichi was inserted. I imagine, however, that the deals and battens required to be brought from up-country to Miramichi, where they could be

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[1] Hodgson v. Davies, 1810, 2 Camp. 530; Robinson v. Read, 1829, 9 Barn. and Cr. 449; Cowasjee v. Thompson, 1845, 5 Moore, P. C. C. 165; Foster Alcock & Co. v. Grangemouth Dockyard Co., June 8, 1886, 23 S. L. R. 713.

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authorities[1] and on the terms of section 45 of the Sale of Goods Act, 1893,[2] that that was not delivery such as would put an end to the transit. (2) The fact that M'Dowall & Neilson's acceptance was taken for the price was not equivalent to payment. The trustee in sequestration did not deny that at the time the bills were accepted the acceptors were not in credit, and their bills could not have been discounted. If so, theirs was not an "approved acceptance," which meant an acceptance to which no reasonable objection could be taken.[3] (3) The reclaimer's averments as to custom of trade were irrelevant. Custom of trade could not alter the meaning of a phrase which had a fixed legal interpretation.

At advising,—

LORD JUSTICE-CLERK.—The circumstances of this case are so clearly and fully stated in the note to the interlocutor under review that I do not con-

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put on board ship, and one object of the clause certainly was to secure that the goods should be brought to Miramichi 'during the shipping season,' which I gather from the charter-party to mean when the bay is not closed by ice. I am not therefore satisfied that the clause meant more than that the goods were to be brought to Miramichi in a manner and at a time suitable for shipment.

"Further, I think that it is plain that the buyers must have named Glasgow as the destination of the goods. I do not see how otherwise Glasgow should have been mentioned, nor why the price should have included freight and insurance to Glasgow.

"The trustee, however, avers (and he asks proof of the averment) that 'the said goods were duly delivered by the sellers to the buyers at Miramichi, the place of delivery mentioned in said agreement, and the *transitus* from the sellers to the buyers was thereupon ended.'

"Now, I do not know whether that means that the goods were actually handed over to the buyers, or their agents, at Miramichi, or whether the averment is merely the inference which the trustee draws from the provision in the contract as to delivery at Miramichi, as he construes it.

"My impression is that the latter is the case, because the learned counsel for the trustee could not tell me to whom the goods were delivered. All the information he had was that there had been a good deal of correspondence between the buyers and the sellers as to the despatch of the goods from Miramichi. Snowball Company, on the other hand, say that no delivery was made to anyone at Miramichi.

"Now if actual delivery of the goods was given at Miramichi, the trustee

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[1] Berndtson v. Strang, 1868, L. R., 3 Ch. 588; *Ex parte* Rosevear China Clay Co., 1879, 11 Ch. D. 560; Bethell & Co. v. Clark, 1888, 20 Q. B. D. 615.

[2] The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts:—

Sec. 44. "*Right of Stoppage in transitu.*—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of price."

Sec. 45. "*Duration of Transit.*—(1) Goods are deemed to be in the course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier, for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee or custodier."

[3] Bell's Prin. sec. 107.

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sider it necessary to recapitulate them. I agree with the result at which the Lord Ordinary has arrived. The contention of the trustee that delivery was taken of the goods at Miramichi is not, I think, tenable. It is unfortunate that the word "deliverable" was used in the contract in connection with Miramichi, but I do not read that word as meaning to be delivered to the buyers at that port, but only that they were to be deliverable on board ship for transmission to this country with "all reasonable dispatch," as it is expressed, the meaning being that they were to be brought down country to the port of loading without any undue delay, so that they might be forwarded on and reach this country with all convenient speed.

In point of fact, the bill of lading contradicts the contention of the trustee, for the bill of lading was taken out not to the purchasers, as might have been the case had the purchasers received delivery at Miramichi, but to the sellers, who thus held the document the possession of which gave

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must know who was the representative or agent of the buyers to whom delivery was made, and I do not see my way to allow a proof of the averment with which I am dealing unless it is amended by adding a statement to that effect. I do not think that I would be justified in putting the parties to the expense of a proof upon an averment of doubtful relevancy, when the circumstances, the specification of which would make the averment relevant, must be known to the trustee if they actually existed.

"The trustee, however, contended that even assuming that the goods were not delivered to any third party representing the buyers at Miramichi, still the *transitus* there came to an end, because when the goods reached Miramichi nothing further could be done with them without further instructions. The leading authority founded upon was *Dixon* v. *Baldwen* (5 East, 175), where Lord Ellenborough said that the *transitus* had come to an end because 'the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them in motion again, to communicate to them another substantive destination, and that without such orders they would continue stationary.'

"Now, in the first place, I do not understand why new orders from the buyers should have been necessary so far as fixing the ultimate destination of the goods was concerned. Glasgow was in fact the ultimate destination, and 'Glasgow' was named in the contract in terms which it seems to me could have no meaning unless it was the place to which it was intended that the goods should be sent; and as I have pointed out, freight and insurance to Glasgow were included in the price.

"But even assuming that when the goods arrived at Miramichi it was necessary for the buyers to give the sellers instructions where to send them, that, in my judgment, would make no difference. It is plain from the contract that the goods were in no case to remain at Miramichi, but were to be forwarded by ship from Miramichi by the sellers to the purchasers. Therefore, assuming that the goods remained for a time at Miramichi in the sellers' custody awaiting the buyers' instructions where to send them, the transit would not be at an end, because the sellers would not be holding the goods as the buyers' agents to take possession of and to keep them, but only for the purpose of forwarding them in fulfilment of the contract of sale.

"In the case of *Dixon* v. *Baldwen* the circumstances shortly stated were these: Battier of London was in the habit of buying cotton goods from Baldwen of Manchester to be forwarded to Metcalf & Company at Hull, for the purpose of being shipped by the latter to Hamburg. The course of dealing was, that after Metcalf & Company received the goods, they held them for Battier until they received instructions from him when and to

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them the power over the goods while they were on the voyage. I think it cannot be doubted that J. B. Snowball Company could at any time while the goods were on the voyage have given a good title to the goods to any purchaser they might have dealt with, they holding the bill of lading. They might be in the position that those who contracted with them for the goods would have a good action of damages against them if they failed to carry out their contract, but I do not see how it could be held that those who made a contract with them could have claimed and successfully asserted their right to the particular goods, on the footing that they had been delivered to them and had become their property by delivery.

The trustee desired a proof upon the question of delivery at Miramichi, but taking the view I have expressed I can see no ground for allowing a proof of the very meagre statements on this part of the case, and we were told at the debate that no proposal was made by the trustee to amend his record. It was admitted that nothing more definite could be stated.

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whom to ship them to Hamburg. In ordering from Baldwen the goods in regard to which the question of the sellers' right to stop *in transitu* arose, Battier wrote to Baldwen specifying the goods and telling him to forward them to Metcalf & Company 'to be shipped to Hamburg as usual.' It was upon the latter words that the sellers maintained that the goods were still *in transitu* after they had been shipped to Hamburg by Metcalf & Company pursuant upon instructions which they had received from Battier.

"It was held that as between Battier and Baldwen the *transitus* ended when the goods were delivered to Metcalf & Company, the latter being Battier's agents to hold the goods altogether at his disposal. It seems to me that the circumstances in that case were substantially different from those with which I am dealing.

"A case much more nearly allied to the present is the *Rosevear China Clay Company* (11 Ch. Div. 560). In that case James, L.J., said—'The authorities shew that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. . . . It seems to me that the mere fact that the port of destination was left uncertain, or was changed after the contract of sale, can make no difference.'

"In the same case Brett, L.J., said—'It seems to me that it can make no difference whether the destination of the goods is communicated to the vendor at the time of the contract for sale, or whether the destination is to be named after the contract but before the shipment.'

"I am therefore of opinion that unless the goods were actually delivered to the buyers or their representative at Miramichi, they were still *in transitu* during the voyage between Chatham and Glasgow.

"The next question is whether, assuming that the goods were *in transitu* when they were stopped by Snowball Company, the latter had not received payment of the price.

"In the memorandum of agreement it was provided—'balance of invoice to be by approved acceptance to sellers' or sellers' agents' draft payable in London at one hundred and twenty days from sight of, and in exchange for, bill of lading, policy of insurance, and other shipping documents.'

"On 15th September Farnworth & Jardine sent to M'Dowall & Neilson, through Singleton, Dunn, & Company of Glasgow, the bill of lading and two bills of exchange at 120 days, for £3378, 7s. 5d. and £3000 respectively, drawn by Farnworth & Jardine upon M'Dowall & Neilson. Upon 18th September the latter firm accepted the bills and returned them to Singleton, Dunn, & Company. The estates of M'Dowall & Neilson were sequestrated under the Bankruptcy Acts on 1st October, and their

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It was maintained by Mr MacRobert that Miramichi was the only place to which the sellers were bound to send, and therefore that it was the place of delivery. But I agree with the Lord Ordinary in thinking that this was plainly not so, and that the contract contemplated that the goods would require to be sent on from there to their final destination, the conditions as to the right of the sellers to substitute other vessels than those named by them to the buyers indicating that the transaction was not at an end at Miramichi, and the taking of the bill of lading in the sellers' name is in entire consistence with this. The bill of lading also in its terms states Glasgow as the port of delivery.

I cannot doubt, therefore, that the goods were *in transitu* during the voyage to Glasgow, and that the sellers were entitled to exercise the right of stoppage, unless they did some other act which completed the buyers' right, so as to cause the goods to be no longer *in transitu*, but to be the delivered property of the other party to the contract.

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trustee avers that on 5th October the bills were returned to him by Singleton, Dunn, & Company.

"The question therefore is, whether in these circumstances Snowball Company were unpaid sellers who were entitled to stop the goods *in transitu*.

"As a rule, when a bill is taken instead of present payment of a debt, and the bill is not paid at maturity, the creditor may sue for the debt just as if the bill had not been granted. In short, payment by bill is, in general, only conditional payment, and I do not think that it makes any difference that payment is stipulated to be by 'approved' bill, because that is a stipulation in favour of the creditor, an 'approved' bill having been held to mean a bill to which no reasonable objection can be taken.

"Now, here the bills were worthless, having been granted by M'Dowall & Neilson upon the eve of bankruptcy, and their estates having been actually sequestrated a few days afterwards. In such circumstances, it seems to me that Snowball Company cannot be held to have received payment of the goods unless either they contracted to take the bills as in full payment and discharge of the price, or so acted as to bar themselves from maintaining that they had not done so.

"The averment of M'Dowall & Neilson's trustee is as follows:—'They' (the bills) 'were accepted by J. B. Snowball Company, Limited, in full payment and satisfaction of and in substitution for their claim for the price of the goods under the contract of sale. . . . In any event, by the usage and custom of the wood trade, an 'approved acceptance' is understood to mean a bill accepted in full payment and satisfaction of the price of the goods in respect of which the bill is granted.'

"Now, in regard to the first of these averments, I do not know whether the trustee is merely stating what, in his view, is the legal result of the memorandum of agreement, or if he means to say that there were circumstances (which he does not specify) which shew that the bills were, in fact, taken in full payment and satisfaction of the price. If he means the former, I do not agree with him; if the latter, the averment, in my opinion, fails for want of specification.

"I am unable to read the memorandum of agreement as binding Snowball Company to take the bills as in full payment and satisfaction, even although they should turn out to be worthless. The stipulation in regard to 'approved acceptance' is contained in a clause which has the general heading 'Payment,' that word not being used in the clause itself. I may say, however, that I do not regard that as material, because I apprehend that the mere fact that in such a case the agreement says that payment is to be by bill, is not equivalent to a stipulation that the bill shall be taken

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Now, the trustee maintains that this was done by the sellers taking acceptances for the price before the goods arrived in Glasgow, in pursuance of a clause in the contract, by which "balance of invoice" was to be by "approved acceptance to sellers' or sellers' agents' draft, payable in London at 120 days from sight of, and in exchange for, bill of lading, policy of insurance, and other shipping documents." The fact is that the bankrupts' acceptances were given on 18th September, and that the sequestration took place on 1st October. Can it be said in these circumstances that these were approved bills? Mr Bell, in his Principles, says that "an approved bill seems to import only a bill to which no reasonable objection can be made." Applying this test, can this be said of these bills, which, as the Lord Ordinary points out, were plainly worthless? But the trustee makes an

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as in satisfaction and discharge of the price, and renders the payment by bill otherwise than conditional. The clause provides for a variety of things. It commences: 'Buyers to adopt usual charter-party, and pay freight in 'accordance therewith.' Then follow the words which I have already quoted, to the effect that 'balance of invoice to be by approved acceptance,' and so on; and finally, it provided that 'if required, the buyer shall give sellers or sellers' agents an approved acceptance at thirty days' for advances made abroad on account of freight, receiving in exchange the captain's receipt and a policy of insurance for the amount. I do not think that there is anything in that clause to make the payment by bill other than a conditional payment.

"Coming now to the averment in regard to the alleged custom of trade, I would, in the first place, remark that as averred it seems to me to be no more than a statement of a proposition in law of general application. I do not doubt if sellers of goods in fact take a bill as 'in full payment and satisfaction' of the price, then the price will be held to be paid. What the trustee intends to aver, however, is, I understand, that, according to the custom of the wood trade, in cases where an approved bill is stipulated for, whenever the seller takes, without objection, a bill from the buyer, it is regarded as an approved bill, accepted by him in full payment and discharge of the price. In other words, the alleged custom is that by 'approved bill' is meant a bill of which the seller has indicated his approval by taking it, and not, as in the ordinary case, a bill to which no reasonable objection can be taken.

"Whether, however, that is, or is not, a correct statement of the view of the trustee, I am of opinion that this is a case in which it is not competent to prove an alleged custom of trade in order to construe the agreement. Such a proof could only be allowed on the grounds that the words in the agreement, 'approved acceptance,' were technical words of the trade, and required explanation of what they signified in the trade. These words, however, are not technical words of the wood trade, but are common in mercantile contracts, and have a well-known legal import. To allow evidence in such a case would therefore, it seems to me, be to practically hand over to the witnesses the construction of the contract, which is a matter for the Court alone. I may refer to the case of *Calder* v. *Aitchison*, 9 S. 777, 5 W. & S. 410; and *Steel Company of Scotland* v. *Tancred, Arrol, & Company*, 15 R. 215, 17 R. (H. L.) 31.

"The result upon the whole case is that, in my opinion, unless M'Dowall & Neilson's trustee is in a position to amend his statements by making them more specific in the particulars to which I have referred, his claim to the whole fund *in medio* falls to be repelled, and he is only entitled to be ranked to the balance of the fund after payment to Snowball Company of the price of the goods."

averment of custom of trade, under which "approved bill" means a bill of which the seller has indicated his approval by taking it. I agree with the Lord Ordinary in holding that these words must be construed according to their legal import in this contract, and that legal import is expressed as I have quoted above.

My view, therefore, upon the whole matter is that the trustee desiring to have a judgment on the record as it stands, and not proposing any amendment, the Court ought to adhere to the judgment of the Lord Ordinary, and I accordingly so move your Lordships.

LORD YOUNG concurred.

LORD TRAYNER.—I agree with the conclusion at which the Lord Ordinary has arrived.

The main contention presented by the reclaimer against the Lord Ordinary's judgment was based upon the clause in the agreement or contract of sale between the parties which provides that "the goods are deliverable in the usual and customary manner at Miramichi with all reasonable dispatch." I read that as referring to delivery at Miramichi for the purpose of shipment—not delivery there as to the buyer. The whole clause points to this—that there should be no undue delay in the shipment of the cargo. Under the contract the seller had to provide a ship to carry the cargo to Glasgow, and to pay freight and insurance to that port, and such an obligation on the seller rather points in the direction of the cargo being still under his control and at his risk until it reached its destination. I do not mean to say that full delivery of the cargo to the buyer could not have been made at Miramichi, so as to vest the buyer with full property, even although there remained on the seller the obligation to find a ship to carry it and also to pay freight and insurance. But certainly in the usual course a contract of sale c.i.f. contemplates delivery of the cargo at the port of discharge, not the port of shipment. However that may be, the question remains, was the cargo in point of fact delivered to the buyers at Miramichi? The Lord Ordinary justly shews that the averments in regard to this are very vague. The buyers were not personally at Miramichi, and could not therefore themselves receive delivery. Their averment is that they instructed the sellers to receive the cargo as for them, and instructed them to ship the same to Glasgow "as their agents in that behalf." But nothing is said as to when or how such instructions were given or sent, and this averment of agency is too vague and inadequate. It could and should have been made more precise if proof of it was desired. The claimant Reid (who now represents the buyers) was asked if he proposed to amend his statement on this matter, and the answer was that nothing more specific could be said than was already on record. But I think there is no need of further proof on this part of the case beyond what we already have. It is apparent that the sellers did not deliver the cargo to the buyers at Miramichi, or ship it there as agents for the buyers, for the bill of lading shews that they shipped it in their own name, deliverable to them or their assigns at Glasgow. So long as they held these bills of lading the cargo was under their control, and was so much their property that they could

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have conferred a right to it upon anyone to whom they pleased to indorse the bills of lading. But the terms of the bills of lading tend also to shew that Glasgow was the port of delivery, and not Miramichi. I come therefore to the opinion (with the Lord Ordinary) that the transit of the cargo, as between seller and buyer, did not terminate at Miramichi, but at Glasgow, and that being so, it was duly stopped *in transitu* by the sellers' notice to the ship on its arrival at the port of delivery.

The only other argument maintained on behalf of the claimant Reid was, that the buyer had paid for the cargo by accepting bills for the price in favour of the sellers, and that the latter were thereby barred from claiming the price of the cargo as on the contract of sale, or exercising any right as sellers—that the only right which remained to them was to operate diligence on the bills. I think it enough to say that in the circumstances of the case that argument is not in my opinion tenable.

LORD MONCREIFF.—I am of the same opinion. On both points I agree with the Lord Ordinary. On the first question of transit it is plain from the memorandum of agreement between the sellers and the buyers that the destination of the goods was Glasgow. The vessel to carry the goods from Miramichi was to be chartered by the sellers, and in point of fact it was chartered by them, and the bills of lading were taken in their own name. The prices for the goods included freight and insurance to Glasgow.

No doubt if on arrival of the goods at Miramichi they had been delivered to the buyers or their agent it might have been held that transit was at an end; but this was not done. The goods were put on board the vessel by the sellers, and were still on board when the stoppage took place.

The only clause upon which the claimant Reid can found is that in the memorandum of agreement,—"The goods are deliverable in the usual and customary manner at Miramichi," &c.

But this clause must, I think, be read in the light of the rest of the document, and so read amounts to no more than this, that the goods were to be brought to Miramichi in due time to be shipped there during the shipping season.

The second question is whether the claim for the sellers is barred by their having indorsed the bills of lading in exchange for acceptances by M'Dowall & Neilson. In my opinion the payment so made was conditional, and as the acceptances were immediately found to be worthless owing to the insolvency of the buyers, Snowball Company, Limited, were unpaid sellers in the sense of section 44 of the Sale of Goods Act, and were entitled to stop the goods *in transitu*, and resume possession of them. The acceptances were not those of a third party, but those of the buyers themselves, and they could not have been discounted.

In these circumstances I am of opinion that the mere addition of the word "approved" has not the effect of depriving the payment of its conditional character. I am therefore of opinion that the Lord Ordinary has rightly sustained the claim for the sellers, J. B. Snowball Company, Limited.

THE COURT adhered.

DRUMMOND & REID, W.S. – WEBSTER, WILL, & Co., S.S.C.—Agents.

Miss ISABELLA TRAIN, Petitioner (Reclaimer).—*W. Thomson.*
WILLIAM CHARLES STEVEN (Respondent).—*M'Lennan—Munro.*

No. 10.

Nov. 12, 1904.
Train v. Steven.

*Bankruptcy—Sequestration—Warrant to cite Debtor—Objections to sufficiency of vouchers produced—Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 26.—A petition for a debtor's sequestration presented without his consent was objected to by the debtor on the ground that the only voucher produced was under suspension.

The Lord Ordinary on the Bills sustained the objection and dismissed the petition.

The petitioner having reclaimed, the Court *held* that the direction in sec. 26 of the Bankruptcy Act, 1856,* to grant a warrant to cite the debtor was peremptory, and remitted to the Lord Ordinary to grant the usual order and proceed.

Bill-Chamber. 1st Division.

ON 8th September 1904, Miss Isabella Train, residing at Wesley Cottages, Eskbank, near Edinburgh, presented a petition to the Lord Ordinary on the Bills for sequestration of the estate of William Charles Steven, chartered accountant, Edinburgh.

Along with the petition the petitioner produced (1) an extract decree against Steven, dated 28th June 1904, for expenses amounting to £59, 7s. 3d. in name of A. W. Gordon, solicitor, Edinburgh, as agent-disburser; (2) an execution of charge, dated 1st August 1904, proceeding upon said decree; (3) an assignation of said decree and charge by A. W. Gordon in favour of the petitioner, dated 11th August 1904, and bearing to be granted in consideration of the sum of £25 paid to Gordon by the petitioner.

Arrestments having been used in the hands of the debtor against Gordon, the debtor on 30th August 1904 had raised an action of multiplepoinding in the Sheriff Court at Edinburgh, in which he called the arresters, the present petitioner, and A. W. Gordon. On 7th September 1904 the debtor also brought a suspension of the charge.

A caveat having been lodged by Steven in the sequestration, and parties having been heard thereon, the Lord Ordinary on the Bills (Stormonth-Darling) on 9th September 1904 pronounced this interlocutor:—"In respect the voucher produced with the petition is under suspension, dismisses the petition."

The petitioner reclaimed.

The respondent lodged a minute in which he set forth the facts above narrated with regard to the arrestments, and the bringing of the multiplepoinding and the suspension, and also further stated that on 9th September 1904 the Lord Ordinary on the Bills in the suspension, on caution, had sisted execution, and on 23d September had passed the note and continued the sist, caution having been found; that *ex facie* of the taxed account, on which the decree produced with the petition proceeded, £27, 14s. thereof consisted of counsel's and counsel's clerks' fees, which the respondent averred had not been paid,

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), enacts, sec. 26—"When a petition for sequestration is presented without the consent of the debtor . . . the Lord Ordinary or Sheriff to whom it is presented shall grant warrant to cite the debtor . . . to appear within a specified period, if he be within Scotland, by delivering to him personally, or by leaving at his dwelling-house or place of business, or the dwelling-house or place of business last occupied by him, a copy of the petition and warrant . . . to shew cause why sequestration should not be awarded; and the Lord Ordinary or the Sheriff shall, if desired, grant diligence to recover evidence of the notour bankruptcy or other facts necessary to be established."

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and the decree for which was not assignable, Mr Gordon being personally bound to account for them to counsel and their clerks when recovered; that the petitioner had not given any consideration for the assignation of said fees to her, the consideration set forth being £25, and that she was thus not a creditor of the respondent whose debt amounted to not less than £50, as required by section 14 of the Bankruptcy (Scotland) Act, 1856;[1] that the respondent was perfectly solvent, and was prepared to pay the amount in the decree to the person or persons having just right thereto; that his intention had been to consign the amount in the decree in the hands of the Sheriff-Clerk as soon as the competency of the multiplepoinding had been sustained, that he had already found caution for the amount in the suspension process, and that he was willing, and offered to consign said amount in the present process if necessary for the affirmance of the interlocutor reclaimed against.

Argued for the reclaimer;—Under section 26 of the Bankruptcy (Scotland) Act, 1856,[1] the Lord Ordinary had no discretion, and must grant warrant to cite.[2] At that stage the matters alleged by the respondent were irrelevant. They could only be considered and decided on at the later stage, when the debtor had an opportunity under section 30 of shewing cause why the sequestration could not be competently awarded.

Argued for the respondent;—Where the debtor was present, as he was in this case, there was no necessity for a warrant to cite, and if it were instantly shewn that the petition ought to be dismissed that could be done without any warrant to cite being granted. Section 21[3] prescribed the requisites, failing production of which the petition must be dismissed. These requisites were not present here. (1) The petitioner's debt did not amount to £50,[4] in respect that £27, 14s. of the sum in the decree, being counsel's and counsel's clerks' fees unpaid, was not assignable. (2) The voucher was not sufficient, for the charge was under suspension, and a multiplepoinding had been raised. (3) There was no notour bankruptcy. An expired charge was not enough. There must also be insolvency. The presumption of insolvency arising from an expired charge might be rebutted, and was here rebutted by caution being found in the suspension. Satisfaction of the debt had now been made by the offer of consignation, and the petition should be dismissed upon that ground also.[5]

Lord President.—I think the Lord Ordinary has erred here, and that he should have ordered service in the ordinary way. The reason which he gives for not doing so is, that the voucher produced with the petition is under suspension. It is not said that it is bad *ex facie*, or even that it could be instantly verified to be bad, but merely that it is challenged. It may be on good grounds or without good grounds; and the result of the interlocutor being allowed to stand would be that, while the question of the vouchers is being considered in proceedings quite extrinsic to this petition, the order of service could not be made. It seems to me that if this were

[1] 19 and 20 Vict. cap. 79.
[2] Hope v. Macdougall, Nov. 7, 1893, 21 R. 49.
[3] 19 and 20 Vict. cap. 79, sec. 21.
[4] 19 and 20 Vict. cap. 79, sec. 14.
[5] 19 and 20 Vict. cap. 79, sec. 30; Goudy on Bankruptcy, p. 154; Alexander v. Barclay, Jan. 14, 1845, 7 D. 264, 17 Scot. Jur. 130.

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to be sustained as a sufficient reason for refusing an order to cite, it would place an impediment in the way of sequestration, with the benefits which it confers in the way of cutting down or preventing the acquisition of preferences, which would be most unfortunate. It seems to me, therefore, that the Lord Ordinary should have granted a warrant to cite the debtor, seeing that there was no instant verification of anything which would be a ground for refusing that order.

LORD ADAM.—I had occasion to express my opinion upon this question in the case of *Hope* v. *Macdougall*,[1] and I remain of the opinion, which was the opinion of the Court, that the proper course in such circumstances as were present here was to pronounce an order for service.

LORD M'LAREN concurred.

LORD KINNEAR.—I agree. I think the procedure prescribed by the statute is peremptory. It may turn out that this petition for sequestration is not competent or not sufficiently supported, but meantime the statutory course must be followed. It may be that if the petitioning creditor fails to produce any account or vouchers, as required by the 21st section, the petition may be dismissed *de plano*. But if a question arises as to the sufficiency of vouchers actually produced, it cannot be decided or considered until after citation.

THE COURT recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary on the Bills to grant the usual order of citation and to proceed.

A. W. GORDON, Solicitor—ROBERT BROATCH, Solicitor—Agents.

No. 11.
Nov. 16, 1904.
Marquess of Bute's Trustees v. Marquess of Bute.

LORD EDMUND BERNARD TALBOT AND OTHERS (Marquess of Bute's Testamentary Trustees), Real Raisers and Claimants (Respondents).—*Campbell, K.C.—Pitman.*

REVEREND GEORGE JOHN SMITH (Roman Catholic Bishop of Argyll), Claimant (Respondent).—*Campbell, K.C.—Graham Stewart.*

REVEREND WILLIAM TURNER (Roman Catholic Bishop of Galloway), Claimant (Reclaimer).—*Salvesen, K.C.—Scott Brown.*

JOHN CRICHTON, Marquess of Bute, Claimant (Reclaimer).—*Mackenzie, K.C.—Blackburn.*

*Charitable Trust—Church—Cy-près—Bequest for building church—Conditions impossible of fulfilment.*—A testator directed his trustees to expend two sums of £20,000 each upon the erection of two Roman Catholic churches or "such smaller sum or sums as may be necessary . . . my intention being merely to have such church . . . completed although it may be at a less cost than £20,000 each"; any unexpended balance to revert to the residue of his estate. Except for a provision of £10,000 for the endowment of one of the two churches, the trust-disposition and settlement contained no provision for endowment. Upon the completion of the buildings the trustees were directed to convey them, on certain specified conditions, to trustees to be appointed respectively by the Bishop of the Roman Catholic Diocese in which the churches were to be situated.

In a multiplepoinding raised after the death of the testator the Bishops

[1] Nov. 7, 1893, 21 R. 49.

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stated they were unable to accept the bequests under the conditions specified, on the ground that owing to want of endowment the conditions could not be implemented. They proposed that the testamentary trustees should either accumulate the funds till they amounted to a sum sufficient to build and endow the churches, or that the fund should be applied in accordance with a scheme to be approved by the Court.

*Held* that either proposal was contrary to the truster's intention, and that the bequests having lapsed owing to the refusal of the Bishops to accept them on the conditions specified by the testator the sums in question fell into residue.

2D DIVISION. Ld. Kyllachy.

JOHN PATRICK CRICHTON, third Marquess of Bute, died on 9th October 1900, leaving a trust-disposition and settlement, dated 13th July 1894.

By the trust-disposition and settlement the Marquess, *inter alia*, bequeathed, "to such trustees as may be named for the purpose by the Right Reverend George John Smith, Roman Catholic Bishop of Argyll, whom failing, by his successor in that office for the time, a sum of £10,000, the income of said sum to be applied by them for the upkeep of daily Roman Catholic Cathedral service at Oban in the church to be built there by my trustees, or elsewhere in Oban: . . . To my trustees the sum of £40,000 . . . for the purpose of erecting and completing by themselves, or in conjunction with others, according to plans to be approved of by my trustees, a Roman Catholic church at Oban and a Roman Catholic church or monastery at Whithorn (the said church at Oban and church or monastery at Whithorn to be built by my trustees at the said places in the order in which they are above named, and that at a cost to my trustees of not more than £20,000 for said church at Oban, and £20,000 for said church or monastery at Whithorn, but my trustees shall not expend in these erections or either of them more than £10,000 in any one year . . .): And in the event of my having given the whole or part of the cost of erecting and completing either or both of the said church and church or monastery, and the same having been completed during my life, the sum or sums so given by me shall be held to be payment in full of the legacy hereby bequeathed for the purpose of completing said church and said church or monastery, and in the event of such church and church or monastery having been commenced but not completed during my life, any sum or sums given or paid by me towards the erection of such church or church or monastery shall be held to be payment *pro tanto* of the sum or sums hereby bequeathed towards such erection, and my trustees shall pay the balance only of such sum or sums or such smaller sum or sums as may be necessary to complete such church or church or monastery, my intention being merely to have such church and church or monastery completed, although it may be at a less cost than £20,000 each: And when each of the said church and church or monastery has been completed, my trustees shall denude thereof in favour of my widow, whom failing, one of my descendants (one of whom when practicable shall always be selected to act as trustee by the remaining trustees), and such other trustees, not exceeding four in number, as may be named or appointed for the purpose by the Roman Catholic Bishop officiating in the respective districts for the time, and which four other trustees shall be laymen, with the exception of the Bishop himself, who may be one of said trustees, and one of them shall be a lawyer; and said trustees shall, as a condition of receiving a convey-

ance of said church and church or monastery, be bound to undertake to free and relieve my trustees and my trust-estate of all future liability concerning the same, and my said trustees shall, before denuding of said church and church or monastery in favour of the trustees to be named or appointed as aforesaid, either exact from said Bishop a formal and sufficient deed, renouncing for himself and his successors in office, as an inherent condition of his and their trusteeship, all or any immunity which he or they as a Roman Catholic ecclesiastic may in any way have or claim from civil proceedings against him or them as trustee or trustees, or otherwise, as they may be advised by counsel learned in the law, shall in denuding of the said church and church or monastery, or either of them, make it an effectual inherent condition of the trust that such immunity shall not be pleadable by any trustee, whether a Roman Catholic Bishop or not."

The trust-disposition then provided:—"And further, my said trustees, in denuding of said church and church or monastery, or either of them, shall make it a condition of the conveyance thereof—(First) That each of the said churches shall be free and open, and that no charge for admission to or for presence in the building or any part of it, or for seats therein, shall be made on any occasion whatever: (Second) That each of said edifices shall be consecrated within eight days of the date on which it may be handed over to the new trustees, and that the whole of what is called 'The Divine Office' shall be publicly said or sung there every day, and other daily or occasional services shall be conducted as directed by the Rubrics: And I further direct that in the event of my trustees joining with other subscribers in erecting any one of the churches at the places above named, they must make it a prior condition of their doing so that the conditions hereinbefore enjoined with reference (first) to the non-immunity of the Roman Catholic Bishop from civil proceedings as trustee; (second) the churches being free and open; (third) the consecration of the edifice; and (fourth) 'The Divine Office,' shall form an inherent part of the constitution of the church: And I hereby declare that in the event of the trustees who may be named in terms of the powers hereby conferred for carrying out the purposes of the trust to be constituted with reference to the said church at Oban, and the said church or monastery at Whithorn, declining to undertake the trust subject to the several conditions herein specified, or failing to carry out the said several conditions, the trusts in their favour, and such portion of the legacies as may remain unexpended, shall lapse so far as such trustees are concerned, and the edifices and balance of the legacies shall revert to my trustees, in order that they may give effect to my intentions as above indicated; and in the event of my trustees finding it unnecessary to expend the whole of said sums of £20,000 for each of said church at Oban and church or monastery at Whithorn, either by reason of payments made by me during my life, or by reason of money being available for the purpose from other sources, so that the full sums of £20,000 shall not be required to complete the said erections respectively, the balance unexpended by them shall revert to the residue of my estate."

In November 1903 the trustees named in the trust-disposition and settlement brought an action of multiplepoinding for the determination of questions that had arisen upon the foregoing provisions, the fund *in medio* being the sum of £40,000 mentioned therein.

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The Roman Catholic Bishop of Argyll lodged a condescendence and claim in which he stated:—"2. The funds at the claimant's disposal are not such that it is certain that in all time coming the condition imposed by the truster, that 'The Divine Office' shall be publicly said or sung every day, could be fulfilled. It might therefore happen that, through inability to do this the church, which had then been consecrated, would in terms of the trust-deed revert to the trustees. The claimant cannot accept of the bequest on this condition. Further, funds at the claimant's disposal are not such as to enable him to maintain the fabric of the church. 3. The claimant therefore maintains that the real raisers ought to hold the said £20,000, and accumulate the interest thereof until the income has accumulated so as to form an endowment fund for the maintenance of the fabric and the performance of 'The Divine Office,' or otherwise to submit a scheme modifying the testator's intentions in certain respects, so as, as far as possible, with the said sum, to carry out the essential intention of the truster."

The claimant therefore claimed that the trustees should either (1) accumulate the said sum, or (2) prepare the scheme referred to.

The Roman Catholic Bishop of Galloway also lodged a condescendence and claim, in which he made averments in greater detail as to the impossibility of carrying into effect the bequests as they stood looking to the law of the Roman Catholic Church, and suggested alternative schemes for carrying into effect what he maintained to be the essential purposes of the testator.

The testamentary trustees lodged a condescendence and claim to substantially the same effect as those of the bishops.

The Marquess of Bute, the heir and residuary legatee of the testator, lodged a condescendence and claim, in which he stated:—"2. The claimant maintains that, on a sound construction of the said trust-disposition and settlement, the trustees have no power to accumulate the income of the said two sums of £20,000, and £20,000 in order to form an endowment fund, the testator having expressly provided that any balance of said sums unexpended on building shall revert to the residue of the estate. He further maintains that the beneficiaries under the deed having declined to accept the said sums on the conditions on which they were bequeathed, the bequests have lapsed, and fall to be dealt with as part of the residue of the estate. With reference to the averments by the other claimants, that, under the circumstances, the Court should approve of a scheme to give effect *cy-près* to what they maintain to have been the testator's intention, the claimant denies that there has been any change of circumstances since the testator's death to justify such a course being adopted, and, further, maintains that the doctrine of *cy-près* cannot competently be given effect to in the present process. He therefore, as residuary legatee of the late Marquess of Bute, claims to be ranked and preferred to the whole fund *in medio*."

On 20th May 1904, the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the claim of the claimant the Marquess of Bute contains no averment, and that nothing appears upon record, relevant in existing circumstances to infer a lapse to the said claimant as residuary legatee of the two bequests of £20,000 each now in question; therefore repels *in hoc statu* the claim for the Marquess of Bute, and decerns: Finds, however, it is alleged, and not disputed, that there is at least a prospect that if the churches and monastery in

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question shall be built by the pursuers and real raisers as directed by the trust-settlement, the same may not be accepted by the trustees to whom they are directed to be handed over unless provision shall be at the same time made for the upkeep of the fabrics and the maintenance of religious services therein: Finds that in these circumstances the claimants other than the Marquess of Bute desire to have an opportunity of submitting to the Court a scheme or schemes for applying part of the said two bequests of £20,000 each to the said subsidiary purposes: Therefore, before answer, allows the said claimants to lodge *quam primum* such scheme or schemes as they propose, with a view to their being reported to the Court: *Quoad ultra* continues the cause."

Leave to reclaim having been granted, the Marquess reclaimed.

The nature of the arguments sufficiently appears from the contentions above set forth, and from the opinions of the Court.[1]

At advising,—

LORD JUSTICE-CLERK.—I am unable to agree with the interlocutor of the Lord Ordinary, as my view is that the claimant the Marquess of Bute is entitled to judgment. The bequest of the late Marquess which is in dispute is quite clear in its terms, that his trustees are authorised and directed to provide church buildings at Whithorn and at Oban, at an expense of not more than £20,000 at each place, it being further expressed as his intention that if on the buildings being completed the whole sum of £20,000 has not been expended, the remainder is to revert to his estate, his "intention being merely" to have the buildings completed, although "at a less cost than £20,000."

He affixed to the bequest the conditions that a conveyance of the buildings to trustees was not to be given by his testamentary trustees except upon certain conditions, two of which were that the buildings should be consecrated within eight days, and that the "Divine Office" should be said or sung in the building every day.

The ecclesiastical authorities by whom these conditions could alone be carried out, viz., the Roman Catholic Bishops in Argyll and Galloway, state their inability to fulfil either of these conditions if the buildings are erected in terms of the bequest, because of the want of any endowment by which the conditions could be fulfilled.

The trustees accordingly have not proceeded with the erection of the buildings, and propose, with the acquiescence of the Bishops, to hold the funds so that by accumulation they may increase and thus provide for endowment as well as building.

I can find no authority for this being done. The late Marquess nowhere indicates that his estate is to provide any endowment, except one which he specifies, viz., £10,000 for the Oban Cathedral which he intended to be built. It seems to me to be very plain that he did not intend to provide any other endowment, and that to keep up the money he left to raise an endowment fund would be to do what he has given no authority for doing.

[1] *Cited by the Reclaimer*:—Young's Trustees v. Deacons of the Eight Incorporated Trades of Perth, June 9, 1893, 20 R. 778. *By the Respondents*:—Miles v. Farmer, 1815, 19 Ves. Junr. 483; Attorney-General v. Bowyer, 1798, 3 Ves. 713a.

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Thus his purpose in the bequest for building has failed, as the circumstances are such that those to whom it would fall to consecrate the buildings and to carry on the services decline on the ground of inability to undertake that these conditions of the gift shall be fulfilled.

I feel constrained, therefore, to hold that the sums bequeathed fall back into the estate of the late Marquess, to be dealt with as the residue is required to be dealt with, and that the interlocutor of the Lord Ordinary should be recalled and the claim of the present Marquess sustained.

LORD YOUNG concurred.

LORD TRAYNER.—The late Marquess of Bute directed his trustees to expend a sum of £40,000, or so much of that sum as might be found necessary, on the erection of two churches, one at Oban and the other at Whithorn. When completed these churches were to be conveyed to certain trustees to be nominated by the Roman Catholic Bishops for the time in Argyll and Galloway respectively. The churches, however, were only to be conveyed to the trustees so nominated on certain conditions, which are very clearly stated—about them there is, and can be in my opinion, no dubiety. I need not repeat here what the conditions are. It is enough to say that both the Roman Catholic Bishop of Argyll and the Roman Catholic Bishop of Galloway state in their claims that they cannot accept the legacy—that is, a conveyance of the churches—on the conditions specified. That, in my view, is conclusive of their respective claims. The trustees of the late Marquess have no authority or right to build the churches, and would act unreasonably in doing so if they are certiorated that the churches when completed would not be accepted by the donees on the conditions on which alone they could take the benefit of the donation or legacy. One of the grounds on which the legacy is declined is that there would be no funds for maintaining the churches and the celebration of divine service therein. In aid of the reverend claimants the trustees (of the late Marquess) propose that they should be authorised to retain the £40,000 in their hands and accumulate the same with the interest thereon until the fund amounted to a sum sufficient to build the churches and also to endow them. I think this not only not authorised by the truster's settlement but directly opposed to his intention. The truster contemplated that by public subscription or otherwise the churches might be completed without the expenditure of the whole £40,000, and except the sum of £10,000 specially bequeathed for the maintenance of divine service in the church at Oban he neither gave nor intended to give any sum whatever towards endowment. His words are, "My intention being merely to have such church and church or monastery completed, although it may be at a less cost than £20,000 each." I gather it to have been the meaning and intention of the truster that he would provide the churches, but looked to his co-religionists to maintain them and the services therein. The proposal, therefore, of the trustees to accumulate funds for the purpose of endowment is not in accordance with any direction given to them, but contrary to the truster's wish and intention. What, then, is to come of the £40,000? This also is, I think, provided for. The truster directs that if his trustees find it "unnecessary to expend the whole" of the £40,000 "the balance unexpended by them shall

revert to the residue of my estate." As it has turned out, it is not "necessary" for the trustees to expend any part of the £40,000, and therefore the whole of it (although the truster only anticipated a balance) in my opinion reverts to residue. The result, in my opinion, is that the claim of the Marquess of Bute (the residuary legatee) should be sustained to the whole fund *in medio* and the other claims repelled.

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LORD MONCREIFF was absent.

THE COURT pronounced this interlocutor:—"Recall the interlocutor reclaimed against: Repel the claims of the claimants other than the claimant the Marquess of Bute: Rank and prefer him to the whole fund *in medio* in terms of his claim."

J. & F. ANDERSON, W.S.—WILLIAM CONSIDINE, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—W. & J. COOK, W.S.—Agents.

THOMAS M'DOUGALL, Petitioner (Appellant).—*Campbell, K.C.*—*T. B. Morison.*
THOMAS NISBET, Respondent.—*Lees, K.C.*—*Craigie.*

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M'Dougall v. Nisbet.*

*Police—Street—Building Regulations—Width of street—Glasgow Building Regulations Act*, 1900 (63 *and* 64 *Vict. cap. cl.*), *sec.* 20.—Section 20 of the Glasgow Building Regulations Act, 1900, enacts,—"The Dean of Guild shall not, without the consent of the Corporation, grant decree for the erection or re-erection of any building upon ground adjoining any street unless on the condition that one-half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures, if any, existing thereon, and shall . . . be wholly dedicated to the public for street purposes . . . The width of any public street, of which the dimensions are not set forth in the register . . . shall be fixed by the Master of Works."

In an application for a warrant to erect buildings, *held* that in fixing the width of a street the Master of Works is entitled and bound to apply his mind to the whole circumstances of the case, and to fix what he considers the proper width, even though the result of his determination is to dedicate to the public for street purposes ground which is the private property of the person proposing to build.

ON 22d March 1904 Thomas M'Dougall, builder, 41 Circus Drive, Dennistoun, Glasgow, presented a petition to the Dean of Guild Court, Glasgow, for a lining and warrant to erect tenements of dwelling-houses and shops on ground belonging to him fronting Springburn Road, Glasgow. Prior to 1891 Springburn Road was a turnpike road 40 feet in width, outside Glasgow, but by the City of Glasgow Act, 1891, the road was included within the city boundaries, and became one of the public streets of the city.

1ST DIVISION.
Dean of Guild Court, Glasgow.

On 31st March 1904 the Dean of Guild, *ante omnia*, remitted to the Master of Works to hear parties, and thereafter to fix the width, and determine the centre of Springburn Road *ex adverso* of the petitioner's subjects specified in the petition, all in terms of section 20 of the Glasgow Building Regulations Act, 1900.†

* This case was heard and argued along with the immediately following case of *Neilson* v. *R. B. Wilson & Co.*, p. 60.

† The Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), enacts, sec. 20,—"The Dean of Guild shall not, without the consent of the Corporation, grant decree for the erection or re-erection of any building upon ground adjoining any street unless on the condition that one-half of the

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On 19th April 1904 the Master of Works reported that having heard parties and "having due regard to (1) the history and character of Springburn Road, which was a turnpike road, and is also a public street of the city; (2) the provisions of the Glasgow Police Act, 1866, section 366,* and the Glasgow Building Regulations Act, 1900, section 20; and (3) the width of the street where tenements or permanent buildings have been already erected," he fixed the width of Springburn Road at the part in question at 60 feet, and on a plan prepared by him defined the position of the centre of said street by marking thereon a red line.

On 26th April 1904 the petitioner appealed to the Dean of Guild against the determination of the Master of Works. The contentions of the parties, as stated in the petitioner's note of objections, and the answers thereto of the Master of Works, are fully set forth in the opinion of the Lord President.

On 9th June 1904 the Dean of Guild pronounced this interlocutor:—"Refuses the appeal, and sustains the determination of the Master of Works contained in the said report and plan; fixes the width of Springburn Road at the part in question at 60 feet; defines the centre of the said road to be along the red ink line marked on the said plan . . . and continues the cause."†

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width of such street, measuring such half from the centre of such street towards such ground shall be cleared of all structures if any existing thereon, and shall, subject to the provisions of the Police Acts, be wholly dedicated to the public for street purposes, and this condition shall be presumed to be made by the Dean of Guild in every decree granted by him . . . For the purposes of this section the width of a public street shall be the width set forth in the register where such width is entered therein . . . and the width of any public street of which the dimensions are not set forth in the register . . . shall be fixed by the Master of Works. And the position of the centre of any such street shall be defined by the Master of Works with reference to any application which may be made to the Dean of Guild for a lining to erect or re-erect any such building."

Section 21. "Any person deeming himself aggrieved by any determination of the Master of Works under the immediately preceding section may appeal to the Dean of Guild within fourteen days thereafter, and the Dean of Guild shall thereupon have power to fix such width and define such centre of such street . . ."

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), enacts, section 366,—"The Dean of Guild shall not grant a warrant to erect any building, except a stone wall, not exceeding 6 feet in height, within 20 feet of the centre of any portion of a statute-labour road within the city, or within 30 feet of the centre of any portion of a turnpike road within the city which is relinquished by the trustees, and is assumed by [the Magistrates and Council] as a public street under the powers of this Act unless the said building could have been erected within a less distance of the centre of such turnpike road without contravention of the Acts relating to the said road."

† "NOTE.—(After narrating the facts)—It can scarcely be maintained that the Act of 1900 made the provision it did in section 21, if all that the Master of Works could do under section 20 was to measure with a tape the *de facto* width of public streets. In the Dean's judgment the Master of Works was entitled and bound to apply his mind to the whole circumstances and fix what he thought was the proper width. That being so, the Dean has considered the reasons assigned by the Master of Works for his determination of the width of this road at 60 feet, and he sees no reason to alter that determination. . . ."

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Against this interlocutor the petitioner appealed to the Court of Session, and argued;—The lining asked for was 30 feet from the centre of Springburn Road, and complied with the provisions of section 366 of the Glasgow Police Act, 1866,* and this was all the Dean of Guild was entitled to ask for. The fact that the buildings were to be erected 10 feet from the existing boundary of the road, did not dedicate the intervening space to the public for street purposes. Springburn Road prior to its inclusion within the city boundaries by the City of Glasgow Act, 1891, was a rural turnpike road, with a well-defined width between stone walls of 40 feet, and that was its width when this petition was presented. The Corporation had not yet issued the register of streets provided for by section 9, subsection (2), of the Glasgow Building Regulations Act, 1900.† Had they done so, the actual breadth—viz., 40 feet—of Springburn Road would have been entered on the register. The duty imposed upon the Master of Works by section 20 of the Act of 1900 was to fix the width of the street as actually existing. He was not entitled to add to its width by appropriating private property. If it was thought necessary to widen the street, the necessary ground could be acquired by the Corporation at the public expense under the provisions of section 300 of the Glasgow Police Act, 1866, or section 25 of the Act of 1900.[1]

Argued for the respondent;—The Dean of Guild could not grant a lining except in conformity with the provisions of section 20 of the Act of 1900, and until an application for a lining was presented there was no occasion to fix the width of the street. The plain meaning of section 20 was that the Master of Works should fix the width of the street with a view to existing and future possibilities of traffic. It did not mean that he should merely measure the existing street. It was not necessary for the Corporation to acquire the extra ground, but it must be cleared of existing structures and dedicated to the public for street purposes.

At advising,—

LORD PRESIDENT.—The question in this case is whether a judgment of the Dean of Guild of Glasgow, by which he fixed the width of Springburn Road, Glasgow, *ex adverso* of property belonging to the appellant, at 60 feet, and defined the centre of that road to be along a red ink line marked upon a plan produced, is right.

The proceedings originated in a petition by the appellant, lodged in the Dean of Guild Court, on 22d March 1904, for authority to erect certain buildings on the property belonging to him fronting Springburn Road. Upon this petition the Dean of Guild, on 31st March 1904, pronounced an interlocutor by which he, *ante omnia*, remitted to the Master of Works to hear parties, and thereafter to fix the width, and define the position of the centre, of Springburn Road *ex adverso* of the petitioner's property specified in the petition, all in terms of section 20 of the Glasgow Building Regulations Act, 1900.

By that section it is declared that the Dean of Guild shall not, without the consent of the Corporation, grant decree for the erection or re-erection of any building upon ground adjoining any street, unless on the condition

* Quoted *supra*, p. 56. † 63 and 64 Vict. cap. cl. sec. 25.

[1] Schulze v. Magistrates of Galashiels, May 14, 1895, 22 R. (H. L.) 70.

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that one-half of the width of such street, measuring such half from the centre of such street, towards such ground, shall be cleared of all structures, if any, existing thereon, and shall, subject to the provisions of the Police Acts, be wholly dedicated to the public for street purposes, and that this condition shall be presumed to be made by the Dean of Guild in every decree granted by him.

It is further declared by section 20 that, for the purposes of it, the width of a public street shall be the width set forth in the register, where such width is entered therein, and that the width of any public street of which the dimensions are not set forth in the register, and of any private street of which the dimensions are not specified or shewn as thereinbefore mentioned, shall be fixed by the Master of Works. The section further provides that the position of the centre of any such street shall be defined by the Master of Works with reference to any application which may be made to the Dean of Guild for a lining to erect, or re-erect, any such building as therein mentioned.

On 19th April 1904 the Master of Works, in execution of the remit thus made to him, reported to the Court that, having heard parties, and having due regard to, (1) the history and character of Springburn Road, which was a turnpike road, and was also a public street of the city, (2) the provisions of the Glasgow Police Act, 1866, section 366, and the Glasgow Building Regulations Act, 1900, section 20, and (3) the width of the street where tenements or permanent buildings had already been erected, he fixed the width of Springburn Road at the place in question at 60 feet, and on a plan prepared by him as relative thereto, he defined the position of the centre of the street by marking thereon a red line on which there are marked the words "Centre line of road," that line being situated midway between the old walls on each side of the road. The appellant alleges that the width of the road at the place in question was previously only forty feet.

The appellant, deeming himself aggrieved by the determination of the Master of Works, appealed to the Dean of Guild against it, and craved to be heard in support of his appeal. In particular he maintained that the purposes of section 20 of the Glasgow Building Regulations Act, 1900, viz., that the streets should be cleared of structures, and dedicated to street purposes, having been fulfilled, he (the appellant) did not desire to propose any interference with it, except the temporary interference incident to his building, and proposed that his building line should be 30 feet from the centre of the street in terms of section 366 of the Glasgow Police Act of 1866, which declares that the Dean of Guild shall not grant a warrant to erect any building, except a stone wall not exceeding 6 feet in height within 20 feet of the centre of any portion of a statute-labour road within the city, or within 30 feet of the centre of any turnpike road within the city which is relinquished by the trustees thereof, and is assumed by the Magistrates and Council as a public street under the powers of this Act, unless the said building could have been erected within a less distance of the centre of such turnpike road without contravention of the Acts relating to the said road. To this the Master of Works replied that the purposes of section 20 of the Glasgow Building Regulations Act, 1900, had not been fulfilled, and that the fixing of the width of the street was necessary, and I think that this reply was well founded. The appellant complained that the Master of

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Works had erroneously assumed that by the removal of the building line to 30 feet from the centre of the street, he could extend the width of the street to the same line, thus attempting to appropriate for street purposes, and to subject to the provisions of the Glasgow Police Act, 1866, 10 feet of ground belonging to the appellant, which he alleges was truly subject only to the restriction imposed by section 366 of that Act prohibiting buildings thereon exceeding 6 feet in height. He maintained that the power claimed by the Master of Works was not warranted by section 20 of the Act of 1900, or by any other enactment of law, and he pleaded that if the Master of Works considered that it would be to the public advantage to have the street widened, his proper course was to proceed under section 300 of the Act of 1866, and purchase the additional ground which he desired on behalf of the Magistrates and Council, or under section 25 of the Act of 1900, which provides that in order to secure as far as possible a regular line and satisfactory width and level for the footpaths in every street, the Corporation may, after notice by the Master of Works to the person responsible for the maintenance of such footpath, or the part thereof affected, alter the line and level of the footpath, increase or lessen the width thereof, and carry out such other operations thereon as may be necessary or desirable for the improvement of the footpath or street, and thereafter such footpath, when so altered or widened, shall be subject to the provisions of the Police Acts. The Master of Works alleged that other tenements besides those of the appellant had been erected since 1891 in Springburn Road, within the portion added to the city in 1891, that these tenements were 30 feet from the centre of the road, and that the width of the street there was in fact 60 feet. It appears to me that the position taken up by the Master of Works, and sustained by the Dean of Guild is well founded, and in particular I think that the city did not require, in order to effect the widening of the Springburn Road at the place in question, to purchase, or take under compulsory powers, any of the land belonging to the appellant.

On 9th June 1904 the Dean of Guild having considered the pleadings, documents, and plans lodged, refused the appeal, and sustained the determination of the Master of Works contained in the report and plan mentioned, fixed the width of Springburn Road at the part in question at 60 feet, and defined the centre of the road to be along the red ink line marked on the plan.

In a note to his interlocutor the Dean of Guild says that the building of the appellant's proposed tenements was not placed on the line of an old boundary wall mentioned in the pleadings, but 10 feet further back, and this was done to meet the requirements of the Glasgow Police Act of 1866, section 366, which declares that the Dean shall not grant a warrant to erect any building within 30 feet of the centre of any portion of a turnpike road within the city, that this keeping back of the building line left a strip of ground of 10 feet between the old boundary wall and the new building line, and that the dispute between the parties was ultimately limited to this strip of 10 feet,—that the Master of Works having fixed the width at 60 feet, his determination was brought under review of the Dean of Guild under section 21 of the Act of 1900, and that he (the Dean), in accordance with the determination which he had made in a previous case, decided that the Master of Works was right.

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Nov. 17, 1904. M'Dougall v. Nisbet.

I am of opinion that the conclusion thus arrived at by the Dean of Guild is correct. I concur with him in thinking that, keeping in view the terms of section 21 of the Act of 1900, the Master of Works was entitled, and bound, to apply his mind to the whole circumstances of the case, and to fix what he, in view of these, considered to be the proper width. I also concur with the Dean of Guild in thinking that, for the reasons assigned by the Master of Works, he rightly determined the width of the road in question at 60 feet, and accordingly that his decision to that effect should be upheld.

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion. This case and the one which follows it raise the same question though in different forms; it is a question on the construction of the Glasgow Buildings Act.

Now, the effect of this Act seems to be, first, that the local authorities when a new building is proposed to be put up, may fix the width of the street to be anything they please, and may then make it a condition of the building order that nothing shall be erected on the space which has been thrown into the street for the purpose of increasing its width. I confess I see nothing in this legislation that calls for special construction. The provision of the Act of Parliament is perfectly plain, that the Master of Works (who, as I consider, is merely a servant of the Corporation) is to provisionally fix—subject, of course, to the review of the Dean of Guild—the width of the street. That cannot mean merely measuring the existing street; it must mean determining what is to be for future and practical purposes the width of the projected street. It has been represented to us that this is a hardship on proprietors; but, after all, the Corporation is only doing for the proprietor whose property adjoins the street what every sensible proprietor who lays out his land for feuing would do for himself—that is, making roads and passages of sufficient width for the accommodation of tenants and passengers. That being settled, I do not think the facts of the case present any difficulty. I agree with your Lordship that, the width of the street being fixed in accordance with the statutory requirements, whenever an owner adjacent to the street comes for an order requiring the sanction of the Dean of Guild he is entitled to require that the ground thrown into the street shall be cleared of building and levelled, and then the street is to be available for purposes of traffic.

LORD KINNEAR concurred.

THE COURT dismissed the appeal.

WEBSTER, WILL, & Co., S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 13.

Nov. 17, 1904. Neilson v. R. B. Wilson & Co.*

GEORGE NEILSON, Petitioner (Respondent).—*Lees, K.C.—Craigie.*
R. B. WILSON & COMPANY AND ANOTHER, Defenders (Appellants).—*Campbell, K.C.—T. B. Morison.*

*Police—Street—Building Regulations—Width of Street—Glasgow Police Act*, 1866 (29 *and* 30 *Vict. cap. cclxxiii.*), *sec.* 366—*Glasgow Building Regulations Act*, 1900 (63 *and* 64 *Vict. cap. cl.*), *sec.* 20.—The proprietor of ground

* This case was heard and argued along with the immediately preceding case of *M'Dougall* v. *Nisbet*, p. 55.

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adjoining a public street in Glasgow obtained a lining in the Dean of Guild Court for certain buildings upon a plan which shewed that they were to be erected at a distance of 30 feet from the centre of the street in compliance with section 366 of the Glasgow Police Act, 1866. At the time the lining was granted the actual width of one-half of the street at the place in question was 20 feet, and no steps had been taken to fix the width of the street in terms of section 20 of the Glasgow Building Regulations Act, 1900. After the buildings had been erected a statutory notice at the instance of the Master of Works was served upon the proprietor, calling upon him to lay a foot-pavement on the space of 10 feet intervening between the buildings and the original boundary of the street, and in the course of the proceedings to enforce the notice in the Dean of Guild Court, the width of one-half of the street was fixed at 30 feet under the provisions of section 20 of the Act of 1900.

*Held* (1) that in view of the provisions of section 20 of the Act of 1900 it must be presumed that the lining was granted on condition that one-half of the street, measuring from the centre of the street towards the buildings, should be cleared of all structures and dedicated to the public for street purposes, and (2) that the proprietor was bound to form the foot-pavement in front of the buildings.

1ST DIVISION.

Dean of Guild Court, Glasgow.

ON 1st November 1900 Thomas M'Dougall obtained a lining from the Dean of Guild for the erection of certain buildings on part of his ground fronting Springburn Road, Glasgow. The plans shewed that the buildings were to be erected at a distance of 30 feet from the centre of the road, in compliance with the provisions of section 366 of the Glasgow Police Act, 1866.* At the time the lining was granted the boundary of Mr M'Dougall's property was a low wall 20 feet from the centre of Springburn Road, so that there was a space of 10 feet between the wall and the proposed buildings. The plans shewed that this space of 10 feet was to be formed into a footpath, the kerb being in the line of the wall, and in fact before the buildings were erected the wall was cleared away, and the 10 feet of ground was left unenclosed and open to foot-passengers. At the time the lining was granted no steps had been taken to fix the width of Springburn Road in terms of sections 20 and 21 of the Glasgow Building Regulations Act, 1900.†

Before October 1902 R. B. Wilson & Company, 24 St Enoch Square, Glasgow, and John Howie, 52 Cowlairs Road, Glasgow, became the proprietors of the buildings erected under the lining granted to Mr M'Dougall in 1900.

On 7th October 1902 George Neilson, Procurator-fiscal of the Dean of Guild Court, Glasgow, presented a petition to the Dean of Guild Court, in which he stated that notices had been served in terms of section 317 of the Glasgow Police Act, 1866, upon R. B. Wilson & Company and John Howie, representing Thomas M'Dougall, as proprietors of lands and heritages in Springburn Road, requiring them, within ten days thereafter, to form a foot-pavement to a width of 10 feet from their building lines in accordance with a certain specification; that the defenders had lodged written objections to the requisition; and that the cost of the work would, in the opinion of the Master of Works, exceed £5. The petitioner therefore prayed the Dean of Guild Court to decide the question raised as to the reasonableness and necessity of the work, and the liability of the defenders for the cost thereof.

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* Quoted *supra*, p. 56.

† Quoted *supra*, p. 55 and 56.

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The defenders stated in their objections that Springburn Road was 40 feet wide, including a footpath 7 feet wide on the side next their buildings; that the intervening strip of 10 feet next their buildings formed no part of the road, but was their private property, which they were entitled to fence off; that the Master of Works and the road authority were not entitled to cause the said 10 feet strip to be formed into a footpath till the road authority had acquired it for the purpose of widening the road under the powers conferred by section 299 of the Glasgow Police Act, 1866; and that the existing footpath of 7 feet was an inseparable part of the public street, which the road authority were bound to maintain. The defenders, however, stated that they and Mr M'Dougall were willing to allow the 10 feet strip of ground next their buildings to be devoted to the public use without payment, and to permit the existing footpath of 7 feet to be thrown into the carriageway, on condition that the road authority formed the 10 feet strip into a foot-pavement at their own expense, and took it over as part of the public street.

On 25th February 1903, the Dean of Guild, *ante omnia*, remitted to the Master of Works to fix the width of Springburn Road in terms of section 20 of the Glasgow Building Regulations Act, 1900.

On 27th March 1903, the Master of Works reported that having heard parties and "having due regard to (1) the history and character of Springburn Road, which was a turnpike road and is also a public street of the city; (2) the provisions of the Glasgow Police Act, 1866, section 366, and the Glasgow Building Regulations Act, 1900, section 20; and (3) the width of the street between tenements or permanent buildings where such have been already erected," he fixed the width of Springburn Road at the part in question at 60 feet, and on a plan prepared by him defined the position of the centre of the street by marking thereon a red line.

The defenders appealed to the Dean of Guild against this determination, and on 20th February 1904, the Dean of Guild refused the appeal, sustained the determination of the Master of Works, and fixed the width of Springburn Road in terms thereof.

On 20th February 1904, the Dean of Guild pronounced an interlocutor, in which he found, *inter alia*, that the paving work specified in the petition was necessary and reasonable, and ordained the defenders to execute the same.*

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* "NOTE.— . . . Mr M'Dougall's position is that the piece of ground in question is not a footpath, that it could yet be fenced in by him by his placing a wall or other structure on the position of the old wall now removed, and that accordingly he cannot be asked to form this ground into pavement or throw it into the public street without compensation.

"In terms of section 20 of the Glasgow Building Regulations Act, 1900, it must now be presumed that in the lining referred to the following condition was made, viz., that one-half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures and wholly dedicated to the public for street purposes. If that be so, the Dean of Guild thinks that the strip of ground in question has been dedicated for street purposes, and cannot now be enclosed by Mr M'Dougall.

"It is said by the respondent that the width referred to in this condition is to be measured from the centre towards the ground; that the section provides how the centre and the width are to be ascertained; that the centre can in terms of the section be defined by the Master of Works only

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The defenders appealed to the Court of Session.

In addition to the argument submitted in the case of *M'Dougall* v. *Nisbet, supra*, p. 57, the appellants argued;—There was here no application for a lining. The petition was presented under the powers conferred by section 317 and following sections of the Glasgow Police Act, 1866, and a remit to the Master of Works to fix the width of a public street in such a proceeding was incompetent. The powers of section 20 of the Glasgow Building Regulations Act, 1900, could only be invoked when a petition for a lining had been presented.

The respondent, in addition to the argument submitted in the case of *M'Dougall* v. *Nisbet, supra*, p. 57, argued;—The decree of lining was got on certain conditions as shewn by the plans, and these conditions could not now be departed from.[1]

At advising,—

LORD PRESIDENT.—(After narrating the facts and the proceedings in the Dean of Guild Court).—In the note to his interlocutor the Dean of Guild

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with reference to any application for lining; that as this process is not an application for lining no determination of the Master of Works can be applied here; and that there being no defined centre, the section does not apply.

"The Dean of Guild does not think it is necessary to decide whether the width or the centre of the street can be defined only with reference to an application for lining, or whether the limitation applies only to the fixing by the Master of Works of the centre. The view he takes does not involve the application of any determination by the Master of Works. In its main enactment the section provides that one-half of the width of such street, measuring such half from the centre towards the building, is to be cleared and dedicated to the public, and the Dean finds in Mr M'Dougall's own plans and in his pleadings in the present proceedings sufficient data for finding the centre and the width of Springburn Road at the part in question; and Mr M'Dougall's ideas on these points fortunately coincide with the determination of the Master of Works.

"Even assuming that Mr M'Dougall's contention as to the width and centre being defined only with reference to an application for lining is a sound one, the Dean of Guild cannot help feeling that the plans submitted by Mr M'Dougall were capable of only one reading, which was that no question was to be raised about the strip of ground between the then existing wall and the building-line. The Dean has no doubt that if there had been any suggestion on the face of the plans that the ground in question was to form the subject of a claim on the part of Mr M'Dougall, the Court would in that application for lining have invoked the provisions of section 20, and had the width and centre defined with reference to that application for lining. But, as the Dean has said, he does not need to consider any argument as to the machinery given by section 20 for finding the width. Mr M'Dougall has himself fixed the width and centre, and by the Act one-half of the width of such street *ex adverso* of Mr M'Dougall's property is wholly dedicated to the public for street purposes. An attempt was made to read the word 'street' as roadway exclusive of footpath, but such a construction is out of the question.

"If the Dean is right in the view he takes, then little remains to be said on the merits of the present action. The ground as it presently stands is not in a proper state for a footpath, and there is no doubt as to the reasonableness of the requirements of the Master of Works for the repair or forma-

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[1] John C. M'Kellar, Limited, v. Bryce, Jan. 23, 1904, 6 F. 313.

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states that when Mr M'Dougall applied for and obtained a decree of lining relative to the part of Springburn Road in question, the plans submitted and passed shewed that he had in view, and was giving effect to, the requirements of the Turnpike Act by placing the building for the erection of which authority was sought thirty feet from the centre of Springburn Road, and that no indication was given that Mr M'Dougall intended to retain a small wall of about five feet in height, which formed the boundary of his ground along Springburn Road, or that he intended to enclose the piece of ground between that wall and the new building line. He states that in point of fact the wall was cleared away, and that the piece of ground had not been enclosed, but had been left open to foot-passengers since Mr M'Dougall's building was put up. He further states that the Master of Works had called upon Mr M'Dougall to repair the ground thus used as a footpath, or to form it into a proper footpath, but that Mr M'Dougall denied that it was a footpath, and maintained that it could yet be fenced in by him by his placing a wall or other structure on the position of the old wall now removed, and that accordingly he is not bound to allow it to be added to the public street without receiving compensation. The Dean of Guild says that in view of the provisions of section 20 of the Glasgow Building Regulations Act, it must in his judgment be presumed that, in the lining referred to, the condition was made that one-half of the width of the street, measuring from the centre of the street towards the ground, should be cleared of buildings and dedicated entirely to the public for street purposes, and I concur with him in this view, and also in thinking that a strip of ground in question has been dedicated for such purposes, and cannot now be enclosed by Mr M'Dougall. The width and centre of the road have been duly fixed, and under the Act one-half of the width *ex adverso* of Mr M'Dougall's property has become wholly dedicated to the public for street purposes. It seems to be clear that the ground as it was at the commencement of these proceedings, was not in a condition proper for a footpath, that the requirements of the Master of Works for the repair and formation of the footpath were reasonable, and that the proprietors whose lands adjoined, or have a right of access by the street, are liable for this repair. As the cost of the works required to be executed exceeded, in the opinion of the Master of Works, the sum of £5, the Dean of Guild acted properly in granting the order craved by the Procurator-fiscal.

I may refer to my opinion given to-day in the case of *M'Dougall* v. *Nisbet*,[1] for a further examination of the statutory provisions applicable to the case.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT dismissed the appeal.

CAMPBELL & SMITH, S.S.C.—WEBSTER, WILL, & Co., S.S.C.—Agents.

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tion of this footpath, or as to the liability of the proprietors whose lands adjoin to and have a right of access by the street in question. The cost of the works required to be executed exceeds, in the opinion of the Master of Works, the sum of £5, and the Dean has therefore granted the order craved by the Procurator-fiscal."

[1] *Supra*, p. 57.

JOSEPH EVANS & SONS, Pursuers (Respondents).—*Salvesen, K.C.—Irvine.*
JOHN G. STEIN & COMPANY, Defenders (Reclaimers).—*Jameson, K.C.—T. B. Morison.*

No. 14.

Nov. 17, 1904.
Evans & Sons v. Stein & Co.

*Reparation—Slander—Foreign—Lex loci delicti—Publication of Slander.*—In order to maintain an action *ex delicto* in Scotland, when the wrong is committed in another country, the wrong must be one for which an action can be maintained both by the law of Scotland and by the law of the country in which it is said to have been done.

In an action of damages for slander brought by a firm in England against a firm in Scotland, the pursuers averred that the slander was contained in two letters and a telegram, sent from Scotland, by the defenders to the pursuers, and that the slander had been published in the sense of English law, in respect that the letters had been dictated to and typewritten by the defenders' clerks, and that the telegram had passed through the hands of post-office clerks. The names of the defenders' clerks and of the post-office clerks were not given.

The Court (*rev.* judgment of Lord Kincairney) *dismissed* the action, holding (1) that there was no relevant averment of publication of defamatory matter to persons other than the pursuers; (2) that the defamatory statement to the pursuers was made in England; (3) that it was admitted that by the law of England the statement to the pursuers themselves was not an injury to reputation and was not an actionable wrong; and (4) that the action could not be maintained in respect that the statement was not an actionable wrong by the law of England.

1ST DIVISION. Lord Kincairney.

ON 13th January 1904 Joseph Evans & Sons, engineers, Wolverhampton, raised an action against John G. Stein & Company, Ganister and Fireclay Works, Bonnybridge, concluding for £1000 damages for slander.

The pursuers averred that the slander complained of was contained in two letters and a telegram dispatched through the post-office and delivered to the pursuers at Wolverhampton, complaining of delay in forwarding certain pumping plant. (Cond. 10) The statements in the letters and telegram were falsely and maliciously made, and without probable cause or any cause. "The question whether the letters and telegram are actionable falls to be determined according to the law and practice of Scotland. . . . The letters complained of were dictated by the defenders to, and typewritten by, a clerk or clerks in the employment of the defenders in Scotland. The letters and telegram of the defenders, dated 18th and 19th June 1903, addressed to the pursuers were in the ordinary course of the business opened by, and read by, members of the staff of pursuers' firm on delivery at the pursuers' place of business. None of said letters or telegram were in fact opened by, or read by, partners of the pursuers' firm in the first instance. All the said letters and telegram were thus published to third parties, in the sense of English law, both in Scotland and in England. The said telegram, dispatched by the defenders on 18th June 1903, passed through the hands of clerks in telegraph offices as an open message both on its dispatch from Scotland and on its arrival in England, and was thus published to third parties in both countries in the sense of English law."

The defenders averred;—(Ans. 10) " . . . The pursuers carry on business in England, and the letters complained of were addressed and delivered to the pursuers at their place of business in Wolverhampton. Said letters were not published in Scotland, and the question whether or not the contents of said letters are libellous

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falls to be determined according to English law and practice. By the law of England, in order to constitute a libel it is necessary for the alleged libellous writing to be published to a third party, and the dispatch by the defenders to the pursuers of said letters was not publication in the sense of English law. . . . ."

The pursuers pleaded, *inter alia;*—(1) The defenders having slandered the pursuers as condescended on, the pursuers are entitled to reparation as concluded for, with expenses.

The defenders pleaded, *inter alia;*—(1) No relevant case.

On 21st June 1904 the Lord Ordinary (Kincairney) pronounced an interlocutor approving of certain issues and counter issues for the trial of the cause.*

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* "OPINION.—This is an action of damages for defamation. The pursuers, Evans & Sons, carry on business in England, and the defenders, Stein & Company, in Scotland. The libel is said to be contained in certain letters and a telegram passing from the defenders in Scotland to the pursuers in England.

"I think the letters are undoubtedly slanderous, and I am of opinion that the issue proposed fairly enough expresses their meaning.

"But the defenders stated at the debate an argument of considerable importance and difficulty, contending that the pursuers were not entitled to any issue. Their argument was that the action was founded on a delict committed in England, and that therefore the pursuers' right depended on the law of England, that, according to the law of England, there could be no libel unless the alleged libellous writings had been published to a third party; and they aver that the dispatch 'by the defenders to the pursuers of the said letters was not publication in the sense of English law.' They do not aver on record that the telegram was not published. They argued that the pursuers were not entitled to any issue. But I do not think that the defenders have stated any pleas which can cover that argument, and I could not have given effect to it without an amendment of the record. But, although the argument was ingeniously and forcibly stated, I am not prepared to assent to it. In the first place I am not convinced that the case should be determined by the law of England. I think it should be determined by the law of Scotland. The defenders maintained that the place where the letters and telegram were delivered to the pursuers was the *locus delicti*, and that the law applicable was the *lex loci delicti*. They founded chiefly on *Kendrick* v. *Burnett*, 1897, 25 R. 82, and *Goodman* v. *Barnet*, 14 S. L. R. 449. These were cases of injuries inflicted or suffered either on the high seas or in England. But, although they are important cases, their bearing on the present case is not nearly so close as that of *M'Clarty* v. *Steele*, 22d January 1881, 8 R. 435. They were cases in which there was no doubt about the *locus delicti*. *M'Clarty* v. *Steele* was an action raised by one Scotchman against another on account of defamation uttered in Penang, in which it was contended that the law of Penang (I understand the law of England) should be applied, but where the case was decided in accordance with the law of Scotland. That case appears to me to be closely applicable when examined, and to warrant or necessitate the conclusion that this case falls to be decided in accordance with the law of Scotland.

"Further, I do not think it established that England was the *locus delicti* in this case. No authority was cited to that effect. I am disposed to think that Scotland was the *locus delicti*, because the letters were written and posted and the telegram dispatched in Scotland. It was in Scotland that the defenders did all that they did. They launched the slanders complained of there, leaving them to be taken up and carried forward by the ordinary postal machinery of the country. Now, according to the law of Scotland publication is not essential to the completion of a libel,—*Mackay* v. *M'Kechnie*, 1883, 10 R. 537. It may be that no damages could have been claimed had

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The defenders reclaimed, and argued;—The *locus delicti* was in England, where the alleged wrong had been committed, and therefore the question whether any wrong had been done to the pursuers entitling them to damages must be decided by the law of England.[1] According to English law no action for damages for defamation could lie unless the defamatory words were published to a third party.[2] Here there had been no publication. Sending a letter through the post was not publication.[3] Dictating a letter to a clerk was not publication, and the name of the clerk was not stated. When a wrong was alleged to have been done in a foreign country no action would lie in the Courts of this country unless the wrong was actionable both in the foreign country and in this country.[4]

Argued for the pursuers;—The *locus delicti* was in Scotland, where the letter had been written and posted, and the question whether an actionable wrong had been done must be determined according to the law of Scotland.[5] Publication to a third party was not necessary in Scotland.[6] The wrong was done when the letters were posted, just as a contract might be completed by the posting of a letter. The *locus* of a crime committed through the agency of the post-office was the place where the letter was posted.[7] In England, it had been held that a letter was published by the act of posting in the place where it was posted.[8] (2) Although by the law of England a defamatory statement to the person defamed was not actionable, there had here been publication to third parties. Communication to clerks or typewriters in the employment of the person sending the letter was publication according to English law.[9] So also was the sending of a telegram.[10] A wrong had been committed which was actionable both by the law of Scotland and by the law of England, and an issue should be allowed.[11]

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the letters not reached the pursuers at all. But when the defenders had done all they could to ensure delivery, the utmost that could be said is that their liability might be suspended while the letters were in transit.

"Still further, there was, in my opinion, sufficient publication in this case; and it is to be noticed that the defenders do not venture to aver that the telegram, which went through the hands of the telegraph clerks, was not published; and it seems to me that there is a sufficient averment of publication of the letters also. At least I think there is no sufficient reason for refusing an issue on the ground of want of publication. What the result may be if it should appear in the end that the letters had not been published need not now be determined.

"On the whole I think that, having regard to the state of the pleadings, the defenders have not succeeded in establishing that there should be no issues. . ."

[1] The M. Moxham, 1876, L. R., 1 Prob. Div. 107.

[2] Odgers on Libel and Slander, 3d Ed., pp. 170, *et seq.*

[3] Barrow v. Llewellyn, 1615, Hob. 62.

[4] Kendrick v. Burnett, Nov. 17, 1897, 25 R. 82; Goodman v. London and North-Western Railway Co., March 6, 1877, 14 S. L. R. 449; Horn v. North British Railway Co., July 13, 1878, 5 R. 1055.

[5] Gillespie's Ed. of Barr's International Law, p. 922.

[6] Mackay v. M'Cankie, Jan. 27, 1883, 10 R. 537.

[7] The Queen v. Holmes, 1883, L. R., 12 Q. B. D. 23.

[8] Odgers on Libel and Slander, 3d Ed., p. 175.

[9] Pullman v. Hill & Co., L. R. [1891], 1 Q. B. 524.

[10] Williamson v. Freer, 1874, L. R., 9 C. P. 393.

[11] Machado v. Fontes, L. R. [1897], 2 Q. B. 231; M'Larty v. Steele, Jan. 22, 1881, 8 R. 435.

No. 14. Nov. 17, 1904. Evans & Sons v. Stein & Co.

LORD M'LAREN.—The defenders in this case, who are described as makers of fire-clay goods, Bonnybridge, Scotland, in May 1903, gave an order to the pursuers, who are hydraulic engineers at Wolverhampton, England, for the supply of a pump for their works at Bonnybridge. The pump was wanted immediately, and the defenders say, whether rightly or wrongly it is unnecessary for the purposes of this action to consider, that the pursuers professed to have the pump they required in stock and ready for immediate delivery. Some delay ensued in the execution of the order, and the defenders, who I assume were put to inconvenience by the delay, were very angry, and addressed to the pursuers certain letters and a telegram, which, to say the least, were very intemperate in expression, and which in my judgment were defamatory. If these communications had been addressed to a third party, they would, according to our law, and I do not doubt according to the law of England, have been proper to be submitted to a jury under an action of libel. The present action has been instituted for the recovery of damages for libel or defamation.

The peculiarity of the case is, that while the law of Scotland awards reparation for defamatory statements made to the party accused on the ground of injury to feelings, the law of England, which does not take account of injury to feelings, gives no action for statements addressed to the defamed party himself. As counsel are agreed as to the doctrine of the law of England on this subject, it is unnecessary that it should be proved.

The Lord Ordinary has allowed an issue on the ground, as he states, "that Scotland was the *locus delicti*, because the letters were written and posted and the telegram despatched in Scotland."

On the best consideration I have been able to give to the Lord Ordinary's reasoning on this subject, I am not able to concur in his opinion. It appears to me that it is of the essence of an injury of the nature of defamation, that the defamatory charge should reach its destination, or should at least become known to someone. While the letters complained of were in transit through Scotland they could not injure the pursuers, because their contents were as secret and as completely protected from disclosure as if they had been locked up in the defenders' desk. It was only when the letters were delivered at Wolverhampton that damage was done; but then the damage was of a kind that the law of England does not consider actionable. In my opinion, the case is exactly the same as if the defender had taken the letters to Carlisle and posted them there, because in their transit through Scotland the letters could do no harm.

I do not overlook the consideration that a contract may be completed by the posting of a letter, on the principle that the post-office is an agency for the transmission of a completed contract. But, as I think, there is no real analogy between the cases. In cases of contract it is considered that the offerer by sending his offer through the post-office invites a reply through the same medium, and thus the post-office, with the assent of the two parties to the proposed contract, is made the agent for the delivery of the reply. This is the principle of the law on the subject, because the post-office does not hold itself out as an agent for anyone, except for the delivery of the material packets that are entrusted to it.

In the present case I cannot hold that the post-office was the agent for

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the publication of a libel, and there was certainly no preliminary assent on the part of the pursuer to the use of the post-office for the transmission of a libel upon himself. I therefore come to the conclusion that no wrong was committed by the defender within the jurisdiction.

It is proper to notice that the pursuers make a point (Article 10) of the fact (as they aver) that the letters complained of were dictated by the defenders to, and typewritten by, a clerk or clerks in their employment, and were copied into the defenders' letter-book.

Now, I am not prepared to hold that the employment of an amanuensis in the ordinary course of business to write letters on business amounts to publication of a libel, should such letters be found to contain defamatory matter.

The work of an amanuensis to whom letters are dictated is confidential employment, and in the general case the amanuensis knows nothing of the parties or the subject in controversy. His duties are purely mechanical, and he cannot, without a breach of confidence, make any use of the information which he may pick up in writing a letter to dictation. It may be that if the person employed to write the letter knew the party to whom the letter was addressed, and the letter conveyed to his mind a defamatory imputation, an action would lie. But in this record we have not even a statement of the name of the clerk to whom the letters were dictated, and there is no suggestion that the letters conveyed any meaning to his mind. In such circumstances I cannot hold that there is a relevant statement of a defamatory libel addressed or uttered to a known person within the jurisdiction. I may add that the difficulty as to formulating a relevant averment in such a case is not removed by the insertion of the word "maliciously." This word, when applied to the act of dictating a letter is obviously a mere expletive, conveying no meaning distinct from that of the averment without the word maliciously.

What I have said regarding the dictation of letters applies with, if possible, greater force to the transmission of telegrams. The duties of the clerks in the telegraphic department of the post-office are strictly confidential, and I think it would be a new departure in the law of libel to hold that a telegraphic message which is not otherwise actionable becomes so because it is read by the post-office clerks who are engaged in its transmission. In this case also, it would, in my opinion, be necessary to make a circumstantial averment of publication to an individual. It would then depend on the evidence of the person named whether the words complained of conveyed any defamatory meaning to his mind.

On the whole matter, I am of opinion that no relevant case has been made, and that the defenders are entitled to be assoilzied from the action.

LORD ADAM concurred.

LORD KINNEAR.—I am of the same opinion. I quite agree with Lord M'Laren that the injury which the pursuer alleges must be held to have been done at Wolverhampton when he opened and read the letter which contains injurious imputations. So long as the letter was not opened and read by anybody except the person who wrote it, no harm was done, and

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apart from the question whether it was published to the clerks in the pursuer's office or to the telegraph clerk; the injury, if there was injury, was done only when the pursuer opened and read the letter. In these circumstances it appears to me that the argument as to the *locus delicti* is fallacious, because it proposes the question in the form of a *petitio principii*. The first question is not where was the *locus delicti*, but whether there was a *delictum* or not, and the whole of the somewhat metaphysical discussion as to whether the wrongful act, of which the pursuer says he is entitled to complain, was done in Glasgow or Wolverhampton seems to me altogether beside the question.

The first question is, was there a *delictum* or actionable wrong; nobody disputes that the defenders' conduct was blameworthy. But the question is whether it is an actionable wrong; and it is only after we have ascertained that, that we can go on to ascertain whether the *locus* was one or other of the places mentioned on record. The law on that question, as I think it is settled by modern decisions, is that in order to maintain an action *ex delicto* in the Courts of this country, when the wrong is committed in another country, the wrong must be one for which an action can be maintained both by the law of this country and by the law of the country in which it is said to have been done.

The first question therefore is whether it is an actionable wrong according to our law to address language such as that complained of to the pursuer himself, even although it is not communicated to any third person. I agree with Lord M'Laren that there would be an actionable wrong. But before an action can be maintained here we must next go on to see whether there is a wrong by the law of England also; and we are not put to ascertain that law by the ordinary course of procedure, because it is admitted that by the law of England the communication of language of this kind to the person of whom it is spoken and to nobody else is not an actionable wrong. As I understand it, the admission which was made as to the law of England amounts to this—that the cause of action in a case of slander or libel is not mere insult but injury to reputation, and in as much as there is no injury to reputation in saying things to a man himself, which nobody else hears or knows anything about, no action will lie according to the law of England in respect of such statements. That being so, the law applicable to the present case is laid down in a judgment of great authority by Mr Justice Willes in the case of *Philipps* v. *Eyre*.[1] The learned Judge says,—"Where an obligation by contract to pay a debt or damages is discharged and avoided by the law of the place where it was made, the accessory right of action in every Court open to the creditor unquestionably falls to the ground. And by strict parity of reasoning, when an obligation *ex delicto* to pay damages is discharged and avoided by the law of the country where it was made, the accessory right of action is in like manner discharged and avoided." The question considered in that case was whether liability for an act assumed to have been an actionable wrong according to the law of the colony where it was committed had been discharged by a subsequent act of indemnity in that colony; and the question which the learned

[1] 1870, L. R., 6 Q. B. 1, at p. 30.

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Judge was considering was whether the discharge or avoidance of the obligation according to the law of the *locus delicti* excluded an action in England. But his Lordship's reasoning is directly applicable, because the doctrine, as I understand it, is that the accessory right of action in any Court which may be open to the person complaining depends upon the recognition of an obligation, *ex delicto* or *ex contractu*, as the case may be, by the law of his own country, under which he is living, and its coincidence in that particular with the law of the country in which he sues. If there is an obligation *ex delicto* it may be enforced in any Court having jurisdiction. If there is no obligation *ex delicto* by the law of the place where the alleged wrong is done, and under which the complainer is living, there is no action anywhere.

I think that principle also goes to meet the pursuer's argument that the defence in this case was founded upon the law of remedy, and not upon the law of obligation. Mr Salvesen argued that if the law of England affords no remedy, the defence on that ground raises a question of remedy which must always be determined by the law of the country in which action is brought. That appears to me to be a confusion of things which ought to be distinguished. The method by which a right may be enforced is a question of procedure; but whether there is any remedy at all, or in other words, whether there is a right of action, is not a question of procedure, but a question of legal right depending on the existence of an obligation *ex contractu* or *ex delicto*, and the question of obligation must be determined first, before we can consider what the remedy is.

This appears to me to be in accordance with the doctrine explained by Lord Brougham in *Don* v. *Lippmann*.[1] The distinction taken is between the law which governs the constitution of an obligation and the law of procedure which regulates the remedy. Lord Brougham points out that personal rights and obligations must be fixed by the law of the country in which the parties in whom they inhere are living. But they do not necessarily look to the Courts of that country alone as the only tribunals by which the performance of obligations may be enforced or damages may be recovered, because the party complaining is entitled to follow the wrongdoer to the Courts of his own country, or of any other country to the jurisdiction of which he may be subject. If he does so, he must submit himself to the modes of procedure which are adopted by the Court to which he resorts.

This arises from the necessity of the case, because no Court of Justice can invent new forms of procedure and new rules of evidence in order to meet the case of any particular pursuer who comes into Court complaining of wrong done or right infringed in some other country. The rules of evidence and procedure must be applicable to all alike, and therefore when a pursuer comes here he is bound to submit himself to the rules of this Court as to the methods by which his remedy is to be obtained, but he is bound in the first place to shew that according to the law of his own country he has a right under which he is entitled to a remedy. In the present case it has been conceded by the pursuer's counsel that he has no right by the

[1] 1837, 2 Sh. and M'L. 724.

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law of his own country which will support an action in the Courts of that country or in any other.

The question then remains whether there is a relevant averment of publication or communication to somebody other than the pursuer. I agree with Lord M'Laren that there is not. I think there may or may not be publication of the language contained in a letter if the letter is dictated to a clerk, or if the words in a telegram are communicated as they must be to telegraph clerks. But whether there has been such communication or not is a question of fact; and, if a pursuer complains of publication as a wrong, he is bound to state specifically to whom the language complained of was made known. Here the averments on that subject are, as I agree with Lord M'Laren, too vague, and too entirely wanting in specification to be sent to proof. I therefore consider that there is no issuable matter in this record.

The LORD PRESIDENT concurred.

THE COURT recalled the Lord Ordinary's interlocutor and dismissed the action.

DOVE, LOCKHART, & SMART, S.S.C.—JOHN MARTIN, Solicitor—Agents.

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A B, Pursuer (Respondent).—*Shaw, K.C.—Salvesen, K.C.—C. D. Murray.*

C D, Defender (Reclaimer).—*Campbell, K.C.—Younger.*

*Reparation—Slander—Privilege—Privilege of witness—Privilege in precognition.—Held* (*aff.* judgment of Lord Kincairney) (1) that a witness is absolutely privileged in respect of statements made in giving his evidence, if pertinent to the matter at issue; but (2) (*diss.* Lord Young) that this privilege does not extend to statements made in precognition.

*Reparation—Contract—Confidentiality—Breach of confidence by medical practitioner.*—The question whether a breach of medical confidence is actionable depends on the character of the disclosure made.

In an action of damages against a medical adviser for breach of confidentiality, *held* that the pursuer was not entitled to the general issue whether the defender, to the pursuer's damage, disclosed matters relative to her state of health ascertained in the course of confidential employment.

2D DIVISION. Lord Kincairney.

THIS action was raised in March 1904 by Mrs A B, wife of T B, against C D, a medical practitioner, for payment of two sums of £2500 each as damages.*

The pursuer made averments to the following effect:—The pursuer and her husband were married on 19th December 1900. On 28th September 1901 the pursuer, on account of her husband's unkind treatment, went to live with her father. With a view to an action of separation and aliment, her law-agents employed the defender as her confidential medical adviser in the proposed litigation. "The defender accepted said employment on pursuer's behalf, in the knowledge and on the footing that said employment was private and confidential, and that his professional services were required for her guidance in the matter of the proposed action." On 24th October 1901 the defender, along with the doctor then attending the pursuer, examined her.

* Another action of damages for slander was at the same time raised by the pursuer's father against the defender, but it is not necessary to refer to it further.

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"In the course of his examination it was explained to the defender that the pursuer had at one time, on medical advice, taken stimulants and morphia in order to relieve pains from which she suffered greatly, but that she had for some time discontinued doing so, as she had been advised that it was harmful. . . . As the result of his examination, the defender recommended that the pursuer should be sent to a nursing home until her confinement was over. All this was done in the strictest confidentiality and in the fullest reliance upon the defender observing the conditions of his employment, which was, as before stated, of the most confidential character." The defender subsequently expressed views to the pursuer's agents that made it evident that his opinion was adverse to the pursuer with reference to the proposed action.

The action of separation was raised by the pursuer on 13th December 1902. The pursuer's husband defended the action, and a proof was led before Lord Low, which was partly taken in July 1903. The defender was not called as a witness for the pursuer.

On 20th October 1903 her agents received a letter from her husband's agents stating that an examination of the pursuer by her husband's medical witnesses which had been arranged would be attended by the present defender. The pursuer's agents "reminded the defender that he had already been consulted by the pursuer in the matter of said action, that he had attended the pursuer professionally, and that he had had private meetings with the pursuer's agents at which the whole case on pursuer's behalf had been in confidence disclosed to him." The defender attended along with the other medical witnesses for pursuer's husband, and made a lengthy examination of the pursuer.

(Cond. 10) Shortly after making said examination, the defender reported the result of his examination of the pursuer and his opinion on the case to her husband's agents. "He also, at or about the same time, voluntarily gave information to the said parties as to certain matters which he alleged he had ascertained as the result of this prior examination of the pursuer, when, as above condescended on, he had been employed and attended the pursuer as her private and confidential medical adviser, and made to them the statements set forth in Cond. 11. The defender also at or about the same time voluntarily shewed to the pursuer's husband, and to" his agent, "and to the counsel engaged by the pursuer's husband in the said cause, or communicated to said parties, the contents of certain private notes hereinafter mentioned alleged by the defender to have been made by him at the time of his previous examination of the pursuer, and alleged by him to embody the facts concerning the pursuer which he had then learnt, and the result of his said examination. The defender had no permission or authority from the pursuer, or anyone representing her, to disclose to any of said parties any facts which he had learnt as the result of the examination made by him, or of communication made to him, when confidentially employed by the pursuer."

(Cond. 11) "The defender was accordingly requested by the pursuer's husband, or those acting on his behalf, to give evidence. . . . He agreed to do so, and on 24th October 1903, at a diet which had been fixed for hearing the remaining evidence in the case, he was examined as a witness for the pursuer's husband. The defender was not cited as a witness, but gave his evidence voluntarily. In the course of his evidence the defender deponed to certain matters which

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he alleged that he had learnt on the occasion of his professional visit to the pursuer in October 1901; and he also, at his own hand and without being called on, voluntarily produced a book which he said was his private note-book, containing the notes before referred to, alleged by him to have been made at the time. Said notes, a copy of which was lodged in process in said action, are in the following terms:—

'Oct. 25th. . . .
'[The pursuer's name was here given], 16th Febry. 24th 1900.
'Marriage. Wednesday, 19th Decr. 1900.
'Last period, 21st May.
'Sickness, in April, but took breakfast; last time awful sickness in 'July 1901, when going with Nurse . . . to . . . with 'Mrs . . .
'Menstruation commenced aet. 12, always regular, but always painful, 'and required to be in bed, and took whisky and water. Opiates first by direction of Dr . . . ordered opiates (4 years 'ago).
'Injecting ¼ grain morphia did for the whole time. In end of last March took morphia when annoyed, probably took 2 (¼ gr. tabloids).
'Advised should be sent to a nursing home till after her confinement over, to wean her from morphia, &c., and separate her and her husband, and also her own family, till after the birth of the child. This view not pleasing to patient nor to her father (who has married a second wife), and it seems they are all bent upon inducing premature labour, so as to free the patient of any permanent reminder of this marriage, and, if possible obtain a separation.' The said notes were read or the contents of said notes were stated in Court by the defender in the course of his evidence. . . . The said evidence was intended by the defender to impress, and did in fact impress, the Lord Ordinary unfavourably to the pursuer's case, and but for said evidence she believes that she would have been successful in her action against her husband. The statements in answer are denied, in so far as not coinciding herewith, under reference to the notes of evidence for their terms." *

(Cond. 12) "In disclosing as above condescended on to the pursuer's husband, and to his law-agents and counsel, any facts relative to the pursuer and her state of health, which the defender had or alleged that he had learned in October 1901, when confidentially employed as the pursuer's professional adviser; and further, in shewing to the said parties the notes before referred to, or communicating to them the contents thereof, and in voluntarily giving evidence on behalf of the pursuer's husband with regard to said matters, the defender acted wrongfully and in violation of the duty of secrecy which he owed to

* The following answer was given to this averment:—(Ans. 11) "Admitted that the defender gave evidence in the case on Saturday 24th October 1903, and that he was not cited as a witness. The notes of the defender's evidence are referred to. Admitted that in the course of his evidence the defender stated that he had at the time made notes of the result of his examination of pursuer in 1901, and that at the request of the pursuer's counsel he produced the notes and allowed a copy of them to be made. *Quoad ultra* denied. Explained that the defender's whole evidence was given in answer to specific questions by counsel, that no objection was taken by the pursuer's counsel, and no exception taken by the Court to any question which was put to the defender."

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the pursuer. The defender having been confidentially employed by pursuer as her medical adviser, in connection with said action, it was his duty not to have accepted employment from the party who was opposed to the pursuer in said litigation with reference to the subject-matter thereof, nor to have disclosed to the parties he did the information obtained by him from the pursuer while acting as her medical adviser. Further, and in any event, it was his duty not to disclose any matters which he had learned, or claimed to have learned, while thus confidentially employed. In breach of said duty, however, the defender gratuitously and unnecessarily disclosed and published the said information, which he had confidentially received. The defender in so doing not merely committed a grave breach of professional etiquette, but was also guilty of a breach of his duty undertaken by him in respect of his confidential employment by the pursuer as aforesaid, and of an actionable wrong. In consequence of the defender's said actings, the pursuer has suffered great loss and damage. She attributes her want of success in said litigation to the defender's actings. In addition, she has been wounded in her feelings and injured in her character. The loss, injury, and damage which she has sustained thereby the pursuer estimates at the sum of £2500, which is the sum first concluded for."

(Cond. 13) "Further, the defender in connection with the matters which he disclosed to the pursuer's husband and his agents as aforesaid made certain slanderous statements of and concerning the pursuer which reflected and reflect seriously on her character and reputation. In particular, the passage in the defender's notes which he communicated to the pursuer's husband, agent, and counsel, as above mentioned, which he afterwards read in open Court, and which is in the following terms :—'Advised she should be sent to a nursing home' [&c., as above quoted], is a gross slander on the pursuer. The said statement means, and was intended to mean, that the pursuer had indicated to the defender her desire, at the time of the defender's visit in October 1901, criminally to procure abortion, that she had endeavoured to obtain his assistance and co-operation to attain this end, and that her sole motive in so doing was to free herself of any permanent reminder of her marriage with her husband. The said statement was entirely unfounded, and was made and published by the defender maliciously. The defender had been informed by the pursuer's medical adviser at said visit that at one time, long prior to the defender's first visit, it had been thought by the pursuer's medical advisers that it might be necessary to induce premature labour, with a view to saving the pursuer's life, which was then in serious danger, but that as matters had turned out this had proved to be unnecessary. At the time of the defender's visit the pursuer had recovered so far that such an operation was quite unnecessary, and no suggestion was ever made with regard to same. This was the sole foundation for the cruelly false and calumnious statement which the defender made, and which he either knew to be false, or made with a reckless disregard of whether it was true or false. The said statement further falsely and calumniously represented that the pursuer was a person so addicted to the use of morphia and other drugs that she required special treatment to cure her of the habit."

The pursuer pleaded ;—(1) The defender having wrongfully and in breach of his duty to the pursuer as her professional adviser, or otherwise of the implied terms of his employment by her, disclosed to

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third parties confidential matters as condescended on, to the loss, injury, and damage of the pursuer, the pursuer is entitled to compensation therefor. (2) The defender having slandered the pursuer as condescended on, the pursuer is entitled to decree for the loss thereby sustained by her. (3) The statements libelled having been made by the defender voluntarily, and the defender in communicating information to the pursuer's husband and his agents having been in breach of the confidential employment condescended on, the defender's plea of privilege falls to be repelled. (4) In any event, the false and calumnious statements made by the defender as condescended on having been made by him maliciously and without probable cause, the pursuer is entitled to reparation as concluded for.

The defender pleaded;—(1) The pursuer's statements are irrelevant. (2) The pursuer's averments, so far as material, being unfounded in fact, the defender should be assoilzied. (3) The defender's statements libelled are privileged.

The following issues were proposed for the trial of the cause:—

"1. Whether, on or about 22d October 1901, the pursuer employed the defender as her private and confidential medical adviser, to advise her as to her state of health, and in the matter of an action of judicial separation proposed to be instituted by the pursuer against her husband, T. B., and in pursuance of said confidential employment communicated to the defender the evidence proposed to be led on her behalf, and submitted herself, on or about 24th October 1901, to an examination by the defender at her father's house . . . and whether the pursuer, having raised an action of separation and aliment against the said T. B., which was defended by him, the defender, in breach of said confidential employment, on or about 22d, 23d, or 24th October 1903, voluntarily disclosed to the said T. B., to W. R., his law-agent in said action, and to the counsel engaged therein on his behalf, or to one or more of them, matters relative to the pursuer and her state of health, ascertained in the course of said confidential employment, and the nature and result of the examination of the pursuer made as aforesaid, to the loss, injury, and damage of the pursuer? 2. Whether, on or about 24th October 1903, in the course of the trial of the said action, the defender, in breach of the said confidential employment, voluntarily gave evidence on behalf of the said T. B., and publicly disclosed the matters mentioned in preceding issue, to the loss, injury, and damage of the pursuer.—Damages laid at £2500."

"3. Whether, on or about 22d, 23d, or 24th October 1903, the defender falsely and calumniously stated to the said T. B., to the said W. R., and to the counsel engaged in said action on behalf of the said T. B., or to one or more of them, of and concerning the pursuer, that the pursuer at the time of the defender's said examination in October 1901 was bent upon inducing premature labour, so as to free her of any permanent reminder of her marriage with the said T. B., meaning thereby that the pursuer was desirous criminally to procure abortion, or used words of like import and effect, to the loss, injury, and damage of the pursuer? 4. Whether on or about 24th October 1903, the defender voluntarily gave evidence as a witness on behalf of the said T. B. in the course of the trial of said action, and falsely and calumniously stated in open Court of and concerning the pursuer that the pursuer at the time of the defender's said examination in October 1901 was bent upon," &c., as in third issue, "meaning

thereby," &c. as in third issue.—"Damages under issues 3 and 4 laid at £2500." No. 15.

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On 12th July 1904 the Lord Ordinary pronounced an interlocutor by which he disallowed the second and fourth issues proposed by the pursuer, and approved of the first and third.*

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* "OPINION.—This is undoubtedly a case of much interest and legal importance. It regards the obligation of a medical man who has been consulted by a party contemplating a litigation with a view to that litigation, and who has made, with a view to the litigation, a medical examination of the party consulting him, not to disclose the results of the examination or the information confided to him.

"The case arose out of an action brought by the pursuer against her husband for judicial separation on the ground of cruelty affecting her health, and she consulted the defender as a medical man with a view to that action. She avers that she or her agents laid before the defender copies of her precognitions, and that the defender, on the pursuer's instructions, examined her medically with a view to the action.

"It is not averred that the defender advised or encouraged the action for judicial separation, but it is averred that the action was raised and was defended by the pursuer's husband, and that a long proof was taken, in which the defender was not examined as a witness for the pursuer. The pursuer further avers that the defender reported the result of his examination of the pursuer to the agents for her husband, and 'voluntarily gave information' to them 'as to certain matters which he had ascertained as the result of his examination of the pursuer,' and the pursuer avers that the defender then shewed to the agents of the pursuer's husband certain private notes which he had made embodying the result of his examination of the pursuer, and containing matter defamatory of the pursuer.

"The pursuer further avers that the defender gave evidence 'voluntarily' in the proof on behalf of the pursuer's husband and against her, and that he produced at the proof a note-book containing the notes made by the defender as to his examination of the pursuer, which were read in Court. The notes are printed in the record, and their general purport appears from the issues. They are said to have been defamatory of the pursuer, and to impute to her among other things an endeavour to procure abortion.

"I think that the result of the action for judicial separation is not given on record, but I understand that it was adverse to the pursuer, and that the pursuer ascribes its adverse result to the evidence of the defender and to his disclosure of what he ascertained by his examination of the pursuer.

"The pursuer states that the defender accepted employment from the pursuer 'on the footing that the employment was private and confidential, and that the defender's professional services were required for her guidance in the intended action,' and that the defender had no authority to disclose the facts he ascertained in the course of that confidential employment.

"The pursuer states that the defender's defamatory statements were made maliciously. But there are no averments on record of any circumstances from which malice could be inferred; and in truth the idea of actual malice seems preposterous and not in the case at all.

"The defender does not plead *veritas*, nor does he distinctly aver that any duty devolved on him to disclose any part of the pursuer's conduct.

"The pursuer has lodged four issues; the first and second are founded on the defender's breach of confidentiality, the first alleging that breach by disclosure to the pursuer's husband, his law-agent, and counsel; the second, breach of confidentiality by his evidence at the trial.

"The third and fourth issues are issues for defamation by imputing to the pursuer, as innuendoed, an attempt to procure criminal abortion; the

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The defender reclaimed, and argued;—*On the issues of slander.*—(1) It was settled law that a witness, like an advocate or a Judge, was absolutely privileged, so long as his evidence was pertinent to the issue.[1] The Lord Ordinary was therefore right in disallowing the second and fourth issues proposed by the pursuer. (2) The same privilege extended to statements made in precognition, which was only a preliminary to giving evidence. That clearly appeared from an examination of the cases which established the privilege of a witness, advocate, or Judge. They proceeded not on the ground of the right of any of these parties to make libellous statements, but on considerations of public policy. It was held to be necessary in the interests of the administration of justice, that the witness should be free to speak, without the fear of an action of damages.[2] But the same reason would protect statements made in precognition—a necessary preliminary if the evidence was to be taken properly. On

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disclosure in the third issue being to the defender's husband, his agent, and counsel, and the fourth being disclosure in the witness-box.

"I suppose that the private disclosure averred would be disclosure in precognition, but that is not averred by the pursuer, and I am not at liberty to assume it.

"The defender pleaded in the first place that this duplication of the issues was illegitimate; that there was only one fact averred, and that there should not be more than one issue, or two issues at most; for which position he cited *Hassan* v. *Paterson*, 26th June 1885, 12 R. 1164; and *Ferguson* v. *Colquhoun*, 1862, 24 D. 1428. These cases are the same, but I do not think they apply. They are cases each regarding a single slander twice uttered, the one in presence of the police, and therefore privileged, the other before the police arrived, therefore,—it was argued,—not privileged. I doubt whether these cases should be extended, and I do not think they apply. Here I see nothing objectionable in the multiplication of issues. For I think there was sufficient difference in the time when, and the circumstances in which the words objected to were spoken, in private and at the trial, to warrant a separate issue for each occasion; and further, it seems to be legitimate to put breach of confidentiality in one issue and defamation in another. No doubt the same act may have caused both injuries; still it is possible that the issue for defamation might fail, as if the defamation were not proved, and the issue put on breach of confidentiality might succeed; or the jury might possibly not be satisfied about the confidentiality, but clear about the defamation; and I think the pursuer was justified in providing against such a contingency; or the damages might be totally different. I think the question is really one of convenience and of precaution against miscarriage; and I think that if the issues should not be thought objectionable in themselves there would be no sufficient reason for reducing their number. There are therefore four issues to be considered.

"I think the issue which is most easily disposed of, and which may therefore be taken first, is the fourth; and I have little difficulty in disallowing it. It is an issue for defamation by evidence given in a Court of justice on oath, not said to be impertinent to the subject under inquiry. Now, I think that nothing is more clearly settled than that in such a case

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[1] Williamson v. Umphray, June 11, 1890, 17 R. 905; Rome v. Watson, March 10, 1898, 25 R. 733; Dawkins v. Lord Rokeby, 1875, L. R., 7 Eng. and Ir. App. 744; Seaman v. Netherclift, 1876, 2 C. P. D. 53; Munster v. Lamb, 1883, 11 Q. B. D. 588.

[2] *Per* the Lord President in Williamson v. Umphray, *supra*, at p. 910; *per* Lord Penzance in Dawkins v. Lord Rokeby, *supra*, at p. 755; *per* Brett, M. R., in Munster v. Lamb, *supra*, at p. 601.

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the view taken by the Lord Ordinary, the protection given to the witness was merely illusory; he must give his evidence under the apprehension that if any statement he made was defamatory, he would be exposed to an action of damages based on an averment that he had made the statement in precognition. If the same principles were applied to the case of an advocate, the result would be that he would be privileged with regard to statements made on record if he wrote them himself, but liable to an action of damages if he dictated them to a shorthand writer or clerk. Apart from the question of public policy, statements made in precognition were privileged because they were made confidentially,[1] and could not be disclosed without a breach of duty on the part of those who heard them. In such cases no issue would be allowed.[2] Again, the pursuer complained of only one wrong—the slanderous statement. Even on the most favourable view of her case, she would not be entitled to two issues for the same wrong.[3] She had suffered no injury by the statements made in precognition, the injury was done by the statements made in the witness box. She could not therefore have an issue for the prior statement, at all events without an averment of malice and of facts and circumstances from which malice could be inferred.[4]

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the protection of a witness is absolute; and it is of no consequence whether the evidence is true or false, *bona fide* or malicious. The leading case on the point is *Dawkins* v. *Lord Rokeby*, L. R., 7 Eng. and Ir. App. 744, and L. R., 8 Q. B. 255. To the same effect are *M'Intosh* v. *Weir*, 2 R. 877; *Williamson* v. *Umphray*, 17 R. 905; and *Seaman* v. *Netherclift*, 1876, 2 C. P. D. 53. Indeed no point is better settled.

"I do not see any sufficient ground for disallowing the third issue, which is also for defamation. It may be that the issue refers to the precognition of the defender for the pursuer's husband, but the pursuer has not said so, and I do not see that that can be assumed. Even if it did refer to the defender's precognition, I have no doubt that there is no absolute privilege attached to words spoken in precognition, and I am not prepared to say that they are privileged at all. I do not think that malice must be added to this issue on the pursuer's record; but the privilege of the defender may possibly appear at the trial.

"I think that the second issue is covered by the principle which affords absolute privilege to whatever evidence is given in Court by a witness pertinent to the question under inquiry, and that it also must be disallowed.

"The greatest difficulty is about the first issue, but I have come to the conclusion that it must be allowed. The authority for it is *A B* v. *C. D*, 13th December 1851, 14 D. 177. No other Scotch authority was quoted, and there seems to be none. But it is quite in point, and I think conclusive; and, sitting in the Outer-House, I consider that I must follow it. I do not mean to say that I doubt it; but only that I think I require to follow it in any case. The pursuer also referred to the report in the British Medical Journal, 28th March 1896, pp. 815 and 882, of the well-known case in which Dr Playfair was defender. I have studied the phraseology of the issue, and the words seem to be very carefully and cautiously chosen. I do not think the pursuer is bound to put more in the issue, and I think that issue should be approved of.

"The result is that I approve of issues first and third, and disallow the issues second and fourth."

[1] Dickson on Evidence, sec. 1669; Leslie v. Grant, 1760, 5 Brown's Supp. 874.

[2] *Per* Lord President in Williamson v. Umphray, *supra*, at p. 913.

[3] Hassan v. Paterson, June 26, 1885, 12 R. 1164.

[4] Ferguson v. Colquhoun, July 19, 1862, 24 D. 1428, 34 Scot. Jur. 712.

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*On the issues of breach of confidence.*—No issue should be allowed. There was no absolute rule that a doctor must preserve secrecy about matters which he had learned professionally. That depended on circumstances, and on the nature of the matter disclosed. The pursuer was not entitled to an issue of breach of confidence with regard to the concluding paragraph of the notes read by the defender, because that had been innuendoed as slanderous, and no two issues could be allowed for the same wrong. The medical details contained in the rest of the note were not of a confidential nature. In giving evidence the defender was bound to disclose them, especially as the pursuer was represented, and took no objection. With regard to the alleged disclosure in precognition, the pursuer suffered no actionable wrong. The Lord Ordinary, in allowing the first issue, proceeded on the case of *A B* v. *C D*.[1] But that case was distinguishable, first, because the statement there made was of a defamatory character; secondly, because in the present case the disclosure was made to the pursuer's husband, or to persons representing him, who had a right to be informed as to the pursuer's health. The defender could not have pleaded confidentiality, the pursuer could.[2]

If any part of the case was relevant, it was not suited for jury trial, and should be sent for proof before a Judge.

Argued for the respondent;—*On the issues of slander.*—(1) The fourth issue should be allowed. Admitting that an ordinary witness was entitled to an absolute privilege, the rule did not extend beyond cases where the witness was bound to give evidence. A skilled witness, like the present defender, although he must obey a citation, need not give evidence unless he pleased. Here, the defender had not even been cited. Again, if a witness answered a question which he was not bound to answer, and if in answering he was committing a breach of duty, he was not privileged.[3] That was the present case; the defender should have objected to any question with regard to his examination of the pursuer, and his objection would have been sustained. Even if it could be maintained, on the English authorities, that all witnesses had an absolute privilege, Scots law had not adopted the English rules as to privilege in legal proceedings, *e.g.*, as to the privilege of a party to an action.[4] (2) There was no privilege as to communications made by a witness out of the witness-box. He was under no obligation to be precognosced, and therefore had no privilege. Even assuming that he was entitled to answer questions in the witness-box, and incurred no liability thereby, that did not justify slanderous statements made previously, nor could it furnish an indemnity for them.[5] On the opposite assumption, a witness who was precognosced but not examined would be liable for what he said, whereas a witness who was examined would not. Besides the pursuer's statements were not confined to formal precognition, they amounted to

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[1] Dec. 13, 1851, 14 D. 177.

[2] The King v. Duchess of Kingston, 1776, 20 State Trials, 572.

[3] Trotman v. Dunn, June 17, 1815, 4 Camp. 211; Moore v. Terrell, 1833, 4 Barn. and Ad. 870; Bolton v. Corporation of Liverpool, reported as note to Moore, at p. 876; Shadden v. M'Elwee, 1887, 6 Amer. State Reports, 821; Mackintosh v. Weir, July 3, 1875, 2 R. 877, *per* Lord Deas.

[4] Dickson on Evidence, secs. 1667, 1684; Williamson v. Umphray, June 11, 1890, 17 R. 905.

[5] Gibb v. Barron, July 1, 1859, 21 D. 1099.

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a general averment of ultroneous communications, on which no privilege was possible.

*On the issues of breach of confidence.*—Apart altogether from slander, the defender, in disclosing facts learned in a professional capacity, committed an actionable wrong. He had a duty not to disclose these facts, and the violation of that duty, resulting as it had done in injury to the pursuer, was actionable, even although the statements made were not of a libellous character, and apart from all question as to their truth. This principle had been established in the case of a doctor, and also in cases of other professional men and agents.[1]

(4) The case was suitable for jury trial. At all events, the Court, in a question of proof or jury trial, would not interfere with the judgment of the Lord Ordinary.[2]

At advising,—

LORD JUSTICE-CLERK.—I entirely concur with the decision of the Lord Ordinary rejecting the proposed issues based upon evidence given by the defender in the witness-box in a judicial proceeding. Nothing is, I think, more clearly settled in our law than this, that a witness is absolutely privileged in giving his evidence, pertinent to the issue, and cannot be subjected in damages for slander for what he says in the Court of justice.

As regards the two issues which the Lord Ordinary has approved in the case, I am unable to agree with him in allowing the first of the two issues. It is evident that information which a medical man obtains as to a patient in his professional capacity is confidential, and ought not to be disclosed to others. At the same time, it must depend on circumstances whether any disclosure made to others is a wrong, for which compensation may be sought by an action of damages in a Court of law. And it would be necessary that a pursuer proposing to take an issue should be most specific in putting in issue the matters said to have been disclosed, of which it is alleged that the disclosure was an actionable wrong. The form of the issue proposed in this case is such as I have never seen. The question asked is only whether there were disclosed "matters relative to the pursuer and her state of health." I do not think that any such issue should be allowed. It is also objectionable because, if allowed, it might enable the pursuer to bring forward the alleged slander dealt with in the second of the approved issues, and this might plainly lead to injustice, for it might lead to damages being given twice for the same wrong.

As regards the second issue allowed by the Lord Ordinary, and the relative issue in the other case, I am of opinion that these must be allowed. The words of alleged slander complained of seem to me to be such as fairly to bear the innuendo that the pursuers put upon them, and if the innuendo were made out to the satisfaction of the jury under the directions of the Judge at the trial there would be a case for damages.

I have only to add that I do not see at present any sufficient ground for

[1] A B v. C D, Dec. 13, 1851, 14 D. 177; M'Donald v. M'Donalds, Jan. 7, 1881, 8 R. 357; Brown's Trustees v. Hay, July 12, 1898, 25 R. 1112; Taylor v. Blacklow, 1836, 3 Bing. N. C. 235; Robb v. Green, [1895], 2 Q. B. 315; Lamb v. Evans, [1893], 1 Ch. 218.

[2] Fearn v. Cowpar, March 14, 1899, 1 F. 751; Edinburgh Railway Access Co. v. John Ritchie & Co., Jan. 7, 1903, 5 F. 299.

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inserting a statement of malice in the issue. It is possible that a question may arise on that matter at the trial, but in my judgment the case ought to be sent to trial on the issue as adjusted by the Lord Ordinary.

LORD YOUNG.—I agree with the Lord Ordinary when he says that this is a case of much interest and legal importance. That your Lordship also thinks so I infer from the observations which you have made upon the established rule of law, that everyone giving evidence in a Court of justice, being admissible as a witness, and answering the questions which are properly put to him, which those allowed by the Court are presumed to be, is privileged, and that it is in the interests of justice, and the public for whom justice is administered, that he should not give his answers under any apprehension of being liable to an action of damages should his evidence be defamatory of anyone, whether a party to the action or not. The ground upon which that rule of law is founded your Lordship has explained, and it is indeed obvious. It is in the interests of the public that the truth should be ascertained in a Court of justice, and that witnesses should give their evidence without any such apprehension or fear.

Your Lordship is of opinion that the second issue should be allowed here, because it does not relate to the statements made by the defender in the witness-box, but to the information previously given by him to the party who called him as a witness. I think the interests of justice, and of the public in its administration, apply to the one as well as to the other. It would be no encouragement to the fearless speaking of the truth in the witness-box to say to the witness:—"You need be under no apprehension of an action of damages for what you shall swear to in the witness-box, but keep in view that you are liable to such action if you have beforehand informed the party who calls you of the facts which you can testify, and to testify which you are called."

Now, what are the facts in this case? The case does present, as I have said, agreeing with the Lord Ordinary, questions of very general interest and importance, but still, like most cases, it has its own specialties and peculiarities, of which the chief here is that the whole matter arises out of a disagreement between husband and wife. The wife believed — I assume honestly — she had been illused by her husband, so as to affect her health, and that to such extent that she could not endure its continuance, and therefore left his society and residence, and went to reside with her father at some distance. Then, with a view to obtain separation from her husband and her support from him without the necessity of living with him and submitting to the continuance of the illusage, it occurred to her, or she was advised, that her proper course was to raise an action of separation and aliment. With a view to that, she was advised to resort to the defender, who is a well-known and indeed very eminent member of the medical profession, and that with the view of ascertaining and getting his testimony, should his medical opinion prove favourable to her, that the condition of broken-down health in which she undoubtedly was, was attributable to such illusage as she alleged her husband had subjected her to, and was not attributable to any other cause. The defender visited her in order to examine her person, and ascertain from her the facts connected with the

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matters upon which she desired his medical opinion and advice. He did examine her person, and questioned her as to matters about which she might not have given information without questioning, the result being as noted at the time in the defender's professional note-book. (His Lordship read the defender's note of October 25, 1901.)—Now, these are the notes which the defender made on and at the time of his examination and interview. No one can doubt that these notes were made privately, and with a view to reminding him, should his services be again required regarding what he had seen and heard, the impression thereby made upon him and the advice which he gave.

Now, I cannot see any impropriety, and indeed I feel sure that there was none, in his making these notes with regard to what had passed, and what he had been told of the lady's habits, and the impression made upon him, and the advice he gave, that she should go to a nursing home until the birth of her child, that being in his opinion the best for her health and so also the best for the child of which she was pregnant, and the impression made upon his mind by the way in which they took that advice, viz., that they were not anxious that the gestation should be prolonged by sending her to a nursing home to be attended to there. The action of separation and aliment is brought by the wife against her husband. She was of course at liberty to call the defender as her witness, to give the result of his examination, and the opinion which he thereupon had formed, and he would have been called, no doubt, as her witness if he had not most distinctly given both her and her father to understand that his opinion was not favourable to her view, and that he attributed her condition, not to the alleged cruel treatment by her husband, but to her own infirmity and bad state of health, produced or aggravated by the way in which she had for a long while been living—using opiates, and alcoholics largely and constantly. It so happened that, about two years after his examination of the pursuer, and his interview with her, the defender was resorted to professionally by her husband. He avers, and probably nobody will doubt the truth of the averment, that, when resorted to by the husband, and asked by him to examine the pursuer, he accepted the employment and made the examination without any recollection of having examined the pursuer before and upon her own employment, but that he was informed then that this was the lady he examined two years before. He is then asked by the husband:—"Well, what passed between you and my wife then? My wife resorted to you for advice upon her then condition, tell me what was that condition, and what passed between you and my wife regarding it." I cannot think it doubtful that the defender acted not only legally but with perfect propriety in giving the husband information of what had passed between him and his wife, but it is I think unnecessary for us to decide that, if the view be sound which I take of the subsequent examination of the defender as a witness, although called not by the wife, but by the husband in the action of separation and aliment.

Was he in that action an admissible witness for the husband? We must hold that he was, for his evidence was admitted by the Judge, and we cannot hold that the less conclusive because no objection was taken to his admissibility. The only parties interested were the husband and the wife, and they were respectively represented by presumably competent law-agents

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and counsel. The Judge does not always, or even usually, interpose any objection to the competency of a witness. Nor does he generally, although perhaps not so infrequently, suggest an objection to the competency of questions put to a witness. If the parties are agreed, and the Judge interposes no objection, then the evidence given by that witness is competent evidence. Now, it is stated, and not disputed upon record here, that all the evidence which the defender gave was in answer to questions which were not objected to by either party or by the learned Judge. I must therefore hold that in that action between husband and wife the defender was a competent witness, and that what he was asked, and what he gave evidence upon, was legally admissible evidence upon which the Court could and must proceed in determining the facts according to which the case before the Court was to be determined.

It was contended that although no action at the instance of the pursuer can be sustained against the defender for having given that evidence—I will speak about her father by and by—an action may be brought against him for having given the information which led to him being called as a witness. There is no averment or suggestion that any statement was made previous to the trial or previous to the examination of the defender as a witness, other than of the facts which he was asked about and gave his evidence about in the witness-box. He furnished the husband with the note which he made, and which I have already read. I have also already said that he, in my opinion with perfect propriety, informed the husband of the note which he had made of the interview with his wife, and the opinion which he had then formed and still retained—whether my opinion is right upon that or not, he in point of fact furnished the husband with the note, and it must have been produced in process before he was examined upon it in the witness-box, and before it was put in evidence.

Lord Trayner.—No. It was handed to him.

Lord Young.—It was before both parties, was before the wife and her advisers as well as before the husband and his advisers, and was before the Judge. It may be assumed that the defender was entitled to refuse if asked to give information privately in precognition or otherwise, although, as I have said, he acted with perfect propriety in giving it. No one is bound to submit to precognition by a litigant, or intending litigant. I have already pointed out that the professional note-book was legal evidence—regularly and without objection judicially admitted without reference to information by precognition or otherwise prior to the trial. It is therefore obvious that had there been no such prior information the notes would have been produced, and the testimony of their writer regarding the facts noted given publicly in open Court exactly as they were. How the Judge would or ought to have dealt with an objection by the witness had he seen fit to state any, either to produce the notes or answer all or any of the questions put to him about them, we are not called upon to decide.

I have indicated, I hope sufficiently, my opinion that the husband was legally entitled to all the evidence which he obtained and adduced regarding the examination of his wife by the medical man to whom she resorted in the circumstances, as to which there is no doubt or indeed dispute.

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What I have said refers principally at least to the action at the instance of the wife against the defender. Her father, it is or may be suggested, is in a different position. I cannot see any ground for that. The rule and the reason for it which your Lordship referred to, and to which I have made so frequent reference, of privilege against any action of damages for defamatory facts sworn to by a witness in Court, apply not only to the parties in the action before the Court, but also to any outsider. A witness is not liable to an action of damages for an answer to a question relevant to the case in which he is examined—is not liable to a third party any more than to a party in the action. If that were not so, then, to a large extent at least, the reason for the rule would be frustrated. Therefore I can see no distinction between the wife and her father with respect to this action against the defender, and my opinion upon the whole matter is, that there is here no relevant case against him, and I think it is only just and fair to him to state, so far as my opinion goes, that nothing which he is alleged to have done or said was improper.

LORD TRAYNER.—I agree with the Lord Ordinary in thinking that the second and fourth issues proposed by the pursuer cannot be allowed. They refer to statements made by the defender when under examination as a witness. I think it well settled that what is stated by a witness in the witness-box is absolutely privileged, except in the case where the witness gives expression to a calumnious statement altogether irrelevant to the subject-matter of the case in which he is being examined, or to the questions put to him. The present defender's statements do not fall within that exception. I further agree with the Lord Ordinary in thinking that the pursuer is entitled to the third issue. What is there complained of is a statement made by the defender of and concerning the pursuer, which (as innuendoed by the pursuer) is clearly actionable; and the innuendo does not appear to me unreasonable. On the contrary, I think the statement complained of quite capable, and reasonably capable, of being read as meaning what the pursuer avers the defender did mean. I am, however, for disallowing the first of the issues proposed by the pursuer, and which the Lord Ordinary has allowed. It is founded on a breach of confidence. But I cannot say that every breach of confidence is actionable. A medical man called in to advise a patient is well advised when he declines to say even that he had been consulted, but it depends on what he says whether his statement is actionable or not. It may be indiscreet, but not actionable. For example, if a medical man said to A that he had been called in to see B, and on being asked by A what was the matter with B, he replied that he was labouring under a severe cold—that would not be actionable. On the other hand, if he stated that B was labouring under some malady, the consequence of misconduct, that would or might be actionable. In the present case, if you exclude the part of the defender's statement which as innuendoed is slanderous, there is nothing in it which can be regarded as an actionable breach of confidence. In coming to the conclusion that this issue should be disallowed, I am not influenced to any extent by the consideration that the statement complained of was made to the pursuer's husband. In the position in which the pursuer and her husband stood towards

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each other—and that in the knowledge of the defender—I think the defender had no right to make to the pursuer's husband any statement which he could not justifiably, or without incurring liability for damages, have made to a stranger.

LORD MONCREIFF.—As all your Lordships have done, I have considered this case most anxiously. I agree that no issue should be allowed as to the evidence given by the defender in Court. The privilege of a witness is absolute, and the pursuer at the trial did not even object to the defender's evidence on the ground of confidentiality. The plea of confidentiality is the privilege of the client or patient; and if the client or patient does not object the witness is entitled and bound to disclose what was communicated to him in confidence.

But the Lord Ordinary has allowed two issues in respect of statements made not on oath. The first is based on an alleged breach of confidentiality, the damages claimed being £2500.

I am not prepared to hold that statements voluntarily given in answer to questions in precognition are necessarily privileged. But the pursuer was bound to specify and put in issue the statements complained of. She has not done so, and does not propose to do so, and I am not surprised, because apart from the alleged slander at the conclusion of the defender's notes there is nothing in them to warrant the large claim made. But the alleged slander forms the subject of the second issue, on which also damages (£2500) are asked; and thus the two issues overlap. The pursuer is not entitled to double damages for the same wrong. I am therefore on that ground for disallowing the first issue allowed by the Lord Ordinary. At the same time the breach of confidentiality, if proved, may possibly have some bearing on the second issue allowed.

The second issue as to the alleged slander raises questions of considerable delicacy. I felt from an early stage of the discussion that a satisfactory decision upon them could not be arrived at without inquiry. The defender pleads that the communications which he made to the pursuer's husband and his legal advisers in October 1903 were privileged; and he may succeed in proving that they were. But at the present stage we must decide that question on the assumption that the pursuer will succeed in proving her averments. And on that assumption, having considered the authorities, I have come to the conclusion that a case of privilege is not disclosed on the pursuer's averments. The words complained of are undoubtedly calumnious. They are not said to be true in the sense that the pursuer and her father intended to produce premature labour for the reason alleged. *Veritas* is not pleaded. If the pursuer had averred that the defender at once communicated his suspicion to the pursuer's husband, a case of privilege might perhaps have been held to be disclosed on the ground that such a communication must be presumed to have been made to prevent the commission of a crime of which it was the husband's right and interest to be warned. But she does not aver that, and it is admittedly not the case. The defender did not communicate his suspicions until two years later, and then according to the pursuer, in circumstances which *prima facie* do not infer privilege.

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The defender, however, may succeed at the trial in shewing that he had a right and a duty to make the disclosure. This will depend mainly at least upon the evidence as to what took place at the first interview between the defender and the pursuer and her father. If the defender can prove that what was said upon that occasion, or what he observed, was such as to induce a reasonable belief in the truth of his suspicion, it may go a long way to establishing a case of privilege even although, as we must assume, the suspicion was unfounded.

If the defender succeeds in satisfying the Court that the communication was privileged the pursuer cannot succeed without proving that the communication was made maliciously. Personal malice is not averred or suggested, and the first thing the Judge will have to decide is whether the pursuer has made averments which entitle her to a proof of malice. If he holds that she has not, the defender will be entitled to a verdict. If he holds that she has, the question of malice will be left to the jury.

I should have preferred that these delicate questions should be tried by a Judge without a jury. But the pursuer does not agree to this course, and the Lord Ordinary, a Judge of long experience, has selected trial by jury. We do not, according to practice and decisions in both Divisions of the Court, interfere with a Lord Ordinary's discretion as to the mode of inquiry in the absence of very exceptional circumstances.

I therefore reluctantly agree with the majority that the second issue allowed by the Lord Ordinary should be allowed as it stands, and the case go to trial.

THE following was the interlocutor:—"Disallow the first issue proposed for the pursuer, to which extent alter the said interlocutor reclaimed against: *Quoad ultra* adhere to the said interlocutor reclaimed against: Approve of the remaining issue as altered and adjusted, appoint same to be the issue for the trial of the cause, and remit to the said Lord Ordinary to proceed as accords: Finds neither party entitled to expenses since 12th July last."

DRUMMOND & REID, W.S.—J. P. WATSON, W.S.—Agents.

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Nov. 18, 1904.
Duran v.
Duran.

MRS CHRISTINA SOPHIA KEITH OR MORSE OR DURAN, Pursuer (Respondent).—*Hunter—Spens.*

FRANCIS DURAN, Defender (Reclaimer).—*Salvesen, K.C.—J. A. Christie.*

*Husband and Wife—Constitution of Marriage—Consent de præsenti—Written declaration before witnesses—Mental reservation.*—In a declarator of marriage it is not sufficient for the pursuer to produce a writing signed by the parties stating that they have taken each other as husband and wife. The pursuer must also shew the circumstances in which the writing was completed, and shew that they were consistent with an intention on the part of the parties to contract marriage.

A party to a mutual declaration of marriage will not be allowed to plead that he did not truly consent to the marriage if he induced the other party to believe that he did consent.

*Circumstances* in which *held* that marriage had been proved by written declaration signed by the parties before witnesses.

No. 16.

Nov. 18, 1904. Duran v. Duran.

2D DIVISION. Lord Kincairney.

MRS CHRISTINA SOPHIA KEITH OR MORSE OR DURAN, widow of George Morse, engineer, Glasgow, brought this action against Francis Duran, commission-agent, Glasgow, for declarator that she was lawfully married to him by mutual declaration signed before witnesses.

The pursuer averred that she and the defender, on 19th November 1902, "accepted each other as husband and wife, and on said date, at 65 West Regent Street, Glasgow, signed an acknowledgment to that effect in presence of Alexander Watson, insurance-agent, and Margaret Kennedy or Watson, his wife, both residing at 96 Thistle Street, Garnethill, Glasgow."

The acknowledgment referred to, which was produced, was in the following terms:—

(No. 11 of Process.) "65 West Regent Street, Glasgow, 19th November 1902.

"We, Francis Duran, commission-agent, residing at 189 Hill Street, Garnethill, Glasgow, and Christina Sophia Keith or Morse, housekeeper, residing at 189 Hill Street aforesaid, do hereby accept and acknowledge each other as husband and wife.

"Alexander Watson, *witness.* FRANCIS DURAN.

"Margaret Watson, *witness.* CHRISTINA SOPHIA MORSE."

It was signed by both parties in the presence of witnesses, and was prefixed to a petition to the Sheriff of Lanarkshire, stating that the parties had contracted an irregular marriage before the witnesses named, and praying for certification, in terms of 19 and 20 Vict. cap. 96, sec. 2, that the parties were lawfully married to one another, and for warrant to the registrar of the district to register the marriage. The petition was signed by both parties. The petition, which was partly printed, and for the rest written by Robert Watson, writer, Glasgow, in the presence of both pursuer and defender, was in the ordinary form used in such petitions. The petition was never presented to the Sheriff.

The defender's averments, so far as material, were as follows:—"Explained that the pursuer and defender had intercourse, in consequence of which the pursuer became pregnant. She urged the defender to marry her, but he declined. She then requested the defender to sign a document, on the distinct representation made by her that it should not constitute a marriage between the parties, but should merely fix the paternity of the child on the defender, and enable the pursuer to vindicate her good name if and when attacked, by exhibition of the document. On these representations the defender signed the document in question. The parties did not intend to marry, and in point of fact there was no exchange of consent to do so."

The defender produced and founded on two declarations, written by the pursuer to his dictation, and dated 17th November 1902 (two days before the alleged ceremony of marriage).*

* (No. 8 of Process.)

"I hereby confess that this marriage, which never would have taken place, as there was no promise nor intention for either party, has been brought about by my own carelessness and foolishness with you, and as you go through this marriage to save my good name, in return I now give you this, and hereby promise not to claim any money, property, or whatsoever you may have or receive either for myself or my two children.

"Should there be any children of this marriage the responsibility must be yours.

"I furthermore hold you always free to do according to your own inclina-

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The defender pleaded;—(1) There having been no exchange of consent between the parties to marry, the defender is entitled to decree of absolvitor, with expenses. (3) *Separatim*, the pursuer being personally barred from insisting in the present action, it should be dismissed, with expenses.

A proof was led. The following narrative of the import of the evidence is taken from the opinion of the Lord Ordinary :—

"It appears that the pursuer kept a boarding-house; and that the defender, who was a Spaniard, became an inmate early in 1901. He had come to Scotland about 1897, and appears since then to have resided chiefly in Scotland, where he obtained employment as a clerk. The circumstances which led to his residence in Scotland have not been explained. He says that he could not speak a word of English when he came to Scotland. But in 1904 when he gave his evidence in this case, he spoke the language well.

"It is a fact of first-class importance, and there is no doubt about it, that at some time during his residence in the pursuer's boarding-house, illicit intercourse took place between the pursuer and defender. They differ in the point of time. He says that it occurred for the first time about a fortnight after he came to the house, and he gives the details with considerable realism. According to him the advances came from the pursuer. His story may be true or may be false; it is hard to say, because it is impossible to place much reliance on either of the parties. It is not clear, however, that he had any inducement to misrepresent the matter. She post-dates the first connection until April 1902, and I think she gives no particulars; but, whichever way it happened, the result was that she became pregnant. Perhaps the fact is of more than the ordinary importance, because I think there would have been no marriage or marriage ceremony had there been no pregnancy; at least not at that time. She first suspected her condition in July 1902, and he and she agreed to consult a doctor. They called on Doctor Howie, the object of their visit being to determine the question of pregnancy. Doctor Howie was unable to give a decided opinion, but, shortly afterwards, the pregnancy became certain. The only intelligible reason for this consultation is that they intended, if pregnancy were established, to be married or to go through a ceremony of marriage.

"At that time nothing was done, but the question of marriage or of a marriage ceremony was frequently spoken about; and the next

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tions, and never to interfere with you, on condition you do not expect me to live with you. CHRISTINA S. MORSE."

"Glasgow, Nov. 17, 1902."

(No. 13 of Process.)

"To your dictation, Francis Duran, I now write as promised.

"I hereby confess that this marriage, which never would have taken place, as there was no promise or intention by either party, has been brought about by my own carelessness. And as you Francis Duran go through this to save my good name, in return I now give you this, and hereby promise not to claim as your wife any money, property, or whatsoever you may have or receive, either for myself or my children, Constance and Phyllis Morse.

"C. S. MORSE.

"17 Nov. 1902.

"I do hereby promise that this will be burned, unseen by any eye but mine, on the death of writer if she has been faithfull."

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significant step was that in or about October 1902 the defender consulted Mr Watson, a writer. This consultation is an important fact in the case, which the defender has considerable difficulty in explaining. He apparently suggests that he consulted Mr Watson in order to ascertain how it would be possible to go through the form of a marriage so that it might appear to the pursuer's parents that they were married, while it would not be binding. It is difficult to accept this view, and Mr Watson depones that he did not so understand the matter. He says that the defender asked what he should do to carry through a marriage, and that he (Mr Watson) advised him. He (the defender) made it perfectly clear (Mr Watson says), that he was desirous of going through a marriage, and was in earnest about it. Mr Watson explained to him how a marriage might be carried out under the Act 19 and 20 Vict. cap. 96. Mr Watson, as he says, told the parties that registration was not essential to marriage, but was important with a view to preservation of proof of the marriage, which depended on consent alone. But I am not certain that he succeeded in making that distinction clearly intelligible to the defender. Certainly the defender professes the most confident belief, and repeats it frequently, that no marriage could be binding without the intervention of a magistrate or minister. He seemed to regard any other law as unthinkable. If he really thought so, and possibly he did, that was his error as to the law, and I do not see how he can escape the consequence of the error.

"Being thus informed, he and the pursuer resumed consideration of the question of a marriage ceremony; and I now come to two very perplexing and singular documents, Nos. 8 and 13 of process, both of which bear the date 17th November 1902, a date which there is no reason to question; that is to say, they bear a date two days before the acknowledgment on which the pursuer founds.

"Nothing can be imagined more strange than the evidence of the parties about these two documents, and whether they are talking falsely or only mere nonsense it is not easy to say. They are both in the handwriting of the pursuer, and they have substantially the same meaning, so far as that is discoverable. The pursuer says that they were written to the dictation of the defender, that there were several such documents (so she seems to say), but she signed only two, and these she signed reluctantly and only because the defender, as she thought, would not sign the declaration of marriage, No. 11 of process, unless she signed these other documents. Why she signed two documents she could not tell.

"The defender's evidence is still more singular. He swears that the second document (No. 13) was written because the first looked like a letter, and the second was written on what he calls legal paper.

"Perhaps it is unnecessary to complicate the case with two unintelligible documents, and I think the former (No. 8) may be held to be superseded by the latter (No. 13); it was so according to the defender. That document (and No. 8 also), in speaking of 'this marriage,' plainly refers to the marriage or ceremony about to be performed. The more important points in this letter seem to be these:—*First*, there is an acknowledgment by the pursuer that as the defender was going 'through this' (that is the marriage) 'to save my good name, I now give you this'; then follows an obligation by her 'not to claim as your wife any money, property, or whatsoever you may

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have to receive either for myself or my children.' The document is signed by the pursuer, and is followed by the perplexing postscript—'I do hereby promise that this will be burned, unseen by any eye but mine, on the death of writer if she has been faithfull.'

"The body of this singular document no doubt furnishes a reason for the acknowledgment different from but quite consistent with marriage, and asserts that there had been no previous promise of marriage, but it is quite consistent with present acknowledgment; and, indeed, I think that, according to its true construction, it imports on his part an acknowledgment of marriage, while he takes care to protect his money.

"The postscript is the most singular part of the whole. It was also written by the pursuer, but it is the defender who speaks in it; and I take special note of the last words, which are that the document is to be burned on the pursuer's death *if she has been faithful*. Why it was to be burned is not obvious; but these words are important, and they can hardly be read as having any other meaning than if she had been faithful as a wife to her husband.

"The documents are, however, perhaps too incoherent and eccentric to be pressed very far either way. But I consider that they favour the pursuer's case of acknowledgment of marriage rather than the defence.

"I understood that these documents were left in the hands of the defender, and that he produced them in process, and has founded on them with the view of shewing that he did not intend marriage by the declaration stating that he did.

"On 19th November the declaration of marriage, to which reference has already been made, was signed in Mr Watson's office. I have already referred to that document at length, and have only to add that I am unable to see that its force is weakened by the two singular writings which preceded it. It may possibly be suggested that it is an inchoate and incomplete deed, seeing it is a portion of a petition to the Sheriff which was never presented. But Mr Watson explained to the parties that it was sufficient to make marriage without registration, and I am not aware of any authority to the contrary."

The pursuer deponed,—"Some time before the marriage the defender asked me to sign a document. (Q.) What sort of document was it he asked you to sign? (A.) He said he did not wish my children to come into any money he might be left, and he asked if I was willing to sign the paper so that my children would not come into any money left to him. I agreed to sign that. I agreed when he asked me, but when I went to his office and saw what he had written I refused to sign lies. (Q.) On the 17th of November I think you signed two papers, Nos. 8 and 13 of process? (A.) I thought I only signed one, but he made out so many, trying to make me to sign it. I would not do it. He changed them about and about, trying to get me to sign it. He may have kept some of the others. (Shewn Nos. 8 and 13 of process)—Both those documents are in my handwriting. (Reads No. 8 of process)—(Q.) Do you remember signing that? (A.) I added that because I thought if he was going to misbehave, he was not going to compel me to live with him. By the Court.—I mean that I added the part about not compelling me to live with him, as he had written down on paper that he was to behave as he liked. Examination continued.—I added the last sentence. The rest was his composition.

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(Q.) Did you write it to his dictation? (A.) No, he wrote about a dozen copies. (Reads No. 13 of process)—I think that was the last of the two. I thought he had destroyed the other one. He wrote it down himself, and I copied it—both of them, every paper that he wrote. (Q.) As regards the *P.S.*, was that intended to be signed by him? (A.) Yes, I suppose he had not signed it. I signed those two documents very unwillingly. It took weeks to get me to sign them. (Q.) After the signature of those two documents what occurred in the way of your getting married to the defender? (A.) He told me he had been to see the lawyer, and asked me to come up to the office and see the paper. I refused to sign. I said that whatever happened I could not sign such a paper. He said, 'Well, I have been to the lawyer, and I won't go back till you do sign it.' I went on for a week or two, and at last I thought I could not be any worse than I was, and I could not delay the marriage any longer, and I signed it. (Q.) Do you mean the two documents Nos. 8 and 13 of process? (A.) Yes. . . . After that ceremony had been gone through the defender treated me as his wife. (Q.) But was there any question about keeping the marriage a secret one? (A.) Yes. He said he did not wish the marriage to be known until we could get a house of our own, as he did not want his name used in keeping lodgers. He allowed me to tell my own people then. I told my own people, but not the gentlemen in the house. . . . After the marriage the defender and I did not occupy the same room. We had not enough of room. I had the two children with me, and he had only a single bed. We had to occupy it sometimes, if I had my father or anyone using my room. (Q.) But although not occupying the same room, were your relations towards each other those of married people? (A.) Yes. (Q.) Did the defender at any time promise to marry you? (A.) Yes, certainly. (Q.) You have now said that the defender intended to marry you, and promised to marry you: in these circumstances, can you explain how you signed the document No. 8 of process, which states that there was no promise and no intention to marriage? (A.) Because I had no choice. (Q.) What do you mean by that? (A.) Because he said he would not go back and arrange for the marriage till I had signed it. It took me about a fortnight to sign it. (Q.) I ask you, is what you signed untrue? (A.) Yes, it is untrue,—part of it. He told me he would write a paper so that my children would not come into any money of his, but when I went to the office this was what he had written. I would not sign. (Q.) You did sign it. (A.) Yes. (Q.) You wrote it in your own writing? (A.) Yes, I copied his. (Q.) Is it not true? (A.) No. (Q.) Why did you sign it? (A.) Because I was compelled. I had no choice. (Q.) Who compelled you? (A.) He did. (Q.) How? (A.) Because he would not go back to arrange for the marriage till I signed it. . . ."

Robert Watson deponed,—"I am a writer and notary-public at 65 West Regent Street, Glasgow. I know the defender in this case. I first saw him about five weeks before the 18th November 1902. As regards how I came to see him on that occasion, he called upon me to ask what he should do to carry through a marriage, and I advised him. (Q.) Did he make it clear to you that he was desirous of going through a marriage? (A.) Perfectly clear, and he was in earnest, I understood, about it. . . . On the 19th, when the pursuer and defender called together at the office, my son came in by arrangement, bringing his wife with him, and the two parties intending to get mar-

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ried. I told my son just to write down this form. He wrote it down, and then after it was written down I told the parties that they might rise and take each other by the right hand. Addressing first Francis Duran, I said, 'That is your name,' and he said it was. I asked him, 'You, being in your sane and sober senses, take Christina Sophia Keith or Morse to be your wife?' and he then turned and said 'Yes.' Then turning to Christina Sophia Keith or Morse, I said, 'Do you take Francis Duran to be your husband?' and she said 'Yes.' Then I said to him, 'Put on the ring, if you please.' He had not a marriage ring, but he had another ring, a sort of signet ring, and he put that on as a symbol of the ceremony. Then they took each other by the right hand, and I turned to the two witnesses. . . . Then my son took the petition over to the desk, and invited first Francis Duran to sign it. He came and signed. Then his wife followed, and I think that was the whole ceremony. He said, 'Well, we are going abroad, both of us, for a short time, but we will endeavour to be home in time to get the marriage registered'; and I said to my son, 'Put in the margin.' I addressed the wife particularly, and I said, 'I warn you to get this marriage registered. It is a marriage without registration, but you may save trouble, and it preserves evidence for all time,' and I put this on the margin. I think that is all. (Q.) Have you any doubt that the defender understood perfectly that he was taking the pursuer to be his wife? (A.) He entered into it freely and voluntarily. He took the initiative in all that was done, and I have not the slightest hesitation in saying that it is a base attempt to back out of it."

The two witnesses gave evidence to the same effect.

The defender deponed,—"(Q.) Did you ever agree to go through a marriage with her which should be binding? (A.) No. (Q.) You have told us that she proposed that you should go through a form of marriage? (A.) Yes. I agreed, as long as there were not any representatives of the State or Church, because I knew, and she told me too, that unless those authorities were present, that that was not binding at all. I was afraid that this thing would be binding, and I requested her to make me a form of paper stating that there was no promise of marriage, that we never had such an intention, and she agreed to do it. . . . My interview with Mr Watson was, I think, one or two weeks before the declaration, No. 8 of process, was signed. Cross.—(Q.) On the assumption that Mr Watson advised you that there could be no marriage without registration, what was the use of this declaration? (A.) He did not tell me it would not be marriage without registration. He told me we could register that marriage before three months, otherwise we could not register at all. (Q.) You intended to register it? (A.) No. (Q.) What is the meaning, then, of these declarations being got at all if there was to be no marriage gone through? (A.) It was got just to shew there never had been any promise between her and me. I wanted it in black and white. (Q.) How was that to affect the matter if you were not to go through a marriage? (A.) We only went there to save her people's name."

On 3d June 1904 the Lord Ordinary pronounced the following interlocutor:—"Finds and declares that on or about 19th November 1902 the pursuer and defender were lawfully married to each other at Glasgow by mutual declaration, subscribed by the parties before Alexander Watson, insurance-agent, residing at 96 Thistle Street,

No. 16. Garnethill, Glasgow, and Mrs Margaret Kennedy or Watson, his wife."*

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* "OPINION.—By this action the pursuer, Mrs Morse, concludes for declarator of marriage between her and the defender, Francis Duran, by mutual declaration dated 19th November 1902, and for decree for adherence and aliment. Counsel for the pursuer held the case to be clear as depending on an unambiguous written acknowledgment; but I am rather disposed to take the view of the counsel for the defender that it is exceptionally difficult and doubtful, and I think the evidence extremely unsatisfactory and unreliable, and little to the credit of either party. But the case falls within a brief compass. The evidence, such as it is, is short and scanty. The case is not complicated by correspondence, and the facts of importance are few. A child was born to the pursuer on 15th March 1903, the paternity of which the defender does not deny; but the view that the interests of the child should be protected by a tutor was not presented, and, bearing in mind the position and means of the parties, it does not seem to me to be necessary.

"The pursuer is a widow, and at the date in question was about thirty-three years of age. The defender is a Spaniard, and he was then about twenty-six. He is a Roman Catholic, but nothing seems to turn on that circumstance. No question of foreign law or of jurisdiction has been raised.

"Although I am compelled to comment on the evidence very unfavourably, yet nothing against the character of either party has been disclosed except what appears in the proof; and there seems no great inequality in social position.

"I have not found any sufficient foundation for the defender's plea of personal bar; and his case consists in a denial of the consent averred by the pursuer. The question is just whether a marriage by consent on 19th November 1902 has or has not been proved.

"The pursuer's case is rested primarily and chiefly on a document, No. 2 of process, dated 19th November 1902, which bears to be a petition or form of a petition by the defender and pursuer to the Sheriff of Lanarkshire praying for certification in terms of section 2 of the Act 19 and 20 Vict. cap. 96, and that the petitioners had been married to each other, and for warrant to the registrar to enter the marriage in the register of marriages.

"This petition begins thus:—'We, Francis Duran, commission-agent, residing at 189 Hill Street, Garnethill, Glasgow, and Christina Sophia Keith or Morse, housekeeper, residing at 189 Hill Street aforesaid, do hereby accept and acknowledge each other as husband and wife.'

"This acknowledgment is signed by the parties and by two witnesses. The petition to the Sheriff follows, with the prayer, and they also are signed by the parties.

"The document is partly printed, and, so far as it is not printed, it was written (except the signatures) by Robert Watson, writer and notary-public, on the instruction of the parties. Although so signed, the petition was never presented to the Sheriff, and no warrant for registration of the marriage was obtained.

"The document includes, as has been seen, a perfectly explicit and unambiguous mutual acknowledgment of marriage, which makes certainly a most formidable beginning to the pursuer's case. The signatures are proved beyond any doubt, and the pursuer contends that as marriage is a contract constituted and completed by mutual consent, and requiring nothing else to complete it, the marriage in this case is established by the written unambiguous contract. The pursuer referred to *Dalrymple*, 16th July 1811, 2 Hag. 54, 107; *MacAdam* v. *MacAdam*, 1813, 1 Dow, 148, 189; *Dysart Peerage Case*, 6 A. C. 489, 543, 556; *Imrie* v. *Imrie*, 26th November 1891, 19 R. 185. If the question here had been as to the effect

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The defender reclaimed, and argued;—The evidence shewed here no marriage was intended by either party, but a mere form to satisfy the pursuer's demands. The *onus* was on the pursuer to shew that marriage was intended, however explicit the document founded on might be.[1] This *onus* she had failed to discharge. [LORD TRAYNER referred to *Maloy* v. *Macadam*.[2] The further citation of authorities was stopped by the Court.]

The pursuer and respondent argued that it was proved that she understood that she was being married, and was led into this belief by the defender. If so, it made no difference that the defender thought that the marriage was not binding.

LORD JUSTICE-CLERK.—I am of opinion that the judgment of the Lord Ordinary ought to be adhered to.

While the document constituting on the face of it an interchange of matrimonial consent cannot be accepted as conclusive proof of a marriage

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of an ordinary contract, it would have been very difficult to take off the effect of its explicit language by any amount of parole evidence. Such evidence would probably be at once ruled incompetent. But the contract of marriage has this great peculiarity that, to prove a marriage, it is not enough merely to table an express contract or declaration. It is necessary besides to shew the circumstances under which the contract was completed, and that these circumstances were consistent with the intention of the parties to contract marriage; and it is competent to prove that, however explicit its terms may be, the parties did not contemplate marriage, but entered into the apparent contract with some different object. What the parties said or wrote is not the chief point in such inquiries, but what they deliberately intended. This peculiarity of a contract expressive of marriage is well settled by decisions of the highest authority:—*M'Innes* v. *More*, 25th June 1782, 2 Pat. App. 598; *Kello* v. *Taylor*, 16th February 1787, 3 Pat. App. 56; *Lockyer* v. *Sinclair*, 3d March 1846, 8 D. 582, 596, 601; *Fleming* v. *Corbet*, June 24, 1859, 21 D. 1034, 1043-4; *Robertson* v. *Steuart*, 27th February 1874, 1 R. 532, reversed 7th June 1875, 2 R. (H. L.) 80. I think that in all these cases there was explicit consent, written or verbal; but marriage was not held to be constituted, because that was not the true intention of the parties.

"I think, however, that this latter rule must be taken with this qualification, that if a party uses words in an apparent contract expressive of his or her consent to marry, and intended to induce and inducing the other party to believe such consent, and inducing the other party to give her or his consent, then the former party will be precluded from denying that he did so consent. If a contract expressive of marriage be interchanged, and the one party sincerely intends marriage, then no mental reservation of the other party will prevent the result of marriage. The best exposition of this view of the law is, I think, contained in the *Dysart Peerage Case*, 6 A. C. 489.

"The pursuer maintains that the parties intended the constitution of marriage by the declaration. The defender, on the contrary, maintains that that was not contemplated, but only such a form of marriage as might be shewn to the pursuer's parents, and that marriage could not be completed until the declaration was produced to the Sheriff.

"It is therefore clear that it is necessary carefully to examine the whole

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[1] M'Innes v. More, June 25, 1782, 2 Pat. App. 598; Kello v. Taylor, Feb. 16, 1787, 3 Pat. App. 56; Lockyer v. Sinclair, March 3, 1846, 8 D. 582.

[2] June 9, 1885, 12 R. 431.

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without evidence of its being a true interchange of matrimonial consent, it is a contract which, if shewn to have been *bona fide* and with intention entered into, will establish a marriage by the law of Scotland.

The proof satisfies me that the pursuer entered into the contract with the intention of becoming the wife of the defender, and that in doing so she was in the belief, induced by the conduct of the defender, that he intended to do the same. Whether he really so intended, at first, and afterwards went back upon it, or whether he fraudulently led the pursuer to believe that he so intended, does not I think matter as regards the result. If she truly intended marriage, and the defender led her to believe that he was really marrying her, then he cannot now draw back. He cannot be allowed to say that he did not intend what he held himself out as intending.

LORD YOUNG concurred.

LORD TRAYNER.—The Lord Ordinary says that he has found this an exceptionally difficult case, and I agree with him; but after consideration of the evidence with the aid of the argument addressed to us, I have come to the conclusion that the interlocutor should be affirmed. The impression left on my mind by the evidence is that the pursuer, in the condition in which she found herself owing to her intercourse with the defender, was very anxious, both for the protection of her own good name, and for the sake of the child to which she was going to give birth, to become the wife of the defender, and that she urged this desire upon him. He consented

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circumstances under which the acknowledgment on which the pursuer relies was signed." (His Lordship here narrated the import of the evidence, *ut supra.*)

"I think there is very little more to be said. There is very little more evidence. The case rests mainly on these three documents, and the rest of the evidence seems neither to add to nor detract from their effect. There was little change in the mode of life of the pursuer and defender after their declaration of marriage. If the marriage was not completed by the declaration there is no room for the contention for marriage at any subsequent time. No evidence has been led that No. 11 of process was ever exhibited to the pursuer's parents, and neither of them gave evidence, which was perhaps not unnatural. But in truth the case has been practically left to depend on the three documents which I have considered, and I cannot resist the conclusion that they establish marriage. The defender's case seems to be rested on the mere idea that a man is not, in this question of marriage, bound to keep his word unless the marriage have the sanction of a magistrate or of a minister. That is not so. There is evidence that the defender was fully informed of his mistake, and he offers nothing but his own assertion in support of his averment.

"I am far from saying that the case is an easy one. I have found it very much the reverse, and it is not without great difficulty and misgiving that I hold that the pursuer has established her right to a judgment of declarator. There are other conclusions in the summons, but they were not argued; and, if a judgment is desired on them, they will require to be debated.

"No doubt the fact that the defender was a Spaniard has to be taken into consideration. It appeared to me that he understands the language well; but I do not doubt that he may not fully appreciate the customs of this country, in particular in regard to irregular marriages, but, in coming to a conclusion in favour of the pursuer, I have endeavoured to keep in view the disadvantage of the situation—of the defender as a foreigner."

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to go through the form or ceremony of marriage which took place. I think the two singular documents to which the Lord Ordinary has referred may be explained on this view—which is the view I take of the evidence—that the defender intended to go through a form which would satisfy the pursuer's wishes, but which would not bind him. He did not intend to marry the pursuer, but to go through a form, short of marriage, which he thought would effect the objects which the pursuer had in view. On the other hand, I am quite satisfied that the defender led the pursuer to believe that he was marrying her, and that she honestly believed him and understood that she was being married. She intended marriage, and nothing short of that. If that is so, then, as your Lordship and the Lord Ordinary have said, it makes no difference that the defender did not intend marriage, it being the fact that he led the pursuer to believe he did.

LORD MONCREIFF.—I agree with the Lord Ordinary. I hold it to be distinctly proved that what passed between the pursuer and the defender on 19th November 1902 in Mr Watson's office constituted a valid marriage. It is distinctly proved that the pursuer so understood and intended. And in that view it is immaterial if the defender in his own mind resolved not to be bound by the contract, because that mental reservation, if it existed, was not communicated to the pursuer or to any of the parties present on that occasion.[1] I am by no means satisfied that the defender did not intend to marry the pursuer; he had compromised her, and she seems to have had sufficient influence with him to induce him to make this reparation. Again, it may be that after the marriage the defender thought that he saw his way to back out of the contract by not registering it, but that does not affect the question.

My opinion is that the defender knew quite well what he was about, and that he quite understood the explanations given by Mr Watson as to the law of the matter. His evidence and line of defence shew considerable cunning; and on the whole matter I think the defence is a shabby and unsuccessful attempt to back out of the contract which he had deliberately entered into.

THE COURT adhered.

DOVE, LOCKHART, & SMART, S.S.C.—ST CLAIR SWANSON & MANSON, W.S.—Agents.

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ANDREW BETTS BROWN AND OTHERS, Pursuers (Respondents).—*Salvesen, K.C.—Sandeman.*
JOHN HASTIE & COMPANY, LIMITED, Defenders (Reclaimers).—*Ure, K.C.—Hunter.*

*Patent—Infringement—Master or Pioneer Patent—Mechanical Equivalent.*—B. patented an invention for the economy of steam in steam steering-engines by means of a cut-off valve actuated by the control valve. The object of the invention was to prevent the loss of steam during the intervals in steering when the engine was at rest. Prior patentees had used the same and

[1] 1 Fraser on Husband and Wife, p. 436, *et seq.*

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other similar mechanical devices for the economy of steam in engines of various kinds while at work, but the application of this device to an engine at rest was a novelty, and the result attained—the economy of steam while the engine was at rest—had never been achieved before.

In a question with the holder of a patent of later date for a device, also designed to prevent the escape of steam from steam steering-engines when the engine was at rest, but using to obtain that result a stop valve worked in unison with the control valve by a steam relay instead of a stop valve worked by the direct mechanical action of the control valve, *held* (*aff.* judgment of Lord Kyllachy) that B.'s patent was a master or pioneer patent, and that the new patent was an infringement.

2D DIVISION.
Ld. Kyllachy.

(ANTE, July 16, 1904, 6 F. 1001.)

In 1897 Andrew Betts Brown, engineer, Rosebank Iron Works, Edinburgh, took out a patent (No. 29,773) for improvements in the valves of steering and the like engines.

Steering-engines, actuated by steam, are constructed with a loosely fitting control valve. This has been found necessary in order that the steering apparatus may act quickly. The result necessarily is that when the engine is at rest there is a certain escape of steam from the control valve. This occasions a serious loss of steam power in ocean-going steamers when a straight course is steered for long distances, but it is necessary in order that the steering-engine may be ready to work at once in any emergency.

The object of Brown's patent was "the prevention of leakage of steam in steering and the like engines by the introduction into the steam feed-pipe of a casing which contains a cut-off valve, operated from and acting in unison with the controlling valve of the steering or like engine." The method by which the escape of steam was prevented was described by Brown in his specification in the following terms:—"For this purpose I fit in a passage or casing, through which the steam enters the controlling valve casing, a double-beat valve which has formed or fixed on it oppositely inclined surfaces, which are acted upon by counterpart inclines fitted in connection with the controlling valve, so that on the movement of the controlling valve it acts through the inclined surfaces to open the double-beat valve and admits steam." He added that "instead of the equilibrium valve" (*i.e.*, the double-beat valve) "any equivalent device may be used."

Brown claimed,—"In connection with the valves of steering and like engines, fitting in a passage or casing through which the steam enters the controlling valve casing a double beat or equivalent valve having opposite inclines acted on by counterpart inclines moving with the controlling valve, the parts being arranged and operating substantially as and for the purposes hereinbefore described."

Brown's patent was largely used, and was a commercial success.

In 1903 Walter Graham took out a patent (No. 10,894) for an improvement in the construction and operation of the controlling valves of steam steering-engines. This patent, together with a patent for a similar purpose (No. 16,525 of 1902) granted to Robert Richardson, were acquired by John Hastie & Company, Limited, Kilblain Engine Works, Greenock, who proceeded to make and supply steering-engines fitted with the devices described in these two patents.

Andrew Betts Brown and Brown Brothers & Company, Limited, who were the owners of Brown's patent, brought the present action against Hastie & Company, concluding for declarator that the patents

granted to Richardson and Graham were infringements of Brown's patent, for interdict against their use, and for damages. No. 17.

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The pursuers' averments relative to the working of the defenders' patent were as follows:—"The mechanisms described in the said specifications, Nos. 16,525 of 1902 and 10,894 of 1903, are infringements of the pursuers' invention. They are themselves identical in principle and mode of working, and embody the substance of the pursuers' invention, so as to produce the same results in practically the same way by the substitution of well-known mechanical equivalents for certain parts of the pursuers' mechanism. The substance of the pursuers' invention is the operating of a cut-off valve by the action of the controlling valve of the steering-engine. Whenever the steersman operates the controlling valve to port or starboard the helm, that valve in turn operates the cut-off valve and admits steam to the steering-engines. The pursuers achieve this result by the direct action of the spindle of the controlling valve upon the end of the cut-off valve, which, for ease of lifting, is made a double-beat valve. Richardson and Graham in the said specifications substitute for the double-beat cut-off valve used by the pursuers a balanced cut-off valve, which is a well-known mechanical equivalent. On the spindle of their cut-off valve there is a piston working in a cylinder. Steam is admitted on both sides of this piston, and so the valve is balanced. This cut-off valve is operated from the controlling valve through the intervention of a small valve operated directly by the controlling valve. This small valve, in the case of Richardson's patent, is operated by the thrust of the end of the controlling valve spindle; and, in the case of Graham's patent, by an eccentric or lever working on the spindle of the controlling valve. When this small valve is opened the balance of the cut-off valve is destroyed, and the steam acting upon the piston opens the cut-off valve. This method of opening a balanced piston valve is old and well known; the modes of working the small valve from the controlling valve are mechanically the equivalents of those employed by the pursuers to lift their double-beat valve. The whole combination is a variation of the pursuers' invention complicated to produce an appearance of dissimilarity."

In their defences the defenders averred;—"The patent founded on by the pursuers and the patent founded on by the defenders both relate to steering and such like engines, and have the same object in view, viz., to save leakage of steam. This object is aimed at by every designer and maker of steam-engines. The patent of the defenders attains this object by different means and upon a different principle from those covered by the pursuers' patent. In the mechanism of the pursuers' patent the controlling valve of the steering-engine is fitted with inclined planes acting directly on corresponding inclines fitted on the stop valve. When the controlling valve is opened, the inclines on it bear upon those of the stop valve and open it, and when the controlling valve is returned to its neutral position the inclined planes on it are withdrawn from those on the stop valve and allow it to close. In the defenders' construction, the stop valve is placed in the steam-pipe, but instead of being operated by the control valve, it is operated by varying the steam pressure on the top side of the piston attached to the valve spindle. In this way the stop valve may be absolutely closed when the steering-engines are not required to operate, and that independently of the position of the control valve, which may remain more or less open without waste of steam."

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Proof was allowed and led. The import of the evidence was that while the use of a stop or cut-off valve working automatically in connection with the distributing valves of engines while at work was familiar to engineers, no one had anticipated Brown in applying such mechanism to prevent the escape of steam from an intermittent engine while at rest, and no other means for attaining this result had been suggested. The evidence was conflicting on the question whether the patents owned by Hastie & Company effected a greater saving of steam than that of Brown. It was admitted by Mr Dugald Clark, a scientific witness for the defenders, that a steam relay was at the date of Brown's patent a well-known method of opening valves.

On 25th March 1904 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds and declares, and interdicts, prohibits, and discharges in terms of the conclusions of the summons, and decerns: Further, decerns and ordains the defenders to deliver up to the pursuers all mechanisms or parts thereof in their possession constructed in accordance with the specifications Nos. 16,525 (1902) and 10,894 (1903), in breach of the pursuers' letters-patent No. 29,773 (1897), and to pay to the pursuers the sum of £300 in name of damages: Finds the pursuers entitled to expenses," &c.*

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* "OPINION.—The pursuers in this case are proprietors of a patent dated in 1897, which relates to improvements in connection with the valves of steering and like engines; and speaking generally, the improvement which the patentee claims may be said to consist in a certain contrivance for stopping, or reducing to a minimum, the waste of steam formerly found inevitable, during the periods (constantly recurring and often prolonged) when the steering engine is at rest, but when, nevertheless, there exists a constant pressure of steam upon, and consequent leakage through, the controlling valve of the engine.

"There is no dispute as to the merit and novelty of the invention. The question is simply as to an alleged infringement by the defenders, who are said to make, sell, or use certain similar apparatus, having the same object, for which they hold certain patents of subsequent date. And, as not infrequently happens, the controversy comes really to turn on the construction of the specification filed with reference to the pursuers' patent, dated, as I have said, in the year 1897.

"The pursuers contend that on the just construction of that specification, read, as it falls to be read, with reference to the state of prior knowledge, the essence and substance of the invention consisted in the introduction for the first time into steering engines of what I may call a separate stop valve formed in the steam casing through which the steam enters the controlling valve; this stop valve being arranged to move in unison with the controlling valve, by means of suitable mechanism, one form of which the patentee fully describes.

"The defenders, on the other hand, say that the pursuers' patent, properly construed, is a patent only for the particular method described of actuating the stop valve, viz.—The motion of opposite inclines fitted on the stop valve, acted upon by counterpart inclines fitted on the controlling valve. On that assumption they say, and I think truly, that their (the defenders') apparatus (the alleged infringing apparatus) actuates the stop valve in a different way, viz., indirectly by variations of steam pressure, instead of directly by the direct mechanical contact of counter inclines. And that being so, they contend that there is no room in this case for what is called the doctrine of mechanical equivalents—a doctrine which applies only where, the essence of an invention being taken, some part of the

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The defenders reclaimed, and argued;—This was not a case of a pioneer patent, *i.e.*, of a patent for an entirely new invention. Here the object aimed at, *i.e.*, the prevention of leakage of steam by a mechanical device working automatically, was not new; and the method of attaining it, by a cut-off valve actuated by the controlling valve, was not new either. The novelty was to carry out the familiar idea, by the familiar means, in circumstances to which they had not hitherto been applied. The sole merit of Brown's invention was to save steam when an engine was at rest by a means which was familiar to engineers as applied to an engine at work. That did not involve the degree of originality and novelty which was necessary to constitute the patent a pioneer or master patent, and therefore to exclude the result attained from the field open to inventors. In all the cases in which the claim to a master patent had been sustained there had been either a new idea or a new method.[1] The present case fell

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described mechanism—essential to its working, but not an essential part of the invention—has substituted for it by the alleged infringer some known different but equivalent mechanism, to produce the same result.

"It is, I think, clear that the question thus sharply raised cannot be solved upon the mere language of the specification, or of the specification and claim. It has first to be ascertained what, having regard to the state of prior knowledge, was the field open to the inventor; and how far what I may call his total apparatus was at its date new—new particularly in the sense of achieving a new and important result. In other words, it is necessary to know whether the invention was what has been called a 'pioneer' or 'master' invention, or was only in truth a new and improved mode of achieving an already achieved result. It is obvious, and has been repeatedly decided, that in determining what is essential and what is not, that is always a most important, and generally a crucial consideration—(*Consolidated Car Heating Company* v. *Came*, L. R., App. Cases, [1903], p. 516, and cases there cited).

"Now, it appears to me to be the just result of the evidence that the pursuers' invention was of the former class, and not of the latter. Steering-engines were, of course, well known in 1897. And in such engines there were, of course, besides the usual distributing valves near the cylinder, what was known as a controlling valve—a valve which, being operated by the usual hand wheel, determines the passage of the steam in different directions, according as it is desired to move the helm to port or to starboard; and which, as each motion is completed, comes back to its neutral position, and thus, at least theoretically, shuts off steam for the time. The difficulty, however, was, that this controlling valve was necessarily loose. It had to be sensitive and to work easily, and it could not therefore be tight. Hence leakage and consequent waste of steam was inevitable, and in large vessels was serious; and at the date of the pursuers' patent no method had been devised, or even proposed, for curing this leakage—this waste of steam—when the engine was not at work. In particular, it had not occurred to anybody that the problem might be solved by the introduction of a separate valve—a separate stop valve, working automatically in connection with the controlling valve, and which, while leaving the latter valve loose, was in itself absolutely tight. Of course stop valves and cut-off valves were old and well-known contrivances. So also as applied to ordinary engines (continuous going engines like locomotives) were cut-off valves working auto-

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[1] Proctor v. Bennis, 1887, 36 Ch. Div. 740; Moore v. Thomson, 1890, 7 Pat. Cas. 325; Aktiebolaget Separator Co. v. Dairy Outfit Co., 1898, 15 Pat. Cas. 327; Presto Gear Case Co., v. Simplex Gear Case Co., 1898, 15 Pat. Cas. 635; Consolidated Car Heating Co. v. Came, [1903], A. C. 509.

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rather within the cases where the method employed by the patentee was protected, but others were not precluded from arriving at the same result by different methods.[1]

(2) Even if it were admitted that Brown's patent was a pioneer patent, it would be going beyond the authorities to hold that the defenders had infringed. On the evidence they had attained a result not reached by Brown—a higher percentage of steam saved, and they had attained this by new means. That result might have been present to Brown's mind, but was not in his specification, and there could be no infringement of the equity of a patent.[2]

Argued for the respondents;—This was a case of a master or pioneer patent, because the invention patented by Brown achieved an object which had never been achieved before. Prior to that invention, the mechanical devices for economising steam by preventing waste had all been applicable to engines continuously at work, and to those

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matically. They were used for promoting economy of steam, or more effective expansion of steam when the engines were working. But it had not occurred to anybody to use either a stop or cut-off valve in connection, not with the ordinary distributing valves common to all engines, but with the controlling valve peculiar to steering-engines; or to use such valve for the purpose, not of economising steam when the engine was working, but of preventing the waste of steam when it was not working. It was left for the pursuer, Mr Brown, to make for the first time this new and useful application of the automatic stop valve, and by doing so, to achieve a result which was much desiderated, and has been a great commercial success.

"Plainly, therefore, it must, I think, be taken that the pursuers' invention was, in the most real sense, what is called a 'pioneer' invention. It was not of the kind in controversy in such cases as *Curtis* v. *Platt*, 3 Ch. Div. 135, or *Dudgeon* v. *Thomson*, 3 App. Cases, 34. It belonged, on the contrary, to the class of patented inventions which were the subject of such cases as *Proctor* v. *Bennis*, L. R., 36 Ch. Div. 740; *Thomsen* v. *Moore*, 6 P. C. 426, 7 P. C. 325; *Aktiebolaget Separator Company* v. *Dairy Outfit Company*, 1898, 15 P. C. 327.

"Having this in view, the question at issue is really this, Whether it can be held, on the fair reading of the pursuers' patent, that having in fact made this new and valuable invention, he (the patentee) has yet for some reason claimed only—or what comes to the same thing, put forward as the essential or an essential part of his protected invention—the particular mode which he describes, of actuating his stop valve by the action of counter inclines. Of course such a thing is possible. The patentee may have failed to recognise the true nature of his discovery, or he may have so expressed his specification as to make the suggested reading inevitable. But the question is whether that is so, or whether reading the specification fairly, and in the light of the state of knowledge at the time, it is not sufficiently manifest that the invention described and claimed is just the invention which the patentee made.

"Now, as to this, all I can say is, that I see no sufficient ground for reading the specification in the narrow sense for which the defenders con-

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[1] Curtis v. Platt, 1863, 3 Ch. Div. 135 (reported as note to Adie v. Clark, 1876, *loc. cit.*); Stewart & Briggs v. Bell's Trustee, Dec. 5, 1883, 11 R. 236; Nobel Explosive Co. v. Anderson, 1894, 11 Pat. Cas. 115, *per* Romer, J., at p. 127; Peter Pilkington, Ltd., v. B. & S. Massey, 1904, 21 Pat. Cas. 696.

[2] Dudgeon v. Thomson & Donaldson, Dec. 22, 1876, 4 R. 256, July 10, 1877, 4 R. (H. L.) 88; Gwynne v. Drysdale & Co., March 5, 1886, 13 R 684; Consolidated Car Heating Co. v. Came, *cit. supra.*

only. They had never been applied to an engine at rest, and their application to such engines constituted a distinct mechanical advance, and was a pioneer patent because it was a new invention and not merely a development or improvement on an old one. A pioneer patent might be obtained although the central idea was not new, and although the result was obtained by means familiar to experts, if that familiarity simply meant, as it did in the reclaimers' argument, that these means had been used by other inventors to obtain other results.[1] Thus in *Moore* v. *Thomson*,[2] a new kind of mariner's compass—in *Proctor* v. *Bennis*,[3] a device for the automatic feeding of furnaces—by mechanical means already known for other purposes, had been held to be of the nature of pioneer patents. If then Brown's invention was a pioneer patent, it was clear that the patents obtained by the reclaimers were infringements. The evidence shewed that they were merely devices for obtaining the same result by a variation in the mechanical means. It was well established that that constituted an infringement.[4] The cases of *Gwynne* v. *Drysdale & Company*,[5] and *Consolidated Car Heating Company* v. *Came*,[6] on which the re-

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tend. It may be true that it would have been better, as it certainly would have been quite easy, for the framer of the specification to state expressly that while fully describing, as he required to do, an effective method of actuating the stop valve, he did not confine himself to that method, but only to that or some equivalent method. But that is, I am afraid, an observation which might be made in most patent cases which come before the Courts. It is the leaving of things to implication which, as a rule, makes construction necessary. And applying here what I conceive to be proper principles of construction, I have, on the whole, come to the conclusion that the pursuers' construction of the specification is the correct one. I consider that the essential feature—the essence and substance—of the patented invention consists simply in the application to steering and the like engines, for the purpose of preventing leakage of steam while the engine is not working, of a separate stop valve working in unison with the controlling valve. And as it is not disputed, or at least is clear, that the defenders' apparatus embraced those elements and employed them for the same purpose and with the same result, I am of opinion that the pursuers are entitled to judgment.

"With regard to damages, that is, of course, a jury question. The actual profit made by the defenders, and presumably lost to the pursuers, upon the manufacture and sale of the ten valves specified, seems to have been about £100. Something, however, must be added in respect of profit presumably lost to the pursuers by the defenders obtaining the orders for the steering engines fitted with the pursuers' valves, which orders, it is said, would, but for the defenders' competition, have come to the pursuers. It seems to be decided that this is a legitimate element to be considered, and the pursuers claim in respect of it an additional sum of £600. I think, however, this is excessive, inasmuch as it assumes as a certainty what was hardly of that character. I think I shall do justice sufficiently by fixing the total damage at £300."

[1] Proctor v. Bennis, 1887, 36 Ch. Div. 740; Moore v. Thomson, 1890, 7 Pat. Cas. 325; Boyd v. Horrocks, 1891, 9 Pat. Cas. 77; Aktiebolaget Separator Co. v. Dairy Outfit Co., 1898, 15 Pat. Cas. 327; Presto Gear Case Co. v. Simplex Gear Case Co., 1898, 15 Pat. Cas. 635.

[2] *Supra.* [3] *Supra.*

[4] Cases cited above (1) and Automatic Weighing-machine Co. v. National Exhibition Association, 1892, 9 Pat. Cas 41.

[5] March 5, 1886, 13 R. 684. [6] [1903], A. C. 509.

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claimers relied, were cases of the class of *Curtis* v. *Platt*,[1] where the patent alleged to have been infringed was merely an adaptation or combination of known means to obtain a known result. In such cases it was no doubt held that alternative methods were not protected, but these cases had no bearing on the present. Even if it were to be held that Brown's patent was not of the class of pioneer patents, the patents used by the reclaimers were infringements, under the rule laid down by the Lord President (Inglis) in *Gwynne* v. *Drysdale & Company*,[2] to the effect that it constituted infringement in all cases if the new inventor merely substituted some mechanical equivalent in an immaterial part of the patented invention.

On the question of damages the respondents accepted the result arrived at by the Lord Ordinary.[3]

At advising,—

LORD JUSTICE-CLERK.—The invention of the pursuer in this case had for its object so to control the apparatus for passing steam into ship-steering engines that escape and waste of steam might be prevented when the engine was at rest, the use of the engine being necessarily intermittent, as it was only intended to run when the ship's helm required to be altered. It had been found necessary, in the case of the control valves of ships' steering apparatus, that the valves should not be tight in their seating, as otherwise there might be great risk of danger from the steering apparatus not being set in motion the instant it was necessary to do so, and as it was plain that if a steering apparatus control valve should remain fast when it was desired to move it, the most disastrous consequences might ensue. The pursuer's invention consisted in so associating a cut-off valve with the control valve, that when the control valve was in the neutral position, the cut-off valve was closed and the passage of steam into the casing of the control valve stopped, thus preventing escape of steam past the loose fitting control valve.

I am satisfied upon the evidence that this was a new invention, to effect a purpose which had not been effected by any previous apparatus. It is true that in some earlier devices a cut-off arrangement had been used to modify the effect of steam pressure in the casing so that at certain points in the stroke of the engine piston the pressure should not be so great as at other parts of the stroke. In one case this was done to give greater freedom to the slide valves admitting the steam into the cylinders, at the moment at which these slide valves were being moved in their seats by the eccentric. In another case a cut-off was used to check the entrance of steam into the cylinder at a certain stage of the stroke, so as to allow the steam already in the cylinder to expand. But these devices did not act with the purpose of stopping all flow of steam into the control valve casings when the engine was not in motion, they only controlled the steam which was passing in by the open control valve. The pursuer's arrangement had a different purpose —the exclusion of steam from the control valve casing when the engine was not working.

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[1] 1863, 3 Ch. Div. 135 (reported as note to Adie v. Clark, 1876).
[2] March 5, 1886, 13 R. 684, at p. 689.
[3] United Horse Shoe and Nail Co. v. Stewart & Co., March 12, 1888 15 R. (H. L.) 45.

In my opinion the pursuer secured a master patent for effecting a useful purpose which had not been previously effected. That being so, the question is whether the defenders' apparatus, intended to effect the same purpose, is an infringement of the patent of the pursuer.

The pursuer in his apparatus, as he applies it in practice, uses a sliding control valve. Upon its shaft he places two slopes or slides, with a horizontal space between their lower ends. In this horizontal space when the control valve is closed, there rests the end of a valve, which, when it is in that position, shuts off the steam from entering the valve casing. When the control valve is moved so as to open the passage to the engine, one of the slides pushes the cut-off valve out of its seat, and thus allows the steam into the control valve casing, and so on to the engine. On the control valve being brought back to zero, the cut-off valve once more comes into action and stops the passage of steam into the casing.

The defenders' arrangement consists of a rocking valve, which, by being turned to one side or other, opens a port to admit steam to one end or other of the cylinder. Upon the spindle of this valve there is an eccentric, the rod from which closes a valve in a small pipe, into which steam can enter, and which steam holds a cut-off valve in the closed position, the steam from the boiler pressing equally on both sides of the valve. When the control valve is moved the eccentric is also moved, with the effect that the small pipe which was full of steam has a port opened to the air, and the pressure being thus relieved from one side of the cut-off valve, it is opened, and the steam to drive the engine is free to pass on by the control valve to the cylinder. On the control valve being again turned to the neutral position, the small pipe is again sealed, and the steam entering it under pressure the cut-off valve is once more held in position, and steam shut off from the control valve casing.

It appears to me that the apparatus of the defenders is only an equivalent for that of the pursuers', effecting the same purpose by well-known means, and only substituting one detail device for another, without any real difference.

On the whole matter I agree with the Lord Ordinary in his reading of the pursuer's specification, and in holding that the pursuers had established their claim against the defenders as infringers of their rights under their patents. As regards the question of damages, I do not see any sufficient ground for interfering with the Lord Ordinary's decision on that matter.

LORD YOUNG concurred.

LORD TRAYNER.—I concur. The validity of the pursuers' patent is not in dispute. The question is, has it been infringed by the defenders? I agree with your Lordship and the Lord Ordinary in thinking that it has.

LORD MONCREIFF.—I am of the same opinion. I agree with and adopt the reasons clearly and concisely given by the Lord Ordinary.

The novelty and value of the pursuers' invention being indisputable, the only question is whether the defenders' specification constitutes an infringement of it.

I am of opinion with the Lord Ordinary and your Lordships that it does.

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The methods adopted by the defenders are not identical, but for all that they are equivalents, more complicated, but calculated and intended to attain the same result as the pursuers' invention, and thus deprive the pursuers of the profits to which they are entitled under their patent.

THE COURT adhered.

STEEDMAN & RAMAGE, W.S.—MILLER & MURRAY, S.S.C.—Agents.

No. 18.
Nov. 19, 1904.
Ramsay v. Mackie.

J. & R. RAMSAY, Appellants.—*Lord-Adv. Dickson—Constable.*
MRS ANNIE ADAM OR MACKIE, Respondent.—*Orr—W. Thomson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1) *and* (2)—"*Undertaker*"—"*Factory*"—"*Warehouse*" "*Occupier*"—*Purchaser of Goods stored in warehouse—Factory and Workshop Act*, 1901 (1 *Edw. VII. cap.* 22), *sec.* 104.—The owner of 600 bolls of peas lying in bulk in a grain store belonging to a warehouseman sold 200 bolls thereof to a firm, who received a delivery order therefor. The grain store was a "warehouse" within the meaning of the Factory and Workshop Act, 1901.

*Held* that the purchasers were not "occupiers" of the store in the sense of the Factory and Workshop Act, 1901, sec. 104, and that the dependants of a carter in their employment, who was killed by the fall of a bag while taking delivery of part of the peas at the store, were not entitled to compensation from his employers under the Workmen's Compensation Act, 1897.

1ST DIVISION. Sheriff of Renfrew and Bute.

THIS was an appeal upon a case stated by the Sheriff-substitute at Paisley (Lyell), in an arbitration under the Workmen's Compensation Act, 1897, between Mrs Annie Adam or Mackie, 3 Kilnside Road, Paisley, as an individual, and as tutor of her pupil children, claimant and respondent, and J. & R. Ramsay, Seedhill Mills, Paisley, appellants.

The facts found proved by the Sheriff-substitute were as follows:—"On 11th March 1904 the appellants bought in the Corn Exchange, Glasgow, from Messrs John Jackson & Company, grain importers, Glasgow, 200 bolls of peas, which peas formed portion of a larger parcel of about 600 bolls belonging to Messrs Jackson, and then lying in bulk at the store of Mr William Finlay, warehouseman, 87 Lancefield Street, Glasgow. This store is a building of considerable size, exclusively devoted to the business of warehousing grain in bulk and bags for brokers and wholesale houses, and a notice under the Factory and Workshops Act is exhibited in the building. At the time when the contract of sale was made the appellants, who are grain millers in Paisley, received from Messrs Jackson, the sellers, a delivery order entitling them forthwith to take delivery of the said 200 bolls at the said store, but by custom of trade and under the rules of the Glasgow Corn Trade Association, in accordance with which the contract was entered into, the appellants might take delivery in such instalments as they might from time to time require within fourteen days from the date of the sale, during which time the appellants were not liable for storage, and the goods lay in the store at the risk of the sellers. Goods such as these when sold *ex* store are proportionately dearer than goods *ex* quay, the difference in price being exacted to cover, *inter alia*, the seller's liability for storage during the said fourteen days. On the 19th and 21st of March respectively the appellants took delivery of a portion of the peas, and on the 22d March they sent the late

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Joseph Mackie, husband of the respondent, who was then a carter in their employment, to take delivery of 31 bags of the said peas. The peas were shovelled into bags by the servants of the warehouseman, Mr Finlay, from the bulk that was lying on the floor of the third storey of the store, and the full bags were then lowered, also by the servants of Mr Finlay, by means of a sling, to the lorry standing on the street below, where the deceased Joseph Mackie was receiving them. In the course of the operations one of the full bags slipped either from the sling or the window, crushed Mackie beneath its weight and killed him."

The Sheriff-substitute held "that the property in the 200 bolls of peas passed to the appellants when the contract was made, that the store is a warehouse within the meaning of the Factory and Workshop Act, 1901, and the Workmen's Compensation Act, 1897, that on the 22d March 1904 the appellants were persons having the actual use of the portion of the warehouse where their peas were stored, and therefore must be deemed occupiers of a factory within the meaning of the 104th section of the Factory and Workshop Act, 1901, and as such occupiers the undertakers within the meaning of the Workmen's Compensation Act, 1897, section 7, and therefore liable in compensation." *

The questions of law were, *inter alia*, as follows:—"(2) Is the said store a warehouse within the meaning of the statutes? (3) If so, were the appellants on 22d March 1904 persons having the actual use of the warehouse, and as such occupiers of a factory within the meaning of the 104th section of the Factory and Workshop Act, 1901? (4) If so, were the appellants on the occasion libelled undertakers within the meaning of the Workmen's Compensation Act, 1897, section 7 (2)?"

The appellants, Messrs Ramsay, ultimately conceded that the store was a warehouse in the sense of section 104 of the Factory and Workshop Act, 1901, and that the second question must be answered in the affirmative.

Argued for the appellants;—The property in the peas did not pass to the appellants until separation of their 200 bolls from the mass of 600 bolls, the property now passing when the *periculum* passed under the old law.[1] Here no peas had been appropriated to the

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. c. 37) enacts—sec. 7 (1)—"This Act shall apply only to employment by the undertakers . . . on, or in, or about a . . . factory." Section 7 (2)—"'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any . . . warehouse . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. . . . 'Undertakers' in the case of a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895."

The Factory and Workshop Act, 1901 (1 Edw. VII. c. 22), which (under the Interpretation Act, 1889) comes in place of the Factory and Workshop Acts, 1878 to 1895, enacts—sec. 104— ". . . For the purpose of the enforcement of the provisions of" the Act applied to warehouses, "the person having the actual use or occupation of a . . . warehouse, or of any premises within the same or forming part thereof . . . shall be deemed to be the occupier of a factory."

[1] Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), secs. 16, 17, 18, and 62 (definition of "specific goods"); Hansen v. Craig & Rose, Feb. 4, 1859,

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appellants' contract. If the respondent's contention were correct then any person who had a personal right to come and demand a quantity of goods from a mass would be liable to the penalties provided by the Factory Act for any infringement of the regulations with regard to warehouses. That was an absurd result. Such a person had no control of the conduct of the warehouse. A person having the "actual use or occupation" of a warehouse[1] meant a person who had the use and occupation of the whole warehouse, or at least of a definite area within it for a continuous period. The use of the word "premises" shewed that there must be occupation of a definitely bounded portion of the warehouse. If the appellants were not occupiers of a warehouse in the sense of the Factory and Workshop Act, 1901, sec. 104, then they were not "undertakers" in the sense of the Workmen's Compensation Act, 1897, sec. 7, and they were not liable in compensation to the respondent.

Argued for the respondent;—The Factory and Workshop Act, 1901, sec. 104, contemplated more than one person being the occupier of a warehouse. Any person who had goods stored in a warehouse had the "actual use or occupation" of it, and was consequently an "occupier" of it within the meaning of section 104. Part of the peas here belonged to the appellants. Separation of their part was not necessary. But even if it were, for a brief period part of the peas was in the warehouse after separation as the appellants' property.

Lord President.—The questions involved in this case are short, but after considering them with the aid of the able argument of counsel I think it is impossible to uphold the judgment of the Sheriff-substitute. There are four questions altogether, but it is not necessary that the first should be answered, and it is conceded by the appellants that the second question must be answered in the affirmative. The third question is as follows:—(His Lordship read the third question.)

The appellants bought from Messrs Jackson, grain importers, Glasgow, 200 bolls of peas, which were a portion of a larger parcel of 600 bolls belonging to them and were then lying in bulk in the store of Mr William Finlay. No peas were separated from the mass and set aside for the appellants or otherwise appropriated to their contract. They had not right to any particular peas, but merely a right to receive delivery of 200 bolls out of a mass. The peas were shovelled into bags by the servants of the warehouseman from the mass lying on the floor of the warehouse, and lowered by a sling to a lorry on the street below, where the deceased Joseph Mackie was receiving them. One of the full bags slipped either from the sling or the window and crushed Mackie to death.

When the accident happened the peas were still in the hands of the servants of the warehouseman and had not been delivered to the appellants. It thus becomes necessary to consider the application of section 104 of the Factory and Workshop Act, 1901, to the circumstances of the case. (His Lordship read the 104th section.) The question therefore comes to be, whether the appellants were at the time of the accident occupiers of the

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21 D. 432, 31 Scot. Jur. 236; Anderson & Crompton v. Walls & Co., Nov. 15, 1870, 9 Macph. 122, 43 Scot. Jur. 48.

[1] Factory and Workshop Act, 1901 (1 Edw. VII. cap. 22), sec. 104.

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warehouse within the meaning of section 104. I am clearly of opinion that they were not. The appellants had not at the time of the accident received delivery of the peas contained in the bag which slipped. These peas were still in the hands of the warehouseman by his servants, and they were not lowering them as the property of the appellants, but of the sellers, and they would not become the property of the appellants until they were delivered to and accepted by them.

The result, in my opinion, is that the third question, whether the appellants were occupiers of a factory within the meaning of the Act must be answered in the negative. The only person other than the keeper of the warehouse who could in any reasonable sense be said to be in the actual use and occupation of the store was the owner of the peas. If 200 bolls had been set apart for and accepted by the appellants in the warehouse so that the warehouseman was keeping these particular bags of peas for the appellants, I could have understood the contention of the respondent. But as matters actually stood it appears to me that the appellants were not occupiers of the warehouse at the time of the accident. I therefore think the Sheriff-substitute has erred, and that the 3d and 4th questions should be answered in the negative.

LORD M'LAREN.—The injury or cause of action out of which the proceedings have taken shape was that the husband of the respondent lost his life by a bag of peas falling upon him from the window of a warehouse while he was engaged in taking delivery. The accident was a sad one, and happened to a man whose employment did not involve risk. It suggests that someone was to blame, and I understand the question of responsibility is to be sifted in another proceeding. In this proceeding it is not necessary to allege fault against anyone. The Workmen's Compensation Act gives a workman a claim to compensation against his employer on certain conditions, and the only question is whether the workman in this case is within the conditions. An endeavour has been made to bring this case within section 7 of the Act of 1897, it being pointed out that for certain purposes a warehouse is a factory. Section 7 (2) enacts that "factory" includes any "warehouse" to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. This is the first element in the construction of the statute for the purposes of the case. The second element is that the word "undertakers" as used in section 7 (1) is defined in section 7 (2) to mean, in the case of a factory, the occupier thereof within the meaning of the Factory and Workshop Acts. With these definitions in view we come to the concrete question, whether in the sense of the Compensation Act and the Factory Acts the employer of a carter who was sent to a warehouse to take delivery of the peas sold to him is to be regarded as the occupier or an occupier of the warehouse within which the bags of peas were stored. While the language is wide in order to prevent evasion, yet "occupier" plainly means the person who runs the factory or warehouse, who regulates and controls the work that is done there, and who is responsible for the fulfilment of the provisions of the Factory Act within it. This cannot be predicated of a person who had a mere casual interest in the warehouse by being the owner or purchaser of a parcel of goods stored in the warehouse.

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In my reading of the statute it would make no difference—I speak with all due reserve—whether the injured man was employed by the seller or the purchaser of the goods to take them away. I am clearly of opinion that a person who merely gets the ordinary trade use of a warehouse for storing his goods in it is not an occupier of the warehouse in the sense of the Act of Parliament. That would make absolute nonsense of the Act, and therefore I come very clearly to be of opinion that the representatives of this workman had no claim against his employer on the ground that he was occupier of a factory.

LORD KINNEAR.—I am of the same opinion. I quite agree with your Lordship that as this was a sale of unascertained goods the property could not pass until specific goods of the description purchased were unconditionally appropriated to the contract.

But the question which we have to determine does not so much depend on the relation of the buyer and the seller as on the relation of the buyer to the warehouseman.

We are told that Messrs Jackson, who were the owners of 600 bolls of peas then lying in bulk at the store of Mr Finlay, sold part of them and handed to the purchaser a delivery order for the part sold. The purchaser had thus no interest whatever in the warehouse, and no concern with the warehouseman except that he held a delivery order on presentation of which he would be entitled to demand delivery of a certain quantity of peas to be taken out of a larger quantity held by the warehouseman for the vendor. In the meantime the peas stored in the warehouse do not belong to the purchaser, he is not liable to pay the storage rent, and he has no contract of any description with the warehouseman. I am quite unable to see that he is in any intelligible sense the occupier of the warehouse. But the Sheriff finds that he was the occupier in order to shew that as the occupier of the warehouse he was occupier of a factory within the meaning of the Factory Acts, and therefore liable as the undertaker within the meaning of the Workmen's Compensation Act for injuries suffered in or about the warehouse. But the specific ground on which the Sheriff holds that the appellants are undertakers is that they are occupiers within the definition of section 104 of the Factory and Workshop Act, 1901. If that is sound, all the provisions of the Act for the use of dangerous machines, for the prevention of accidents, and for the regulation of dangerous trades are imposed, not upon persons having any kind of superintendence or control of a factory or its machinery, but upon anybody who happens to present a delivery order, and it follows that these unfortunate customers of the customers of the warehouse must be made liable in the statutory fines for non-performance of the statutory duties imposed upon them. I think it quite impossible to hold anything of the kind.

I have no doubt therefore that the Sheriff's decision must be altered, and that the judgment proposed by your Lordship is right.

LORD ADAM was absent.

THE COURT answered the third and fourth questions in the negative.

SIMPSON & MARWICK, W.S.—JOHN VEITCH, Solicitor—Agents.

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Murdochs v. Inland Revenue.

ALEXANDER MURDOCH AND GEORGE BAIN MURDOCH, Appellants.—*Younger.*
INLAND REVENUE, Respondents.—*Sol.-Gen. Dundas—A. J. Young.*

*Revenue—Inhabited House Duty—Two houses belonging to different owners connected so as to form one dwelling-house—Inhabited House Duty Act*, 1808 (48 *Geo. III. cap.* 55), *Schedule B, Rule* 14.—The Inhabited House Duty Act, 1808, enacts, Schedule B, Rule 14,—"Where any dwelling-house shall be divided into different tenements, being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duties shall be paid by the occupiers thereof respectively."

A and B, two adjoining dwelling-houses belonging to different proprietors, were connected by an open doorway on the ground floor. The proprietor of A, and his son, the tenant of B, occupied the two houses thus:—The son, who was a physician, occupied the public rooms in B for his practice, one bedroom in B was occupied by himself, and another by a sister. The father and the other members of the family had bedrooms in A. The whole family took their meals in A. The only kitchen used was in A. There was only one servant.

*Held* that there was such internal communication between these two houses that they could not be regarded as "different tenements" in the sense of Schedule B, Rule 14, of the Inhabited House Duty Act, 1808; that the two houses formed one dwelling-house in the joint occupation of father and son; and therefore that the father and son were jointly liable to inhabited house duty for the whole premises.

1st DIVISION. Exchequer Cause.

ALEXANDER MURDOCH, librarian, Glasgow, and George Bain Murdoch, doctor of medicine, Glasgow, appealed to the Commissioners for the General Purposes of the Income-Tax and Inhabited House Duty Acts for the Lower Ward of the county of Lanark, against an assessment made upon them for inhabited house duty for the year 1902-3 on £97, the annual value of Nos. 25 and 27 Bank Street, Hillhead, Glasgow, of which they were the occupiers.

The following were the facts as found or admitted:—"1. (*a*) No. 25 Bank Street belongs to the appellant Alexander Murdoch and his wife, No. 27 Bank Street belongs to George Bain. In 1900 George Bain and the appellant George Bain Murdoch verbally agreed, the first named to let, and the second named to take, No. 27 Bank Street for 5½ years from Martinmas 1900, at the yearly rent of £40. The tenancy of the appellant George Bain Murdoch subsisted during the year of assessment. The appellant George Bain Murdoch is a nephew of George Bain and a son of the appellant Alexander Murdoch.

"(*b*) Nos. 25 and 27 Bank Street are dwelling-houses of three storeys each, basement, ground floor, and first floor. When originally built they were two distinct and independent though adjoining dwelling-houses. There is now, and has been for the last three years, internal communication between them by means of a doorway made in the separating wall of the houses. The doorway, which is without a door, is on the ground floor, is 6 feet 6 inches in height and 3 feet in width, and gives access from the lobby of No. 25 to a pantry in No. 27, which is entered by a door from the lobby of No. 27. The houses were separately assessed to inhabited house duty for the years prior to the year 1902-1903, the Assessor being unaware of the houses having been internally connected by means of the doorway.

"(*c*) The appellant Alexander Murdoch and the members of his

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family, other than the appellant George Bain Murdoch and a daughter, sleep in No. 25 Bank Street. The appellant George Bain Murdoch and the daughter referred to sleep in No. 27 Bank Street. The public rooms of No. 27 Bank Street are used by the appellant George Bain Murdoch for the purposes of his practice as a doctor. The appellant Alexander Murdoch and all the members of his family, including the appellant George Bain Murdoch and the daughter referred to, take their meals in No. 25 Bank Street.

"(*d*) Only one servant is kept for both houses. Her wages are paid by the appellant Alexander Murdoch. The meals of all the inmates of Nos. 25 and 27 Bank Street are cooked in the kitchen of No. 25 Bank Street. The kitchen of No. 27 is not used as a kitchen."

On these facts the Commissioners, after hearing parties, "found, on the evidence submitted to them, that Nos. 25 and 27 Bank Street formed, in their present state, one dwelling-house, which is in the joint occupation of the appellants, Alexander Murdoch and George Bain Murdoch, and were accordingly of opinion that the assessment for inhabited house duty in respect of Nos. 25 and 27 Bank Street should be made on the appellants, Alexander Murdoch and George Bain Murdoch, jointly and in one sum. The Commissioners fixed the assessment at £92, being the *cumulo* amount of (*a*) the amount (£47) of the assessment for income-tax made in respect of No. 25 Bank Street, and (*b*) the amount (£45) to which the assessment for income-tax made in respect of No. 27 Bank Street was reduced on appeal."

Alexander Murdoch and George Bain Murdoch required the Commissioners to state a case, which they did, setting forth the facts given above.

Argued for the appellants;—There were here two separate houses; or, if one house, it was "divided into different tenements, being separate properties," and came under Rule 14 of Schedule B of the Act 48 Geo. III. cap. 55.* In *Campbell* v. *Inland Revenue*[1] there was only one owner of both tenements. Here there were two different owners. The two houses were structurally separate and distinct, and the communicating door did not make them one dwelling-house.[2] The two houses were separately owned, let, and occupied, and it was no business of the Assessor to inquire whether or how often the two families visited each other or dined together. The cases quoted on the other side dealt with the exemption of business premises under Rule 13 of the Customs and Inland Revenue Act, 1878,† and were not in point.

Argued for the respondents;—The only rule which applied to the present case was Schedule B, Rule 1, of the Act 48 Geo. III. cap. 55,‡ which imposed the duty on the actual occupier or occupiers. Separate ownership or tenancy made no difference. This was not the case of

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* Quoted in rubric, *supra*, p. 111.

[1] Feb. 21, 1880, 7 R. 579.

[2] Brown v. Furtado, L. R. [1903], 1 K. B. 723, *per* L. J. Vaughan Williams, at p. 728.

† 41 Vict. cap. 15.

‡ The Inhabited House Duty Act, 1808 (48 Geo. III. cap. 55), enacts, Schedule B, Rule 1,—"The said . . . duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house . . ."

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a dwelling-house divided into different tenements, but of two houses united into one, and therefore Rule 14 of Schedule B of the Act 48 Geo. III. cap. 55,* did not apply. The existence of internal communication had always been regarded as important in questions of this kind.[1] Here the means of communication between the two houses was so complete as to make them one dwelling-house for assessment purposes.[2] No doubt some of these cases dealt with the exemption of business premises under section 13 of the Act of 1878,[3] but the same phrase "different tenements" was used in that section, and had been interpreted in the way now contended for. The case was *a fortiori* of *Brown* v. *Furtado*,[4] because there was here not merely access between the two houses but complete joint occupation and one establishment.

At advising,—

LORD PRESIDENT.—The question in this case relates to the mode in which Nos. 25 and 27 Bank Street, Glasgow, should be assessed for inhabited house duty.—(His Lordship stated the facts set forth in the case.)

I am of opinion that the decision of the Commissioners is right. Although the two houses were originally separate and independent structures, separately occupied, they have ceased to be so by the opening of the doorway, which always remains a free and open channel of communication between them, and by both houses being occupied in common by the appellants and their respective families, just as if they were one family. This one inhabited house has not been divided into separate "tenements" in the sense of the Acts. No part of the house is a separate tenement, so as to be exempted from inhabited house duty on the ground of its being a "tenement occupied solely for the purposes of trade or business" under subsection 2 of section 13 of the Act of 41 and 42 Vict. cap. 15, or upon any other ground.

LORD ADAM.—The first question in this case is whether, for the purposes of the Act, Nos. 25 and 27 Bank Street, Glasgow, are to be treated as one single dwelling-house? Now, that appears to me to be a question of fact, and it depends on the structural condition of these premises at the date of assessment. I do not think that there is any conflict in this inquiry as to what the state of these buildings was. The houses were originally separate houses, but their present condition is this—that a doorway has been opened through the partition wall which formerly divided the two houses. The result is that there is internal communication all over these two houses from the one to the other, and that internal communication in its present state cannot be cut off, because there is no door or anything of that sort in the

* Quoted in rubric, *supra*, p. 111.

[1] Glasgow and South-Western Railway Co. v. Banks, July 16, 1880, 7 R. 1161.

[2] Russell v. Coutts, Dec. 14, 1881, 9 R. 261; Grant v. Langston, [1900], A. C. 383; Union Bank of Scotland, Limited, v. Inland Revenue, March 20, 1901, 3 F. 771; Yorkshire Insurance Co. v. Clayton, 1881, L. R., 8 Q. B. D. 421; Swain v. Fleming, July 27, 1899, 4 T. L. R. 202, 4 Tax Cas. 107.

[3] 41 Vict. cap. 15.

[4] L. R. [1903], 1 K. B. 723.

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doorway to prevent such communication. That being the condition of these houses, I do not doubt that they are, in the sense of the Act, one dwelling-house, and should be so considered. Well, then, the next question is, how are they occupied? The one house, No. 25, belongs to Alexander Murdoch, and the other house, No. 27, is rented by George Bain Murdoch, the other appellant. Now, the way they are occupied is this: Alexander Murdoch and his family, except a daughter and the other appellant, sleep in No. 25. His son, the other appellant, George Bain Murdoch, and the daughter referred to, sleep in No. 27, and the public rooms of No. 27 are used by George Bain Murdoch in his practice as a physician, but all the rest of the premises, as it appears to me, is used and occupied in common. That is the only separate occupation. The families take their meals in common. One kitchen, that of No. 25, is used for preparing these meals. There is only one servant for both families, and in every respect, except what I have stated, these premises are used in common. That being so, is that a joint occupation or is it a separate occupation? It humbly appears to me that the conclusion at which the Commissioners of Income-Tax have arrived is right, and that this is not a separate occupation, but a joint occupation. I do not think it makes any difference in the matter of fact as to joint occupation that the one house belongs to the one appellant and the other house is held by a tenant. If that be so, I think that is an end to the case. But we were referred to Rules 6 and 14 of the Act of 48 Geo. III. c. 55, Schedule B, which it is said may be construed into a different determination. I do not think it necessary to read these rules at length, because I find in the case of *Campbell* v. *Inland Revenue* [1] that an exposition by the late Lord President Inglis of the true meaning and effect of these rules is there set forth. I entirely agree with it, and cannot express it in better language. What he says is this:—"What is the provision of Rule 6, and what is the provision of Rule 14, taking the two together? It simply comes to this, that where a dwelling-house, meaning an entire block of building, is the property of one individual, but is divided into different occupations or tenements let to different tenants, the landlord or owner of the entire block of building is to be taken as the occupier of the entire block of building, and assessed as if he occupied the whole himself." Now, this is not a case of only one owner, and it is not a case in my view, and in your Lordship's view, of a separation into distinct tenements, and therefore it is not one falling under Rule 6. Then he goes on to say under Rule 14,—"but where the entire block of building is divided into tenements in the same manner as is contemplated by the sixth section"—that is, distinct tenements—"but these tenements are distinct properties belonging to different owners, then the incidence of the duty is to be upon the occupant of each separate tenement." But, in my opinion, and, I understand, in your Lordships', this is not a case where the dwelling-house in question is divided into distinct tenements or separate tenements, and Rule 14 does not apply. For these reasons I agree with your Lordship that the determination of the Commissioners is right, and should be affirmed.

LORD M'LAREN.—I concur.

[1] 7 R. 579.

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LORD KINNEAR.—I also concur. In this case the two houses were originally separate, and were thrown into one by the opening up of a communication, which, according to the structure of the building, cannot be closed without structural alterations. If the mode of occupation were material to the question, the building is occupied by one family, with one servant. It seems to me immaterial that one of the rooms is set apart for the separate use of the son for the purposes of his profession, because the fact that one person living in family with others in one house has a separate sitting-room does not make the house in which he lives with others two houses. It still remains one house. I agree with Lord Adam that the rules relied upon do not apply, because this is not a case of one entire block of buildings separated into distinct tenements.

THE COURT affirmed the determination of the Commissioners, and sustained the assessment.

R. & R. DENHOLM & KERR, S.S.C.—SOLICITOR OF INLAND REVENUE—Agents.

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Robert Addie & Sons' Collieries, Limited, v. Trainer.

ROBERT ADDIE & SONS' COLLIERIES, LIMITED, Appellants.—*Salvesen, K.C.—Hunter.*
MRS MARGARET DOCHERTY OR TRAINER, Respondent.—*Watt, K.C.—D. P. Fleming.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2) (*b*), *and First Schedule* 1 (*a*)—*Dependants—Dependence in law or fact.*—The Workmen's Compensation Act, 1897, confers a right to compensation upon those who were wholly or partially dependent on a workman who has sustained fatal injuries in the course of his employment, and defines dependants as (sec. 7, subsec. 2 (*b*)) "in Scotland such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death."

In a claim by a widow for compensation for the death of her son it was proved that the applicant was, at the date of the death, undergoing a sentence of confinement in a State Reformatory for Inebriates, that during the four years preceding she had been in prison with the exception of ten months, and that during that period she had occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son, who had contributed 5s. or 6s. a week towards her support.

*Held* that the applicant was not wholly or partially dependent on her son's earnings at the time of his death within the meaning of the Act, and compensation refused.

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897, in the Sheriff Court of Lanarkshire at Airdrie, between Mrs Margaret Docherty or Trainer, claiming compensation for the death of her son, Thomas Trainer, miner, and Robert Addie & Sons' Collieries, Limited, the Sheriff-substitute (A. O. M. Mackenzie) found that the applicant was entirely dependent on the earnings of her deceased son at the time of his death, and awarded compensation.

In a case stated for appeal he found the following facts admitted or proved:—"(4) That the applicant is fifty-five years old, and is a widow, and that the deceased Thomas Trainer was her only child, and was unmarried. (5) That at the date of the said Thomas Trainer's death the applicant was confined in the State Reformatory for

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Inebriates at Perth, having been sentenced in the Sheriff Court at Ayr on 15th October 1901 to detention in said reformatory for two and a-half years. (6) That since the year 1885 the applicant has spent much of her time in prison under numerous sentences for theft and other offences, and during the four years preceding her son's death she was at liberty for only about ten months in all. (7) That during the said four years the applicant when out of prison lodged with relatives, to whom her son made payments for her maintenance, amounting on the average to 5s. or 6s. a week. (8) That during the said four years the applicant occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son. (9) That in August of the year in which he died the applicant's son, in conversation with a relative, indicated a wish to take up house with his mother when she came out of the reformatory."

The following question of law was stated:—"Was applicant dependent upon the earnings of her deceased son at the date of his death within the meaning of the Workmen's Compensation Act, 1897; and, if so, was she (*a*) wholly, or (*b*) partially dependent thereon?"

At the hearing it was stated that since the date when the case was stated by the Sheriff-substitute, Mrs Trainer had been sentenced to three years' penal servitude.

Argued for the appellants;—The claimant here was not dependent on her son at the date of his death. That was clear as a matter of fact, because she was being supported in the Inebriates' Home at the expense of the country. Dependence was a question of fact, involving three elements—inability of the dependant to support herself, a liability on the part of the deceased to support her, and actual support at the date of death.[1] None of these elements were present in this case. The Sheriff's finding was that the respondent was able to support herself, though she got money from her son when she could. Actual dependence was out of the case, and there was not even an obligation to support. The obligation of a son to support his mother was not unconditional, like the obligation of a husband to support his wife. It only emerged if the mother was unable to support herself, and if the son could support her without impoverishing himself. That distinguished the present case from the cases of *Cunningham*[2] and *Sneddon*,[3] where it had been held that a widow was entitled to compensation for the death of her husband, although at the date of the death she was not actually being supported by him. Besides, in these cases the husband was at the date of the death under an obligation which could have been enforced by an action for aliment; here, if the respondent had brought an action for aliment, the conclusive answer would have been that she being alimented the case of *Rees* v. *Penrikyber Navigation Colliery Company*[4] was exactly in point; there it was held that an inmate of a workhouse was not entitled to compensation for the death of his son, on the ground that, being supported in the workhouse, he was not dependent on the son.

Argued for the respondent;—There was here dependence within

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[1] Turners Limited v. Whitefield, June 17, 1904, 6 F. 822; Pryce v. Penrikyber Navigation Colliery Co., [1902], 1 K. B. 221; Rees v. Penrikyber Navigation Colliery Co., [1903], 1 K. B. 259.

[2] Cunningham v. M'Gregor & Co., May 14, 1901, 3 F. 775.

[3] Sneddon v. Addie & Sons' Collieries, Limited, July 15, 1904, 6 F. 992.

[4] [1903], 1 K. B. 259.

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the meaning of the Act. It did not mean actual dependence on the day of the death. That would lead to the absurd result that if the dependant was on the actual day of the death temporarily in an hospital or undergoing a week's imprisonment, there could be no claim for compensation. The real meaning of "dependant" was a person who was entitled to rely, and did rely, on the deceased for support. The Sheriff had found in fact that the respondent was in that position; if his findings on that point were not clear, the case should be remitted to have it definitely stated. The decision in *Turners Limited* v. *Whitefield*[1] could not be reconciled with that in *Sneddon* v. *Robert Addie & Sons' Collieries*,[2] and the latter case, being the latest in date, should rule. The case of *Rees*[3] was distinguishable, because in English law a son was under no liability to support his parents, except under the poor law. Here a son, in the circumstances of the deceased, was bound to support his indigent mother, and therefore there was no distinction between her case and that of a wife.

At advising,—

LORD JUSTICE-CLERK.—In this case the Sheriff, sitting as arbiter under the Workmen's Compensation Act, has found compensation due to the petitioner on the footing that she was wholly dependent on the deceased's son. Now, that is a case not like most of those which we have had in this Court, and not like any of the cases to which we were referred in the course of the argument, because these cases, I think all except the case of *Rees*,[3] were cases where it was a question as to a widow receiving compensation in respect of the death of her husband, she being dependent on him. Certainly there are some of these cases which are authorities for holding a woman to be dependent on her husband notwithstanding that the relief, the aid, he gave her during his lifetime was to some extent intermittent. I am not in the meantime prepared to go back on any of these cases as they have been decided. I do not think that practically they touch this case at all.

In the first place, this is a claim against a son; and the son is not liable for his mother's support at all if on the one hand she was able to support herself, or if on the other hand she was not able to support herself in whole or in part, but he was unable to support her from his earnings or without impoverishing himself. In regard to the first of these points there is nothing in this case to satisfy me that this woman was not quite able, if she behaved herself, to earn her own livelihood. She seems to have gone through a long course of crime, in fact to be almost a hopeless drunkard and a hopeless thief, the result being that her two last times of confinement have been two and a-half years in an inebriates' home, and that she is at the present moment undergoing three years' penal servitude for theft. Now, that is not a case in which it can be said, unless there was evidence of the fact to the satisfaction of the Sheriff, that she was not able to support herself, and the case as stated by the Sheriff certainly does not set out anything of the kind. It does indicate that during the short periods she was out of prison she did occasionally do work, and that is just what one expects of a person who was a thief as she was. At times she would

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[1] June 17, 1904, 6 F. 822.
[2] July 15, 1904, 6 F. 992.
[3] Rees v. Penrikyber Navigation Colliery Co., [1903], 1 K. B. 259.

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be prowling about to see what she would steal, and at other times she was doing outdoor work. It is not said that she was doing work at times, and that on account of weakness of body and bad health she had to give it up. All that is said is "that during the said four years the applicant occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son." I take it that that means simply this, that when she was not working and came to her son he was willing to give her a little money, as any dutiful son, however poor in circumstances, would be. That case is not one in which the Sheriff could hold in law that she was entirely dependent on her son. Further, the Act requires that she should be, at the time of the death which gives rise to the claim if there is one, dependent on the earnings of the deceased. Now, it is quite plain that she was not free at that time—she was in confinement as a consequence of her own evil practices and not being supported by him, and nobody asking or suggesting that he should support her. She was being supported either by the local rates or by Government money. Therefore these two grounds seem to me sufficient to dispose of this claim adversely to the view expressed by the Sheriff-substitute.

LORD YOUNG concurred.

LORD TRAYNER.—I agree with your Lordships on the merits. I think that the applicant for compensation was not dependent on her son at the time of his death in whole or in part in the sense of the statute, and that she has no claim.

At the same time I do not think that the decision now to be pronounced necessarily conflicts with the decision in the cases of *Cunningham*[1] and *Sneddon*[2] referred to by the respondent's counsel.

LORD MONCREIFF.—I should not have been prepared to hold that the Sheriff's judgment was wrong if this case could not be distinguished from the two recent cases in this Division—*Cunningham* v. *Macgregor & Company*[1] and *Sneddon* v. *Addie & Company*.[2] But this case is altogether exceptional, and I think a little attention to the facts demonstrates that. The respondents' son died on 2d December 1903. Now, at that time the respondent was undergoing the last of a long series of sentences. She was confined in an inebriates' home at Perth. She was committed on 15th October 1901, and her sentence (two and a-half years) did not expire until 15th April 1904; so that at the date of the death of her son in December 1903 there were still four months of her sentence to run. Thus at that date she was in no sense dependent on her son for support. She was being supported, as she had been supported intermittently since 1884, out of public funds. By the time she came out her son had been dead four months, and her claim for support against him therefore never emerged.

I do not proceed on the ground that there is a difference in the liability of a husband and a son; it is not necessary to consider that alleged distinction. I think that before a claim of this kind can be supported there must in the first place be total or partial incapacity on the part of the alleged

[1] 3 F. 775. [2] 6 F. 992.

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dependant to support herself by working; in the second place, she must have no separate means; and in the third place, a legal claim for support must be shewn to have existed at the date of the death of the husband or son, whether that claim was being implemented or evaded. I think it will be found that in all the cases in which such a claim has been sustained these elements existed. In particular, they existed in the cases of *Cunningham*[1] and *Sneddon*.[2] In the statute the definition of dependants is "such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman as were wholly or in part dependent upon the earnings of the workman at the time of his death." I agree that these words must receive a liberal construction, but I do not think we can hold, without stretching their meaning unduly, that at the date of the death of her son the respondent was in any proper sense dependent on his earnings for support.

THE COURT pronounced the following interlocutor:—"Answer the question of law therein stated by declaring that the applicant was not dependent upon the earnings of her deceased son at the time of his death in the sense of the Workmen's Compensation Act, 1897: Therefore recall the award of the arbitrator and remit to him to dismiss the claim."

W. & J. BURNESS, W.S.—LAING & MOTHERWELL, W.S.—Agents.

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Inland Revenue v. Old Monkland Conservative Association.

INLAND REVENUE, Appellants.—*Sol.-Gen. Dundas—A. J. Young.*
THE OLD MONKLAND CONSERVATIVE ASSOCIATION, Respondents.—*R. S. Horne.*

*Revenue—Income-tax—Exemption—Unincorporated Society—Income-Tax Act*, 1842 (5 *and* 6 *Vict. cap.* 35), *secs.* 40, 163, 192.—An unincorporated society, whose aggregate annual income is less than £160, is entitled to claim exemption from income-tax under sec. 163 of the Income-Tax Act, 1842, as extended by the Finance Act, 1894.

1ST DIVISION. Exchequer Cause.

THE OLD MONKLAND CONSERVATIVE ASSOCIATION appealed to the Commissioners for the General Purposes of the Income-Tax Acts for the Middle Ward of Lanarkshire against an assessment of £65 for the year 1903-1904, under Schedule A of the Income-Tax Acts, made upon it in respect of premises situated at No. 20-22 Church Street, Coatbridge, of which it was proprietor.

The following were the facts as found or admitted:—

"1. The Association is constituted under certain rules. A copy of the rules and bye-laws is appended hereto, and forms part of this case.

"2. The Association is the owner and occupier of the premises at No. 20-2 Church Street aforesaid. The premises are occupied by the Association as reading and recreation rooms, offices, &c.

"3. The feu-duty (£2, 15s. 5d.) paid by the Association for its premises, and the interest (£31) paid by it on a bond over its premises, amount to £33, 15s. 5d., from which the Association deducted income-tax amounting to £1, 10s. 11d.

"4. For the year of assessment the Association had no excess of income over expenditure."

The Association claimed total exemption from income-tax (except

[1] 3 F. 775. [2] 6 F. 992.

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in respect of the feu-duty and interest referred to in No. 3 *supra*) for the year 1903-4, on the ground that its income from all sources did not exceed £160.*

The Commissioners sustained the appeal.

The Surveyor of Taxes required the Commissioners to state a case, which they did, setting forth the facts given above.

Argued for the appellants;—Unincorporated societies, such as the Association here in question, were expressly charged with income-tax under section 40 of the Act of 1842,* but they are not referred to in the exemption clause—section 163.* The words there used, "any person," did not include an Association such as this. The interpretation clause—section 192—did not extend "person" so as to include unincorporated societies.

Argued for the respondents;—The construction of the statute suggested by the Crown was unreasonable. Section 192 of the Act of 1842* defined "person" as meaning "several persons," and the Association was just a group of persons. In any case, it was the treasurer of the society to whom the Inland Revenue looked for payment, and he, as representing the society, was a person entitled to exemption.

LORD PRESIDENT.—The question in this case is whether the Old Monkland Conservative Association is liable in an assessment of £65 for the year 1903-1904, under Schedule A of the Income-Tax Act, made upon it in respect of premises situated in Church Street, Coatbridge.—(His Lordship narrated the facts.)

It was maintained on behalf of the Crown that section 40 of the Act of

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* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), enacts:—Sec. 40. "All bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies of persons, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will, under and by virtue of this Act, be chargeable with; and the chamberlain or other officer acting as treasurer, auditor, or receiver for the time being of every such corporation, company, fraternity, fellowship, or society shall be answerable for doing all such acts, matters, and things as shall require to be done by virtue of this Act, in order to the assessing such bodies corporate, companies, fraternities, fellowships, or societies to the duties granted by this Act, and paying the same."

Sec. 163. "Provided always that any person charged or chargeable to the duties granted by this Act, either by assessment or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled, who shall prove before the Commissioners for general purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the rules and regulations of this Act, is less than £150, shall be exempted from the said duties . . ." [The Finance Act, 1894 (57 and 58 Vict. cap. 30), sec. 34, extends the exemption "to persons whose respective incomes do not exceed £160 a year."]

Sec. 192. "Wherever in this Act, with reference to any person, matter, or thing, any word or words is or are used importing the singular number or the masculine gender only, yet such word or words shall be understood to include several persons as well as one person, females as well as males, bodies politic or corporate as well as individuals, and several matters or things as well as one matter or thing, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction . . ."

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5 and 6 Vict. cap. 35, was the charging section, and that although section 163 provided for exemption of "any person" having a specified limited aggregate annual income, the words "any person" could not be held to include the appellant's Association, as the wording of section 163 was repugnant to such a construction, and that the Association was not "a body politic or corporate."

It is, however, to be observed with reference to this contention, that by section 40 of the Act not only corporations and other proper legal persons are rendered liable, but also "fraternities, fellowships, or societies of persons, whether corporate or not corporate," and it is under these words that the appellant's Association becomes chargeable, although it is not a corporate entity in law. *Prima facie* one would expect if it is charged under any of the denominations above mentioned, it would, when its income does not exceed £160 a year, be exempted like an individual or a proper legal person, under the same or a similar denomination, and I think this is the true construction of the statute, the exemption, like the charge, including a group of individuals, such as the members of the Old Monkland Conservative Association, although they do not constitute either a corporation or any other legal entity.

For these reasons I am of opinion that the Commissioners acted rightly in sustaining the appeal, and that their decision should be affirmed.

LORD ADAM.—The assessment in this case is imposed upon the respondents, the Old Monkland Conservative Association, under section 40 of the Income-Tax Act of 1842. The words of the Act are,—"All bodies politic, corporate, or collegiate, companies, fraternities, fellowships, or societies, whether corporate or not corporate, shall be chargeable with such and the like duties as any person will under and by virtue of this Act be chargeable with." I should have thought with your Lordship that the intention of that enactment was that corporations and persons not incorporated, or the persons therein enumerated, should be put in exactly the like position as single persons, that they were to be assessed in the same way and were to pay the same amount of assessment on their incomes, just like any individual. That I should have thought was the intention of the Act, and I suppose that the assessment is laid upon this Old Monkland Association as being a society of persons not incorporated, that is to say, imposed upon them as a non-incorporated society; but it appears to me, when the whole of the section is read, that there are very important considerations, which are these:—"The chamberlain or other officer acting as treasurer, auditor, or receiver for the time being of every such corporation, company, fraternity, fellowship, or society shall be answerable"—and this is the duty imposed by the Act—"for doing all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing such bodies corporate, companies, fraternities, fellowships, or societies to the duties granted by this Act, and paying the same." That is to say, that in the assessment of these bodies, whether corporate or unincorporate, the Inland Revenue authorities are to look to the officer of the society on whom the whole duty lies of representing the various societies, corporate and unincorporate, with reference to these assessing matters; and accordingly, it

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humbly appears to me, looking to the rules of this society, that the officer who in the case of this Association is charged by the Act with these duties is the treasurer. He, under the rules, is the person who is the receiver of all the money and accounts, and no doubt the treasurer of the society is the officer upon whom rests the duty of representing the society under the rules. Accordingly, when we come to consider the 163d section on which the case for the Crown rests, which is in these words,—"Any person charged or chargeable to the duties granted by this Act, either by assessment or by way of deduction from any rent, annuity," and so on, or other annual payment, will be entitled to prove the grounds of exemption, they say that that is a clause which is meant to exempt only an individual, and does not apply to societies, corporations, companies, and such like. I do not think that is the proper reading of it at all. The treasurer, or the person representing the society, is the person referred to in that clause of the Act; and accordingly, as I suppose this Old Monkland Association could not appear as a body, when a person representing them appears on their behalf, I think he was clearly the person representing the society referred to in that 163d section of the Act. It clearly appears that he, as the person representing the society, was entitled to obtain the exemption, if he proved his right to it. All through the Act, where there are references to these associations and companies and corporations, it is always a person that is spoken of and a person who represents and is bound to represent and act for the company. Now, this is a matter in regard to which the Act says that this person as representing the society should be exempted. Again, the interpretation section of the Act says that the word "person" referred to in the Act shall be understood to include several persons. Well, what is this Association? Is it not just an Association of several persons? I think that the true reading of the Act is that the person mentioned in the section includes the person entitled to appear as representing the Association, and claim exemption. On these grounds I think your Lordship's conclusion is right.

Lord M'Laren.—It has been the policy of the Revenue authorities, in applying to Parliament for money, to cast a wide net, and with meshes so small that no person within the general range of the Act can hope to escape upon the ground that he is not specifically included. In the year 1842, when the Income-Tax Act was passed, we had not the benefit of a General Interpretation Act for Acts of Parliament, and, accordingly, to avoid all such questions as have been argued in this case, it was customary to put every proposition both in the singular and the plural, with the addition of a reference to bodies corporate and others who might not be supposed to fall within the scope of a statute putting a tax upon persons or individuals. That practice led to a great deal of redundant phraseology but it had the merit of making the intention perfectly clear to anyone who read the Act. Now, in this Act, as in other taxing statutes, we find that the income-tax is laid not only upon individuals but on bodies politic and corporate and on unincorporated societies or fellowships. I agree with Lord Adam in holding that these last-mentioned words were unnecessary, because an unincorporated society is merely an aggregate of individuals who, if the question be of taxation on heritable property, may be regarded as tenants

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in common, or, if it is taxation of income, may be regarded as traders in common, and, therefore, affected by the general words "person or persons." It so happens that while in the clause laying on the tax the unincorporated societies are referred to in express terms, yet in the clause relating to the exemption of small incomes, unincorporated societies are not specially referred to. It may be that the framers of the Act had not thought that there would be any cases in point needing to be provided for, but of course if it is not necessary to mention unincorporated societies at all, the meaning of the two clauses will be the same; I mean, that the persons to whom they apply must be the same. I should be extremely reluctant to admit the supposition that some of the clauses of the Income-Tax Acts were intended to apply to a range of persons which included unincorporated societies, and that others which it is necessary to construe along with them were not to be applied to unincorporated societies. Nothing but the very clearest language of exclusion would, I think, lead to such an unnatural scheme of construction of an Act of Parliament. I therefore agree with your Lordships that both clauses are to be read as perfectly general in their terms and application, and, therefore, that this club which it is admitted has no income, is entitled to exemption.

LORD KINNEAR.—I concur.

THE COURT affirmed the determination of the Commissioners.

SOLICITOR OF INLAND REVENUE—GRAY & HANDYSIDE, S.S.C.—Agents.

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Nov. 23, 1904.
Tyler v. Logan.

HENRY PETERS TYLER, Pursuer (Respondent).—*Constable—J. D. Smith.*
GEORGE LOGAN, Defender (Appellant).—*Crabb Watt, K.C.—A. M. Anderson.*

*Agent and Principal — Liability of agent to account — Unexplained deficiency.*—The manager of a branch shop was supplied by his employer with goods marked and invoiced at selling prices. Receipts for the goods so received were signed by the manager. At a stock-taking there was a deficiency to the amount of £62.

In an action by the employer against the manager for this amount a proof was taken, in which there was no evidence of dishonesty or negligence on the part of the manager, but no explanation of the cause of the deficiency. *Held* (*diss.* Lord Young) that the employer was entitled to decree for £62, the retail price of the goods not accounted for.

2D DIVISION. Sheriff of Forfar.

HENRY PETERS TYLER, shoe and leather factor, Leicester, who owned a number of branch establishments for the sale of boots, in 1899 appointed George Logan as manager of one of his branches in Dundee, at a salary of 25s. per week. Logan had two assistants, whom he appointed.

The system on which the business was carried on was that boots marked with the selling prices were sent from Tyler's stores to Dundee as required, and that invoices of the goods with selling prices and receive notes were sent with each consignment, and were signed by the local manager on receipt. An agent on behalf of Tyler visited each branch shop at periodical intervals, and took an account of the stock. On each stock-taking the branch manager signed an acknowledgment of the stock as then existing.

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On the stock in Logan's shop being examined on 28th February 1903 it appeared that there was a deficiency to the amount of £62, 1s. 9d. At the previous stock-taking on 25th October 1902 the balance had proved correct, and the balance-sheet, acknowledging a certain amount of goods in stock, had been signed by Logan. In the interval goods had been supplied, and the invoices and receive notes for them had been regularly signed by Logan. In these circumstances the present action, in the Sheriff Court of Forfarshire, was brought by Tyler against Logan, concluding for an accounting of the defender's intromissions since 25th October 1902, and for payment of the said sum of £62, 1s. 9d.

The pursuer pleaded, *inter alia*;—(1) The defender, as manager of the pursuer's branch business as condescended on, is bound to account for his intromissions with the stock under his charge, and to make payment of any shortage unaccounted for.

The defender pleaded, *inter alia*;—(2) The defender having exercised all diligence in pursuer's service and having served him faithfully and honestly is not liable to the pursuer in any alleged shortage of stock unless he be personally in fault, which he was not, and no personal fault being alleged the defender is entitled to absolvitor, with expenses.

Proof was allowed and led. At the proof the foregoing facts were established, and the invoices and receive notes for goods sent to Logan between 25th October 1902 and 28th February 1903 were produced. They were all duly signed by Logan. There was no evidence to explain the deficiency in the stock.

Horatio T. Cave deponed,—"I am superintendent of branches for pursuer, and have been so for twenty years. The pursuer has branch shops in different parts of the country, including four in Dundee, and I have the appointment of the managers and all the arrangements in connection with them. . . . (Q.) What were the terms of defender's appointment? (A.) That he should have sole control of the shop in the managing and ordering of the goods, and have charge of the ordinary working of the shop generally. He had the appointment of assistants and the power of dismissing them. He had unqualified charge of the shop, and we leave it to the managers to choose their own assistants so that they may be satisfied with them. . . . (Q.) Do you think it is possible that during these weeks from 9th December 1902 up to 28th February 1903 that £62 either in stock or cash could disappear without the knowledge of the manager? (A.) I don't think it is possible; I don't see how it could. Even spread over weeks the manager was bound to have seen it. I have calculated out the amount of pairs of boots that sum would represent and taking them at six pairs a £ that makes 360 pairs. (Q.) Is it possible for 360 pairs to have disappeared without it being known? (A.) No. The managers have sole control of the cash, and they bank the cash and advise the remittances to me. When I appointed Logan manager in the Princes Street shop I explained his position to him fully, what his duties were and his responsibilities. All managers are responsible for the stock. Cross-examined.—(Q.) Did you state to Mr Logan that he was responsible personally for all the stock in the shop, did you say such a thing to him? (A.) I must have done it, as I never appoint a manager without doing so, and I would never think of doing it."

The defender deponed,—"When I entered the amount of stock in

these weekly statements I sent in, I did not check the stock in any way. The figures in these statements were simply put in to bring the total on the one side the same as the total on the other. (Q.) In fact it is a mere balance? (A.) Yes. (Q.) Were you ever told by Mr Cave or anyone that you were to be personally responsible for any shortage? (A.) No, I was never told anything of the kind. When I was in Glasgow I was only an assistant, and I only got an hour's notice to leave Glasgow and come to Dundee to take over the Princes Street shop. By the Court.—(Q.) There was no agreement about the footing on which you were to take it over? (A.) No. Neither Mr Cave nor anyone else ever said to me that I was to be responsible for any shortage. . . . Cross.—(Q.) Can you explain how the shortage could be there if you have acknowledged all these goods? (A.) I did not examine the invoices every week. (Q.) You have actually signed for the goods? (A.) We just let it go as being right. (Q.) Was it not your duty as manager to check the goods with the invoice? (A.) You could do it if you liked; I left it to the girls very often. (Q.) Was it not your duty to do it? [No answer.] (Q.) You signed for the goods? (A.) Yes. (Q.) Mr Tyler would only take your signature? (A.) Yes. By the Court.—(Q.) You signed without making personal examination to see whether they were correct or not? (A.) Yes, I trusted to the girls sometimes."

On 8th March 1904 the Sheriff-substitute (Campbell Smith) pronounced this interlocutor:—"Finds that the pursuer has failed to prove that the defender, when acting as manager for him in his shop, No. 15 West Port, Dundee, misappropriated his boots and shoes, or the money for which he sold them, by theft or embezzlement or in any manner of way: Therefore assoilzies the defender from the conclusions of the petition," &c.*

On appeal the Sheriff (Johnston) pronounced an interlocutor, by which he recalled the interlocutor of the Sheriff-substitute, and made, *inter alia*, the following findings:—"Finds that from the nature of the defender's employment, the defender was accountable for the stock committed to him: Finds that he has failed to account for said stock to the value of £62, 1s. 9d., and accordingly that he is liable in that sum to the pursuer: Therefore ordains him to make payment to the pursuer of the sum of £62, 1s. 9d." †

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* "NOTE.— . . . Very little in this case is clear and free from doubt or ambiguity to me, but one conviction is clear, and that is that the defender seemed to me to be an honest man and a credible witness, and that, in so far as the *prima facie* case against him seems to be a true case, it depends upon his unconscious mistakes or errors, or upon blunders in working details by carriers and others in the large loosely managed wide-spread business of the pursuer. . . . My belief upon the matter of probability is that the bulk of the missing goods have never been delivered to the defender at his shop, but have been sent by mistake or accident to some other of the pursuer's shops, or are still in the pursuer's store at Leicester."

† "NOTE.—I so far agree with the Sheriff-substitute that I think it not improbable that the judgment I feel bound to pronounce in this case may bear hardly upon the defender, but I cannot on that ground abstain from pronouncing it. The defender is called upon to account for goods delivered to him, or for their proceeds. That the pursuer should succeed in his demand, I do not think that he is tied up to proving fraud or embezzlement, as in a criminal case. I should be sorry to attribute either to the defender without more definite proof, but I think that in the circumstances

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The defender appealed to the Court of Session, and argued;—The pursuer was not entitled to succeed unless he proved fault on the part of the defender. There was no contract that the defender must account for all the goods he received, and he was not bound to establish the reason for the deficiency. He was entitled to absolvitor, unless it was definitely proved against him that the loss arose either from his dishonesty or negligence. Neither had been proved.

Counsel for the respondent supported the reasoning of the Sheriff.

LORD JUSTICE-CLERK.—I think the Sheriff here has arrived at the right conclusion. The appellant was employed as the manager of an establishment in which there were a large number of goods for sale, and it was part of his duties to take the management and care of these goods. The history of the case is, that when goods were sent to this establishment they were all duly labelled, with classes and prices mentioned, and invoices were presented and signed for all the goods that were sent. These invoices were signed by the appellant on the footing that the goods mentioned in the invoices and the goods received corresponded—it cannot be taken off his hands that they did not. If he did not see, when he passed the invoices, that the goods invoiced corresponded with the goods received, he was not fulfilling his duties as a manager. For a considerable time the stock showed a proper balance, there may have been some slight errors, but there

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he may be civilly liable for negligence just as completely as for embezzlement. . . .

"There remains the question of accountability at law. Now, the defender was not appointed under any written agreement, but I can have no doubt that Mr Cave, the pursuer's superintendent, was justified in saying that the defender was made thoroughly to understand that he was responsible for the goods delivered to him, or their value. Indeed, I cannot contemplate any other result from the circumstances and mode of conducting the business in which the defender had been brought up, and from the documents relating thereto, to which he was a party, even without any formal contract imposing as a term responsibility for the goods at the branch, upon him as manager. He was manager with control of the branch with authority to order in supplies, with the duty of banking to his employer's credit the weekly drawings, and with power to engage and dismiss his subordinates. I think that he was as much responsible to account for the goods committed to him or for their price as he would have been for cash remitted.

"The defence is that the shortage may be accounted for in half-a-dozen ways, though the defender is unable to prove any one of them. For instance, he suggests that the goods, though invoiced, may never have left Leicester, or at anyrate, may never have reached him. Conceivably this may be so, but, unfortunately, they are regularly invoiced, and he signs a receipt as though they were delivered. Moreover, he had an opportunity before signing the receipt, of which, on the evidence of the subordinates in the shop, he availed himself, of checking the invoices before signing for delivery, and where the proof fixing him with the goods is so complete, it is impossible to accept the mere suggestion that the shortage might be accounted for, if we had evidence, which we have not, as a defence to the pursuer's action.

"That there was leakage somewhere is evident from what I have said, and this is corroborated by proof of the marked falling off in the apparent takings in the last three or four months of the pursuer's management, coupled with the fact that immediately after the dismissal of the defender the business resumed its former dimensions."

was a reasonable balance in the circumstances. Then, on this particular occasion, when the appellant was about to be promoted to another establishment under the same employer, the general manager came to examine the stock, and his examination disclosed a shortage of more than £60. That shortage has never been accounted for. It is suggested that there may have been theft. That might account for the loss of a few pairs of boots, but as a general explanation of the deficiency it is quite out of the question. In these circumstances I think the Sheriff has come to the right conclusion —that the appellant, as manager, is responsible for the loss. In so deciding I express no opinion whatever against his honesty. I think there is no evidence of dishonesty, but that he is responsible I have no doubt.

LORD YOUNG.—As I understand your Lordship's opinion to be that of my other brethren on the bench, I shall confine my observations to what I think is due to the defender with respect to his character.

The defender was employed at a very small salary, from December 1899 till March 1903, as manager of a boot shop where hundreds of pairs of boots were sold nearly every week. Let me call attention to the pursuer's statement as to the defender's character as set forth in Condescendences 4 and 5. I think a more distinct statement in favour of the character of an employee could not be given by an employer. That statement refers to his work down to 25th October 1902, the date of the last stock-taking before the shortage now in question was discovered. It was at the next stock-taking, as at 28th February 1903, that the shortage was discovered, amounting to £62 1s. 9d.

Of course, if the defender had received money which he did not account for that would be a case of gross dishonesty. But that is not attributed to him by the pursuer, and is negatived by the evidence in the opinion of the Sheriff-substitute who took it, and that opinion is not dissented from by the Sheriff. The Sheriff thinks, however, that the defender "may be civilly liable for negligence just as completely as for embezzlement." I think the question is whether there was any negligence to lead to liability. That is not shewn. What is the negligence attributable to the defender? It is not that he should have discovered the shortage sooner, supposing it to have occurred between October and February. It occurred to me in the course of the argument that some of the goods consigned to the defender's care might have been stolen on their way to Dundee, and that he had nevertheless acknowledged that they had all arrived, his acknowledgment being, as described by the Sheriff-substitute, an acknowledgment that goods of the value specified in the invoice had arrived. If he had noticed sooner that they had not arrived, or if he had failed to notice it—suppose he had not examined the quantity of boots in the evening of each day, or that there had been misconduct on the part of the young women in the shop, how did the pursuer suffer by the defender having failed to protect him against the risk of loss in transit between Leicester and Dundee? I should have been disposed to hold that there was no ground of liability for negligence, any more than in the case of a domestic servant signing a receipt for goods delivered for his or her master.

I find no ground for interfering with the view of the Sheriff-substitute.

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I think the defender is an honest man, that no dishonesty is proved against him, but that his honesty is established by the evidence, and no such negligence is imputable to him as should induce us to pronounce decree for a sum which would be ruinous to a man in his position.

LORD TRAYNER.—I agree with the Sheriff.

LORD MONCREIFF.—I also agree with the Sheriff.

THE COURT dismissed the appeal.

GEORGE H. BOYD, Solicitor—CLARK & MACDONALD, S.S.C.—Agents.

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MRS JOAN ANDERSON OR YOUNG AND ANOTHER, Pursuers.—*Guthrie, K.C.—Macmillan.*
THOMAS ANDERSON, Defender.—*R. L. Orr—Duncan-Miller.*

*Process—Proving the Tenor—Mortis Causa Disposition and Settlement—Casus Amissionis—Adminicle.*—An action was brought in 1903 to prove the tenor of a *mortis causa* disposition and settlement, dated 13th November 1848. It was proved that the deceased, on 13th November 1848, the day of his death, had executed a settlement, which had been prepared by a law-agent, and was brought by him for signature, and that the deceased's estate had been administered in accordance with the terms of the deed libelled. No witness was adduced who had ever seen the original of the deed. The adminicle produced bore to be a copy of a *mortis causa* disposition and settlement signed by the deceased and his wife before witnesses on 13th November 1848, with testing-clause and signatures. The copy was in the handwriting of a clerk in the employment of the law-agent who had prepared the deed, and it was initialed on the back as compared. It was proved that upon the death of the law-agent in 1872 such of his papers as had not been claimed by clients were removed to the chambers of another law-agent, who had himself thereafter had more than one removal, and that upon search being made in 1903 the original deed could not be found.

The action was defended by the deceased's heir-at-law, who had acquiesced in the administration till 1903, when he discovered that no will could be found. He contended that the settlement must be held to have been destroyed by the granter *animo revocandi*. He did not question the *bona fides* of the administrators.

*Held* that the pursuers had proved that the testator had left a settlement in the terms libelled, and that a sufficient *casus amissionis* had been proved.

1ST DIVISION.

MRS JOAN ANDERSON OR YOUNG, Kilmarnock, and Mrs Margaret Anderson or Nutter, Glasgow, two of the four surviving children of the late Thomas Anderson, lath-splitter, Greenock, in 1903 brought an action of proving the tenor against their brother, Thomas Anderson, engineer, Glasgow, and their sister, Grace Anderson, 36 South Woodside Road, Glasgow. The action concluded for the proving of the tenor of a *mortis causa* disposition and settlement, executed by the parties' father on 13th November 1848, by which he disponed certain house property in Greenock to his "spouse in liferent during her widowhood, and to" his children *nominatim* equally in fee, as also in general his whole means and estate heritable and moveable. His wife was named executrix, but subject to the declaration (1) that she was to be bound to maintain and educate the children; (2) that if she entered into a second marriage all right and benefit enjoyed by her under the

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deed should cease and determine; and (3) that the provisions in her favour were to be in full satisfaction of her legal rights. The deed as libelled bore to be signed not only by the pursuers' father but also by their mother, Mrs Ann Gillies or Anderson, and by two witnesses.

The pursuers averred that since their father's death his estate, which consisted almost entirely of heritage, had been administered in terms of the will. That the rents had been paid to the widow for her own behoof by the factor who managed the property till her second marriage in 1850 to Mr James Middleton, and that thereafter she continued to draw the rents, and therewith supported and educated the children of her first marriage. That since the death of the testator's widow in 1865 the rents had been divided by the factor among the four children of the testator in terms of the will. That in 1867 a bond for £400 on the property was paid by the four children in equal shares, and a casualty partly by the son as heir-at-law and partly by the three daughters as singular successors.

The pursuers further averred;—(Cond. 9) "The pursuers have made every endeavour to find the principal of the said disposition and deed of settlement, but without success, and they have been unable to obtain any information as to when or in whose hands the deed went amissing. Mr Hugh Dempster, writer in Greenock, the agent who prepared the deed, died in the year 1869 or 1870, and the pursuers have ascertained that the papers in Mr Dempster's possession were taken over by Mr James Glen, writer, Greenock. The latter has made a diligent search for the deed, but has been unable to find it. The account incurred by the testator to the said Mr Dempster in connection with the preparation and execution of the said disposition and deed of settlement is produced herewith. Said account bears to have been settled on 10th May 1851."

Defences were lodged for Thomas Anderson, the testator's heir-at-law. He stated, *inter alia*, "that he understood in a general way, from what he was told by other members of the family, and from seeing the alleged copy produced, that his father had left a will, but he had no personal knowledge of the matter, and, owing mainly to the fact that he lived for the most part abroad, he never investigated the matter till quite recently. As the result of inquiries he has recently made, he believes and avers that his father did not leave at his death any settlement."

The Lord Ordinary (Kincairney) made great avizandum.

By interlocutor, dated 9th March 1904, the First Division allowed a proof, which was taken before Lord Adam.

The pursuers produced as an adminicle a copy of the deed libelled, with testing-clause and signatures. The testing-clause set forth that the deed was written by Alexander Chalmers, a clerk to Hugh Dempster, writer in Greenock, and was subscribed by the testator, Thomas Anderson, and by his wife in token of her acceptance of the provisions in her favour, before the said Hugh Dempster and the said Alexander Chalmers as witnesses. This copy did not have the name of Mr Dempster on the back. It was initialed as having been compared. It was in the handwriting of John Park, a clerk in Mr Dempster's employment. Mr Dempster's account for the preparation of the deed and attending at its execution was produced. The evidence on this point is fully stated in Lord Adam's opinion.

No witness was adduced who could speak to having ever seen the

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principal of the deed libelled. Dempster, the law-agent, and his clerks, Park and Chalmers, were all dead.

The following facts were proved:—After the testator's death the rents of the property (about £30 annually) were paid by the factors, Messrs Agnew, to the testator's widow for her own behoof till her marriage to Mr James Middleton in 1850, and thereafter they continued to be paid to her for the board and education of her children. After her death in 1865 her husband received and divided the rents among the children. In 1886 Mr Middleton was asked by Thomas Anderson and his sisters to become factor, and he managed the property and divided the rents till his death in 1898. Thereafter Messrs Paterson & Anderson became factors, and the rents were sent to Miss Grace Anderson, who divided them equally.

The defender was about six years of age when his father died. He was brought up by his mother and Mr Middleton. In 1864 he got an appointment as an engineer in the Indian Merchant Service. When he left Scotland he gave instructions that half his salary should be paid to his mother. When in India he was in the practice of making remittances to Mr Middleton for various purposes, among others for monthly payments to his unmarried sister, Miss Grace Anderson, to the amount of £70 per annum. In 1874 he came home for a visit, when he saw a copy of his father's settlement, but he made no inquiry about it. When he left for India in October 1874 he gave a letter to Mr Middleton empowering him to act for him "in all matters relating to the receiving of money and management of my property in Greenock or elsewhere." He deponed that during the whole time he was in India he was quite willing that the whole rents should go to his sisters and Mr Middleton and be used by them.

In April 1903 the defender's sisters wished to sell the property, and he rather unwillingly consented. It was then discovered that the principal settlement could not be found, and the sisters' agents applied to the defender to sign a petition for service as heir-at-law, but he declined to do so. The position he then took up is shewn in a letter, dated 9th July 1903, to the pursuers' law-agents, which bore,—"It is evident, however, that the object aimed at is with the view of my sisters being enabled by legal means to obtain that which I have hitherto granted to them without question, and because of my feelings of friendship to them, I shall not, of course, take any exception to the taking of counsel's opinion, &c., but while that is so, I have decided to let you know that I have up till the date of my letter of the 7th April, and in fact until quite recently, have always thought that which I was led to believe, that my father had made a will, and that the same had been properly executed. 2d. That the will was in existence. 3d. That it had been registered for preservation and reference, and owing to my having always been abroad it never occurred to me to investigate the matter. It now appears, however, that the supposed will cannot be found, neither has it been registered, and that all proceedings have apparently had reference only to an alleged copy of a will. The knowledge of these facts has caused me in a sense to cancel any previous instructions to you, also my letter of 7th April, so that I cannot allow the property to be sold."

The defender deponed,—"So far as I know, during the whole time I was in India Mr Middleton continued to manage the property, whatever there was to do with it. I took no personal interest in the

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matter; I left the whole thing to Mr Middleton. By Lord Adam.—I was brought up with Mr Middleton before I went to India. I had entire confidence in him. I had considerable regard for him, and so far as I know, he had an equal regard for me. (Q.) Do you think that Mr Middleton was a person who, if he were aware that you had a right to the whole rents of this property, would have deprived you of them knowingly? (A.) No, I don't think that he would do so knowingly."

Argued for the pursuers;—It was proved (1) that a *mortis causa* deed was executed by the deceased on 13th November 1848; (2) that he died on that day; (3) that from his death on till recently the deed in the terms libelled had been acted on continuously without any question; (4) that the deed had now disappeared and could not be found; and (5) that the tenor of the deed was as libelled. These facts were sufficient to entitle the pursuers to decree. If the principal had been destroyed before the deceased's death, that must have been known to the law-agent and the widow, and if they acted on it, they must have conspired to commit a fraud. The law-agent in issuing a copy of the deed must also have committed a fraud if the principal had been cancelled. As to the *casus amissionis*, a special *casus* required to be proved or not according to circumstances, and the whole circumstances must be looked to. The nature of the deed libelled was only one of the circumstances. The loss of the deed must be proved to have taken place in some way not inconsistent with the continued validity of the deed.[1] Here it was proved that the deed must have been lost or destroyed after the death of the testator when its destruction could not affect its validity. In such circumstances proof of a change from one office to another had been held sufficient.[2]

Argued for the defender;—There was no evidence that the copy of the deed produced was a copy of the original, or that it was issued by the law-agent as such. It did not sufficiently prove the tenor of the deed, and it did not prove that the original remained uncancelled at the testator's death. If a *mortis causa* deed, which could be revoked by destruction, could not be found, the presumption was that it had been cancelled by being destroyed by the testator, and this presumption could only be overcome by clear proof to the contrary.[3] Here there was no proof that the principal deed had continued in existence after the testator's death. There was evidence to shew that he was unwilling to sign the deed, and that he did not die on the day he signed it, but three days later. In view of these facts it was not only possible but even likely that he should have destroyed it before he died. There was no such averment or proof of a *casus amissionis* as was required in the case of a deed such as this, which could be cancelled or revoked by destruction. Nothing more was alleged or proved than that it had disappeared—how, when, or where, did not appear. That was not enough.[4]

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[1] Smith v. Ferguson, May 31, 1882, 9 R. 866, *per* Lord President Inglis, at p. 876; Winchester v. Smith, March 20, 1863, 1 Macph. 685, 35 Scot. Jur. 395; Forbes' Trustees v. Welsh, March 1, 1827, 5 S. 468 (497); Incorporation of Skinners and Furriers in Edinburgh v. Baxter's Heir, March 17, 1897, 24 R. 744.

[2] Walker v. Brock, Jan. 24, 1852, 14 D. 362, 24 Scot. Jur. 172; M'Kean v. Miller, Feb. 14, 1857, 19 D. 448, 29 Scot. Jur. 149.

[3] Bonthrone v. Ireland, March 15, 1883, 10 R. 779, *per* Lord Young at p. 790.

[4] Kerr v. Kerr, Dec. 16, 1830, 9 S. 204; Forrester v. Forrester, May

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LORD ADAM.—This is an action of proving of the tenor of a trust-disposition and settlement, said to have been executed by the late Mr Thomas Anderson, by which he is alleged to have disposed of his whole estate, consisting of certain houses in Greenock—for there was little or no personal property—in favour of his wife in liferent, so long as she remained his widow, and of his children in fee. Four of his children still survive. Two of them appear as pursuers in this action, and two of them are called as defenders. By this alleged settlement the truster nominated his wife as his executrix, but during her widowhood only. After directing payment of debts he provides that the widow shall be bound to maintain and educate his children, and he declares that in the event of her second marriage all right and benefit enjoyed by her under the settlement shall cease and determine. These are the main provisions of this will. It is said to have been signed by the testator himself and by his wife—by her, no doubt, in token of her acceptance of its provisions in full of her legal claims. *Ex facie* as it is set forth in the summons it is quite regular and formal in every respect if it ever existed. That document has gone amissing, and two of the daughters have brought this action to have it set up, and their reason for doing so is very plain, because by the settlement they are each entitled to a fourth of the property, but if their father left no settlement the defender, his son Thomas, gets the whole of it.

In the evidence the defender Thomas Anderson says, and quite rightly, that his case is not that his father did not make a will, but that he did not leave a will. That is a very proper statement of the case, for I think there can be no reasonable doubt that a settlement in the terms set forth was executed by the deceased. We know that a copy of it was made in the office of Mr Dempster, who was the testator's law-agent, by one of his clerks, and this copy bears on its back that it was compared. It must have been compared with some original. It is impossible to believe that this copy was simply concocted. Then it appears from the evidence of the testator's daughter, who was present when he was on his deathbed, that Mr Haddow, a friend of the testator's, and the law-agent, Mr Dempster, came to her father on the night of the 13th November 1848, which is the date of the will. Then there is the law-agent's account for the preparation of the will, in which it is stated that on 9th November Mr Dempster was instructed to draw out the deed of settlement, and that he called upon Mr Anderson with the draft that night, but there was some difficulty about its terms in consequence of which he refused to sanction it. It is explained that this difficulty was that he thought his wife would marry again, and in that case he did not want her to have the liferent. But the difficulty was got over by the insertion of the clause declaring that on her second marriage her liferent should cease, and accordingly we find the next entry in the account is "Nov. 13, Calling upon you with Mr Haddow in the forenoon, when you consented to execute the trust-disposition," and then under the same date, "Attendance with you in the afternoon getting it executed." I have

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30, 1838, 16 S. 1064; Smith v. Ferguson, May 31, 1882, 9 R. 866, *per* Lord President Inglis at p. 876, and Lord Shand at p. 880; Brodie v Brodie, Nov. 16, 1901, 4 F. 132.

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no doubt that this document, which is produced, is a copy of the settlement which was so executed. So far, I think we may hold the case is proved.

But then comes the question, whether the deed so executed was still in existence at the date of the testator's death, and that is the question which the defender raises in this case. Did Anderson destroy the settlement before his death? The defender says there is no proof that the settlement was in existence after his father's death, and that therefore there is a presumption that it was destroyed by the testator for the purpose of cancelling it.

I think the proof is to the effect that the testator died on the same night that the will was executed. The defender says he did not die till the 16th November. His object in prolonging the interval between the date of executing the will and the date of the death is to make the time for cancelling by destroying the will longer. I think the evidence shews that the testator died on the 13th. There is another account produced—a doctor's account—which ceases on the 13th. The reasonable presumption is that the doctor's attendance continued till Anderson's death. Then there is the evidence of the testator's daughter, Mrs Young, which is to the effect that she thinks he died on the 13th, though she is not perfectly certain at this distance of time. The only counter evidence is the tombstone. Tombstones are proverbially no great authorities. This tombstone was erected many years after 1848, and I can place no great reliance upon it compared with the other evidence.

Passing from the evidence as to the date of the death, what is the evidence of the existence of the will after the testator's death? There is some slight direct evidence. Mr Middleton asked Mr Agnew (the factor on the heritable property left by the testator) to go to the superior's agent and settle about a casualty which was claimed, and he went and did so, and after that he wrote to Mr Middleton saying that he returns "the disposition and deed of settlement." He does not call it a copy. I do not put much weight on that, but it is an indication that the principal of the deed was at that date (1878) still in existence.

But then we come to the real and conclusive facts in this case. There were three persons in existence after Anderson's death, who must have known whether the will still existed after his death—Mr Dempster, the law-agent, the widow, Mrs Anderson, afterwards Mrs Middleton, and Mr Middleton. They must have known whether or not Anderson left a will. What they did after his death was in accordance with the will and nothing else. Until her second marriage the widow was entitled to draw, and did draw, the rents of the houses. On her second marriage, what ought properly to have been done under the will was to divide the rents equally among the children. But the children were young, and, as was only natural, the mother received the rents and maintained the children out of them. This was not strictly in accordance with the will, but it was very natural. But still the transmission of the right from the mother to the children was marked in the accounts, for after the mother married again the heading of the house factor's statement was different. Before 1850 the rental statements are made to Mrs Anderson, as she was the person to whom the rents were to go. But after her second marriage the heading became—"Rental statement, Mr Thomas Anderson's heirs in account with

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Alexander Agnew," shewing that although the money was sent to the mother, it was sent to her, whether rightly or wrongly, for behoof of the heirs, her children, who were entitled to it equally under the will, to be expended by her upon their maintenance.

Mrs Middleton died in 1865. After that the rents were regularly divided into four parts, and one-fourth part was treated as payable to each of the children. That was just in accordance with the will. But that was not all. There was a bond on the property for £400; and who paid it? Not the defender, who was the heir-at-law. It was paid by the children in equal proportions. Now, it is said that three of them had no right to the property, and yet we find that in 1867 they each paid a fourth of the bond over it. Then there was another thing. A casualty fell due. How was it paid? Just in the same way as the bond, by the children and not by the heir alone. Three of them as not being heirs paid composition each for one-fourth of the property, and the defender paid a much smaller sum for his fourth as relief-duty because he was the heir. Was all this a fraud? Are we to say that Mrs Middleton (formerly Mrs Anderson), the mother, Mr Dempster, the law-agent, and Mr Middleton entered into a fraudulent conspiracy to defeat the rights of the defender, the heir, then a little boy six years old? If not how can we account for what was done except upon the supposition that they knew there was a settlement in these terms, and acted upon it. I do not say that the defender is barred by what he did from claiming his rights now. But I say it is impossible to account for what was done except by the existence of the will. The defender very honestly says that he does not believe Mr Middleton, for whom he had a great regard, would have been guilty of such a fraud. I do not believe it either, and therefore I think what was done by him and the other two must have been done in accordance with a will which they knew had been left by the father of these children.

But then it is said that the *casus amissionis* is not sufficiently proved. I think it is. Mr Dempster died in 1872. His clerks were left in his office for a time, and such of his clients as wished to do so came and removed their papers just as they liked. After a time what was left was removed to Mr Glen's office. There was a considerable risk of papers going amissing under such circumstances. In such a case as the present, if it is clear that a will in the terms libelled was in existence after the testator's death—as I hold it is—no great proof of the *casus amissionis* is required. The question simply comes to be—Whether in the whole circumstances the Court is satisfied that a deed in the terms set forth was in existence after the testator's death, and that it cannot now be found although every search has been made. I think the proof upon both these points is sufficient.

Lord M'Laren.—I quite agree with all Lord Adam has said, and my remarks shall be brief. Mr Macmillan, in his opening speech, sought to establish, first, that the will was executed by Thomas Anderson in 1848, that it was found unaltered at his death, and that it was acted upon; second, that the will went amissing, and that the *casus amissionis* is proved; and, third, that the tenor is proved by the copy produced. If these facts are proved, the pursuers have established their case. Now, I confess I do not

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entertain any doubt that a will in the terms quoted was executed. It is true the testator is dead, and the solicitor who prepared the will died many years ago. I here note that it is a guarantee of good faith in this case that the agency of a solicitor was sought. He is dead; the clerk who was the other instrumentary witness is dead; Mrs Anderson is gone; and no one apparently is now living who had seen that deed. Consequently it has to be set up by secondary evidence. Now, the secondary evidence, which is really as good as could be expected after such a lapse of time, is, first, the agent's account, which sets out the whole facts connected with the preparation and execution of the settlement; next, one of the daughters, Mrs Joan Young, who was then twelve years of age, distinctly remembers that Mr Dempster, the solicitor, and the friends who were advising, were going about the house immediately before her father's death, and she said she knew it was about a will; that Mr Dempster, the solicitor, was preparing a will, and she had no doubt at all that the will was executed. Then it is important to notice that Mrs Anderson, the mother of these children, who drew the rents for herself and her family, acting upon the authority of this will, could not possibly have been mistaken about the will, because she signed it to shew that she accepted its provisions. Mr Dempster, who had the custody of the document, and from whose office a copy was sent for the family, could not be mistaken about it, because he was himself one of the instrumentary witnesses, and he must have known as a professional man that if a will was found in a mutilated state he could not act upon it. If it is established that the settlement was executed, then I agree with what Lord Adam said, that with the evidence we have before us then, if the will was cancelled before Anderson's death, we must assume that all the parties who have been named were in a conspiracy to commit a fraud against the interests of Thomas Anderson, who was then a boy of six years of age. I do not believe it. I should not be inclined to assume fraud against anyone, and I think everything must be presumed to have been honestly done in the absence of evidence to the contrary. I do not agree with the argument that was addressed to us—that it must be presumed that the will was revoked, unless it is proved that it was not revoked. That is a very extraordinary negative for anyone to be called on to prove, and I should doubt if it were possible to establish such a negative by proof. But the law does not impose such an *onus* on anyone. I think that to assume that the will is revoked unless you can shew that it was not revoked, would be a dangerous doctrine if anybody could be got to believe in it. I do not think that is likely to be the case. The will being thus proved to be regularly executed, I agree with Lord Adam that the circumstances are sufficient to account for its disappearance, and especially this—that not only were there several changes of domicile on the part of the agent who succeeded Mr Dempster, but that Mr Dempster himself seems to have been a little careless in the way he kept his papers. Perhaps he had not a very large business, and if he kept papers relating to properties not of very great value loose, such papers would be liable to be mislaid. I think the case is quite as strong as many in which we have held that changes of residence on the part of the agents who had charge of a paper might account for its disappearance. As to the tenor of the deed there can be no doubt, if you

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assume there was a valid will, because the copy in process has been identified as being in the handwriting of one of Mr Dempster's clerks—not the writer of the deed, but a different clerk—and that is spoken to by Mr Glen, who knew his handwriting. Well, then, unless we were to suppose that they also were parties to the hypothetical fraud, the copyist must have had either the original will or the draft from which it was extended before him when he made the copy. It is important to observe that this copy (whether made from the draft or not) is not a copy of an uncompleted deed—it contains a testing-clause, and bears to have been signed by the testator.

I therefore hold that all the points necessary to be made out in an action of this kind are satisfactorily proved. Indeed I cannot help being surprised that long after the death of all the parties to the preparation and execution of this will, so much evidence should have been found as has been adduced to set up this document.

LORD KINNEAR.—I think the case proved for the reasons already given, and I have nothing to add.

LORD PRESIDENT.—I am of the same opinion.

THE COURT pronounced this interlocutor:—"The Lords having considered the cause, with the adminicles produced and proof adduced, and heard counsel for the parties, find the *casus amissionis* of the disposition and deed of settlement libelled proven, and the tenor thereof as libelled proven, and decern and declare accordingly in terms of the conclusions of the summons."

WALLACE & BEGG, W.S.—INGLIS, ORR, & BRUCE, W.S.—Agents.

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Hunter v. Hunter.

DAVID HUNTER AND ANOTHER, Pursuers (Reclaimers).—*Younger—A. A. Fraser.*
MISS MARGARET HUNTER, Defender (Respondent).—*Hunter—W. Ross Taylor.*

*Insurance—Policy of Insurance—Construction—Accident Insurance by Newspaper—Payment to person adjudged by editor to be next of kin—Next of kin.*—A weekly periodical named *Answers* contained a statement that in the event of any person being killed by an accident to any train in which he was travelling as a passenger with a copy of the current number in his possession, £1000 would be paid to "the person adjudged by the editor to be the next of kin of the deceased." It was added that "The person or persons who shall be adjudged by the editor to be the next of kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money."

H was killed in an accident to a train in which he was travelling, having in his possession a copy of the current number of *Answers*. He was survived by three brothers and a sister. After inquiry, the editor adjudged the sister to be his next of kin, and paid £1000 to her. In an action by the brothers against her, *held* that they had no right to share in the sum so paid.

2D DIVISION. Ld. Kyllachy.

THE weekly publications known as *Answers* and *Tit-Bits*, published weekly, offer to pay certain sums to the next of kin of any person killed in a railway accident, provided that he has a copy of the current issue of the paper in his possession at the time. The following is an excerpt from the advertisement, as contained in *Answers* of 25th July 1903:—"£1000 FREE INSURANCE.—In the event of any person, having the current number of *Answers* on him or her at the time,

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being unfortunately killed *by an accident in the United Kingdom to any train in which he or she may be travelling as a passenger*, we have made arrangements whereby the person adjudged by the Editor of *Answers* to be the next of kin of the deceased will receive One Thousand Pounds." . . . "The person or persons who shall be adjudged by the editor of *Answers* to be the next of kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money."

The advertisement in *Tit-Bits* was in the following terms:—"*Tit-Bits* SYSTEM OF LIFE INSURANCE.—One Hundred Pounds will be paid by the Ocean Accident and Guarantee Corporation, Limited, 36 to 44 Moorgate Street, London, E.C., to the person whom the Editor of *Tit-Bits* decides to be the nearest relation of anyone who is killed in a Railway Accident in the United Kingdom, provided a copy of the current issue of *Tit-Bits* is found upon the deceased at the time of the catastrophe, or if it is proved that he or she is a subscriber through a Newsagent or through the Publishers.

"It must be distinctly understood by all subscribers to this paper that the decision as to the payment of the Insurance Money is left entirely to the opinion of the Editor, and his decision is final. All copies of this paper are purchased subject to that condition."

On 27th July 1903 William Simpson Hunter, painter, Glasgow, was killed in a railway accident at St Enoch Station, Glasgow. At the time of the accident he had in his possession copies of the current numbers of *Answers* and *Tit-Bits*. He was survived by three brothers and a sister.

Claims were made to the editors of *Answers* and *Tit-Bits* by the sister, Miss Hunter, and by David Hunter, one of the deceased's brothers.

The editors of both papers, after inquiry, adjudged Miss Hunter to be the next of kin of the deceased, and paid to her the sum of £1000 and £100.

An article in *Answers* for 19th September 1903, after narrating the accident and the claims made, gave the following account of the decision of the editor, and his reasons for it:—

"It was evident that this was a case in which the editorial discretion would have to be used in deciding as to whom the money was to go.

"We further instructed our Glasgow agents to inquire into this second claim.

"The legal formalities, such as the preparation of affidavits of witnesses, &c., took some time; but in the end it was found that, as had been stated by Miss Hunter's solicitors, she had been to a large extent dependent on the earnings of the deceased man for her support, and that, to put the matter briefly, she had been the principal sufferer by her brother's death.

"Upon this we had no hesitation in adjudging Miss Hunter the next of kin of the deceased man, and we lost no time in intimating that decision to our agents and Miss Hunter's solicitors."

An article to the same effect appeared in *Tit-Bits* of 19th September 1903.

In these circumstances, the present action was brought against Miss Hunter by David Hunter, and Alexander Hunter, both labourers in Glasgow, two of the brothers of the deceased W. S. Hunter, concluding for payment to each of them of the sum of £275. They

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averred that the sums of £1000 and £100, paid by *Answers* and *Tit-Bits*, formed part of the estate of the said deceased W. S. Hunter, and that, as he died intestate and unmarried, they were, together with their remaining brother and the defender, each entitled to one-fourth of the said sums.

The pursuers pleaded, *inter alia*;—(4) In respect that the said sums of £1000 and £100 were paid to the defender under contracts of insurance entered into by the deceased William Simpson Hunter upon his life as condescended on, the said sums belong to the estate of the deceased, and the pursuers are entitled to decree as craved. (7) On a sound construction of said contracts of insurance, the pursuers' interest in the sums insured is not affected by the selection by the editor of a person to whom payment may be made, and from whom a discharge may be received by the insurer.

The defender pleaded, *inter alia*;—The defender having been adjudged by the editors of *Answers* and *Tit-Bits*, whose discretion is absolute, as entitled to payment of the amounts insured, is not bound to divide the said amounts according to the rules of intestate succession.

On 2d July 1904 the Lord Ordinary (Kyllachy) pronounced an interlocutor whereby he assoilzied the defender from the conclusions of the action.*

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* "OPINION.—In this case the contentions of both parties have been particularly well stated. Indeed I have seldom seen a case so well stated both on record and in argument. The question is rather a novel one, and I have endeavoured to consider it on its merits, as well as with reference to the decision in the case of *Law* v. *Newnes*, 21 R. 1027, which, *prima facie*, at least seems to rule it.

"My view is this, and I think it is fairly clear, that the question depends upon this—whether the two funds in question were *in bonis* of the deceased at his death. If they were, I do not doubt that, although paid over to the defender (who was only one of the next of kin), she (the defender) would have been liable to account as for money received on behalf of the estate. I do not say she would have been liable to account to the pursuers, but to anyone whether belonging to the family or not, who had obtained the office of executor of the deceased. On the other hand, if the money was not *in bonis* of the deceased, I do not see how there can be any liability to account to anybody. There could, *ex hypothesi*, be no liability to account to the executor of the deceased as such; and as regards the pursuers, the defender has no contract with them, nor did she receive the money under any contract to pay to them.

"Now, this being so, what is the test as to whether these moneys were *in bonis* of the deceased? The test I think is, and must be this—Could the pursuers, supposing they had been decerned and confirmed executors of the deceased, have sued—I mean successfully sued—the debtors under the coupons—the two newspaper proprietors—for payment? And as to that, I do not see how there can be any doubt, at all events if the case of *Law* v. *Newnes* was, as I must hold it was, well decided. For the judgment in that case—a substantially similar case—was, that it was a condition precedent of the debtor's obligation—a condition precedent of the right to sue under it—that the person suing for payment should be clothed with a right to sue conferred by the editor of the paper—the editor of the paper in each case being empowered to select the recipient of the bounty. The obligation is to pay to such person as shall have been adjudged by the editor of the paper to be the next of kin in the one case, and the nearest relation in the other. And, of course, if that is so, it is quite inconsistent with the moneys being *in bonis* of the deceased. The obligation at its best is an obligation

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The pursuer reclaimed, and argued ;—The money paid by the newspapers was *in bonis* of the deceased. No doubt under the terms of the advertisement the newspapers would be discharged by payment to the person they selected as the next of kin, at least if they made their selection honestly. But they made the person selected a trustee for the next of kin. The advertisement was a policy of insurance granted to the deceased by the editors of the papers, as part of the consideration he received by paying the price of the paper. It was in the same position legally as a policy of insurance, bond, or deposit-receipt taken by A and bearing to be payable to B. If not delivered to B, such a policy, bond, or receipt was part of A's estate on his death.[1] The case of *Law* v. *Newnes*[2] only affirmed the liability of the newspaper, it did not decide the ultimate right to the money. The fact that the deceased left it to the editor of the newspaper to decide to whom the money was to be paid did not amount to a legacy by him to that person.[3]

The respondents supported the reasoning of the Lord Ordinary.

LORD JUSTICE-CLERK.—I think that the facts which are admitted in this case shew that the money was neither paid to nor accepted by the defender on the footing that she was receiving it only for the purpose of giving a discharge to the insurers and as trustee for other persons. In the case of *Law* v. *Newnes*[2] it was decided that the editor of the paper was entitled to nominate whom he pleased as the next of kin, provided he acted *in bona fide*. In this case the documents shew that he did so act, and that the defender was adjudged to be the next of kin after careful inquiry. I think no one can have any claim against her on the ground that she is only a trustee for the money received, and any claim there might be by the remaining next of kin against the paper for paying away the money wrongfully could not be a claim against her.

LORD YOUNG.—I think that in the circumstances of this case a very important legal question might be raised as to whether the proprietors of these newspapers ever came under any legal obligation to anyone under the

not in favour of the deceased, or in favour of the deceased's executors, but in favour of persons who are to be selected by the editors as possessing the requisite character, the grounds of selection, whether good or bad, being immaterial if, in point of fact, they are honest.

"The only doubt I have had is whether I ought not to have the facts ascertained by a proof—I mean the facts in connection with the editor's adjudication. But it did not appear to me that there was any real dispute between the parties that the editors proceeded as set out in the defences. What occurred is, I see, set out at length in one of the newspapers which was used at the discussion, and it appears that the two editors both arrived at the same result after hearing both parties—coming both—whether they were right or wrong, to the conclusion that the proper person to receive the benefit was the defender, the deceased's sister, who had lived with the deceased, and had the main interest in his life.

"I think, therefore, that the defender is entitled to absolvitor, with expenses."

[1] Connell's Trustees v. Connell's Trustees, July 16, 1886, 13 R. 1175; Jarvie's Trustee v. Jarvie's Trustees, Jan. 28, 1887, 14 R. 411.

[2] July 17, 1894, 21 R. 1027.

[3] *In re* a Policy No. 6402 of the Scottish Equitable Life Assurance Society, [1902], 1 Ch. 282.

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passages which are cited and upon which any claim must be founded. But no such question is raised here, nor is it likely to arise, because these offers are made for the purpose of promoting the sale of the paper, and if the payments were not made honestly each time a *bona fide* claim was lodged, they would fail to have the effect which they are intended to produce. It is admitted that at the moment when Mr Hunter was killed he was in possession of the current numbers of *Tit-Bits* and *Answers*, and that these papers paid the sums promised by them to the person selected by the editors as the next of kin of deceased. The question now arises whether the passages in the papers referred to import that the person who received the money did so on her own account or as trustee for the whole next of kin. I think it is not doubtful that according to the intention of the proprietors of the papers, the editors were to select the persons to whom the money was to be paid, and that such selection was made after full and proper inquiry, the choice falling on the person who was considered most in need of the money. The money was paid to that person, and the discharge granted by her was a full and sufficient discharge of the obligations on the part of the newspapers to pay the money—if any such obligation existed, regarding which I have, as I have said, considerable doubt. And I am clearly of opinion that she received the money on her own account, and not as trustee for the whole next of kin. This follows from the judgment in the case of *Newnes*,[1] where the Court upheld the selection made by the editor of the paper even though the person nominated was not strictly the next of kin of the deceased, and where I consider it to have been decided that the person chosen was entitled to the money for her own use. But even apart from the case of *Newnes*,[1] I am of opinion that the defender is absolutely entitled to the money which has been paid to her, and that the judgment of the Lord Ordinary is right.

Lord Trayner.—The main argument urged for the reclaimers is that this money which was paid to Miss Hunter was *in bonis* of the deceased brother, and therefore that as he died intestate it falls to be divided among his next of kin. Now, if anything in respect of the alleged contract of insurance was *in bonis* of the deceased it was only an obligation by the insurers. If so, then the next of kin may have an action against the insurers, but they can have no claim against the present defender, who was debtor in no obligation, nor can they claim from her anything that the insurers were pleased to give her. The claim on the part of the next of kin against the insurers (if it exists) would not justify a claim against the defender or a decree against her. The next point urged is, that although the defender got the money on terms that made it her own so far as the insurers were concerned, she got it on terms which made her a trustee for its distribution among the next of kin of the deceased. That depends upon the contract on which the money was paid, whether it was or was not received on terms which made the defender a trustee. Whether there was an enforceable contract between the deceased and the proprietors of the newspapers is a matter on which I express no opinion. It was not argued to us, but I assume for the moment

[1] 21 R. 1027.

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that there was such a contract. But if so what was the contract? It is expressed in the advertisement from which alone it can be gathered, and is to the effect that the proprietors of *Answers* would pay £1000 to the person adjudged by the editor to be the next of kin of any person killed in a railway accident, and having the current number of the paper in his or her possession at the time. I need not refer to the advertisement in *Tit-bits*, because it is practically to the same effect. The advertisements go on to say—"The persons who shall be adjudged by the editor of *Answers* to be the next of kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." It is suggested that that only means that it is left to the editor of the newspaper to select from among the next of kin one who may give him a good discharge, leaving the question as to whom the money belongs to be settled among the next of kin. I am unable to read the contract in any such way. The words I have quoted above do not mean that the person selected is to be the only person entitled to give a good discharge, but that the person adjudged by the editor to be the deceased's next of kin is to be the only person entitled to claim the money, to receive it, and to give a good discharge. Here the editor, having the whole circumstances before him, including the fact that there were other next of kin, adjudged that the defender was the person entitled to claim the money, to receive it, and to give a discharge. I repeat what I said in the case of *Law* v. *Newnes*,[1] that if the editor was proved to have acted in *mala fides* some remedy would be found. But in the present case there is no suggestion of *mala fides;* the editor seems to have acted on intelligible and reasonable grounds. He made full inquiry into the circumstances and found that Miss Hunter resided with her deceased brother, and, as he says, that she had been to a large extent dependent on the deceased man for her support, and was the principal sufferer by his death.

I think the Lord Ordinary's judgment here is well founded, and also that it is in entire accordance with the decision in *Law* v. *Newnes*.[1]

LORD MONCREIFF.—I am of the same opinion. If the editor of *Answers* had a power of selection, there is an end of the question; because the narrative of the case published in his paper shews that, in the full knowledge of the existence and claims of other next of kin, he selected Miss Hunter not as a trustee but as an individual; and that he favoured her claim because she was the principal sufferer by the death of the deceased. If, on the other hand, the editor acted *ultra vires* and not in good faith, then I doubt whether the pursuers have any claim against Miss Hunter. They may, but I greatly doubt it, have a right of action against *Answers*. But, if they have any legal claim, it can only be against that paper, because, after full inquiry, the sums in question were paid to Miss Hunter for her own use alone.

On the whole matter, in accordance with the decision of the case of *Law* v. *Newnes*,[1] my opinion is that the editor had an unqualified power of selection, provided he exercised it *in bona fide;* and it is not suggested that he acted otherwise.

THE COURT adhered.

J. STRUTHERS SOUTAR, Solicitor—MACPHERSON & MACKAY, S.S.C.—Agents.

[1] 21 R. 1027.

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Nov. 25, 1904.
Forrest's Trustees v. Reid.

JOHN TURNBULL AND OTHERS (Trustees of Charles Laing Forrest), First Parties.—*Constable.*
MRS MARGARET SMITH LINDSAY SINCLAIR FORREST OR REID AND ANOTHER, Second Parties.—*Morton.*

*Succession—Fee or Liferent—Vesting—Repugnancy.*—A trust-disposition and settlement contained the following clauses:—"(Sixth) I leave and bequeath the residue of my estate, means, and effects, heritable and moveable, for behoof of all my children equally, and direct my trustees to pay over to each of my sons, as soon as conveniently may be after my death, the share of said residue falling to him: . . . And my trustees shall hold the shares of my daughters during their respective lives, and on the death of each shall pay her share to such person or persons as she may appoint by any revocable deed executed by her after she has attained the age of twenty-one years, and failing such appointment, then to her own nearest heirs"; but with power to the trustees to encroach on the share of which a daughter "may be receiving the income" to an extent not exceeding £200 to provide her with an outfit on marriage. There followed a declaration that "the whole of the said provisions, whether of capital or income, so far as conceived in favour of or devolving upon females, shall be for their own sole and separate use, shall not be assignable by them or attachable for their debts or obligations, and shall be exclusive of the *jus mariti* and right of administration of any husband or husbands they may marry, and shall not be subject to the debts of such husbands or the diligence of their creditors."

*Held* that on a sound construction of the above provisions the daughters had not a right of fee, but merely a liferent with a power to test on the capital of their shares.

*Greenlees' Trustees* v. *Greenlees*, Dec. 4, 1894, 22 R. 136, *distinguished.*

1ST DIVISION. CHARLES LAING FORREST, merchant, Leith, died on 20th July 1903 survived by a widow, and by four sons and two daughters of his first marriage, three daughters of his second marriage, and a son of his third marriage.

He left a trust-disposition and settlement by which he conveyed his whole estate, heritable and moveable, to trustees for the purposes therein mentioned. By the sixth purpose he provided as follows:—"(Sixth) I leave and bequeath the residue of my estate, means, and effects, heritable and moveable, for behoof of all my children equally, and direct my trustees to pay over to each of my sons, as soon as conveniently may be after my death, the share of said residue falling to him: Declaring that notwithstanding the direction herein contained full power is hereby given to my said trustees, if they shall think it necessary or expedient, to retain in their hands the whole or any part of the capital falling to any one or more of my said sons, and merely to pay the income thereof to the son or sons whose capital is so retained during their respective lives or so long as my trustees may think fit, and the capital so retained and the income thereof to be paid as aforesaid shall be alimentary, and shall not be affectable by the debts or deeds of the son or sons of whose share or shares it is the income, nor by the diligence of their creditors, nor shall it be assignable except by a revocable deed *mortis causa*: And my trustees shall hold the shares of my daughters during their respective lives, and on the death of each shall pay her share to such person or persons as she may appoint by any revocable deed executed by her after she has attained the age of twenty-one years, and failing such appointment, then to her own nearest heirs: And my trustees shall pay half-yearly at Whitsunday or Martinmas the free income of the trust-

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estate to my children in proportion to the capital sum which may be due to each, the shares of income of such as are in minority being applied for their maintenance and education to such extent and in such way as my trustees may see best, and the shares of income of daughters after they attain majority being payable to themselves as alimentary provisions on their own receipts alone: But declaring that in the event of any one or more of my daughters being engaged to be married, my trustees shall have power to encroach on the share or shares of capital of residue of which such daughter may be receiving the income to an extent not exceeding £200 for each daughter who may be so engaged, to provide her with an outfit on her marriage: And I declare that the issue of such of my said children as may have predeceased leaving issue shall succeed to the share to which their parent would have been entitled if in life." The testator also provided as follows:—"And I further declare that the provisions herein contained in favour of my children are and shall be in full of all that they could claim by or through my decease in respect of legitim or any other claim competent to them, and also that the whole of the said provisions, whether of capital or income, so far as conceived in favour of or devolving upon females, shall be for their own sole and separate use, shall not be assignable by them or attachable for their debts or obligations, and shall be exclusive of the *jus mariti* and right of administration of any husband or husbands they may marry, and shall not be subject to the debts of such husbands or the diligence of their creditors."

A question having arisen between the trustees and the two daughters of the first marriage, who were the only daughters who had attained majority, with regard to their rights under the sixth purpose of the settlement, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees, and (2) the two daughters who had attained majority.

The first parties maintained that under the sixth purpose of Mr Forrest's trust-disposition and settlement the right conferred upon his daughters with regard to their shares of residue consisted merely of an alimentary liferent, coupled with a power to test upon the capital of their shares, and that as trustees they were bound to retain the said shares for the purposes (1) of maintaining the alimentary character of the liferent, and (2) of preserving the capital for those who might be entitled thereto upon the death of the liferenters.

The second parties maintained that the trust-disposition and settlement conferred on them a vested right to the fee of the shares of residue bequeathed to them, and that they were entitled to immediate payment of their respective shares.

The questions of law were, *inter alia*, as follows:—"1. Under Mr Forrest's trust-disposition and settlement, are the second parties vested with a full right of fee in the shares of residue bequeathed to them? or, Are their rights limited to a right of liferent, coupled with a power to test on the capital of their shares?"

Argued for the second parties;—Under the provisions of the sixth purpose the daughters were entitled to the fee of a share of the residue vesting *a morte testatoris*, and to immediate payment thereof now.[1] In the case cited the trustees were directed to hold the

[1] Greenlees' Trustees v. Greenlees, Dec. 4, 1894, 22 R. 136.

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daughters' shares and to pay them the income. There the daughters were given only a power of disposal in the way of family settlements. Here they were given a general power of disposal, and failing disposal their shares were to go to their heirs. In the declaration as to the provisions in favour of female children the testator used the words "whether of capital or income," shewing that the daughters' provisions were not meant to be liferents merely.

Argued for the first parties;—The case of *Greenlees*[1] was distinguished. In that case there was no ultimate destination of the fee. Here it was otherwise, for the fee was ultimately destined to the daughters' heirs. A mere direction to hold and pay income without any direction as to the disposal of the fee was doubtless not enough to overcome or limit an initial gift to children generally. But here the fee was disposed of. The trustees were directed to pay it to the daughters' testamentary or legal heirs. What was given to the daughters was a liferent with a limited, practically only a testamentary, power of disposal, with a destination, failing disposal, to heirs. Such a gift did not confer a right of fee. The daughters proposed that the destination to heirs should be ignored.

LORD PRESIDENT.—The question which we have to decide is this:—What was the nature of the right conferred upon the daughters by the testator's trust-disposition and settlement. By the sixth purpose of his testamentary settlement he bequeathed the residue for behoof of all his children equally in general terms, not stating the quality of gift to the daughters, but he afterwards stated his intention with regard to them in detail. After dealing with the case of the sons he gave the following direction with respect to the shares of the daughters—"My trustees shall hold the shares of my daughters during their respective lives." This is an imperative direction to the trustees to hold the daughters' shares during their lives. It is quite inconsistent with payment being made to them during their lives. He did not give them a fee, and the gift is in sharp contrast to the gift made in favour of the sons. He, however, directed that on the death of each daughter her share should be paid "to such person or persons as she may appoint by any revocable deed." This confirms the view that no right of fee was given to the daughters. If a right of fee had been given to them, it would not have been necessary to direct that the fee should be paid to their appointees. The direction does not stop there, but there is a destination over, by which, "failing such appointment," each daughter's share is to be paid "to her own nearest heirs." The daughters' heirs do not take by succession to them, but as *personæ prædilectæ* to whom the testator gives an independent right. There is a further provision that "the shares of income of daughters after they attain majority" shall be "payable to themselves as alimentary provisions." This again emphasises the fact that they have no right of fee, they are only to receive the income of what are conveniently called their shares, and the income is declared to be alimentary. The testator further provides that "in the event of any one or more of my daughters being engaged to be married, my trustees shall have power to encroach on the share or shares of capital of residue of which such

[1] 22 R. 136.

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daughter may be receiving the income, to an extent not exceeding £200 for each daughter who may be so engaged, to provide her with an outfit on her marriage." The testator does not say "the share belonging to such daughter," but the share of capital "of which such daughter may be receiving the income"—that is to say, of which she is the liferentrix. Every line of the deed shews that the testator did not intend that the daughters should have any right to the fee, but only a liferent with a power of disposal "by revocable deed."

If your Lordships concur in this view, the first alternative of the first question will be answered in the negative and the second alternative in the affirmative.

LORD ADAM.—I am of the same opinion. It is the intention of the truster as expressed in the deed that we have to give effect to, and for that reason the construction of one testament serves to throw very little light on that of another. Still we must observe the rules of construction laid down in previous judgments. What then was the intention of the truster in this case? In executing a settlement a truster may give a fee, and then try to limit and restrict it, but such limitation and restriction will be of no effect if in fact he has given a fee. The question therefore here is, whether the testator has given a fee, for if so the restriction would be of no avail. The case resembles that of *Greenlees' Trustees*,[1] but differs from it in that there is no direction "to pay" to the daughters. The testator says, "I leave and bequeath the residue of my estate . . . for behoof of my children equally, and direct my trustees to pay over to each of my sons. . . ." While that is a distinct direction to pay to sons, there is no such direction in the case of daughters. Then the testator goes on to direct his trustees "to hold" the daughters' shares during their life, and to pay in a certain way on their death. We have therefore a direction to pay; but only when the daughters are dead. In this we have a clear direction as to the final disposal of the fee, and not as in *Greenlees'* case.[1] The trustees here are to pay the income to the daughters, and the fee to their testamentary or natural heirs. I think there can be no doubt that in this case there was no absolute fee given to daughters on the death of the testator; but that the fee was to be held until their death, and then to be disposed of as they should direct, and failing direction then to go to their heirs.

LORD M'LAREN.—This case touches, or at least comes very near to, a question that has been frequently commented on, and as to which I am not sure that the highest authorities are agreed. I mean as to the effect of a gift taking the form of an unqualified power to the grantee to dispose, when there is superadded a provision as to what is to be done in the event of the power not being exercised. Observations as to this are to be found in the case of *Morris* v. *Tennant*,[2] by Lord St Leonards, and in the case of *Pursell* v. *Elder*[3] by Lord Westbury. In *Morris* v. *Tennant*[2] Lord St Leonards had to deal with a liferent with power to dispose, either by will or by deed, and a destination-over in the event of failure to exercise the power. So the

[1] 22 R. 136. [2] 27 Scot. Jur. 546. [3] 3 Macph. (H. L.) 68.

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power there was a most general one, and the judgment of the House, supported by Lord St Leonards, was to the effect that a liferent with a power of disposal, however general, cannot be construed as a fee, if there is a destination-over in the event of failure to exercise it. But in the case of *Pursell* v. *Elder*[1] Lord Westbury said that to give a person an estate "with words indicative of the intention of the testator that he should have the absolute *jus disponendi*, then in any case these words are to be taken as indicating an intention that he should be the absolute owner." Lord Westbury does not directly deal with the case of a destination-over, perhaps because he was not quite in agreement with Lord St Leonards as to the effect of it.

In the present case it is hardly necessary to solve this troublesome question, for here we not only have a destination-over to heirs, but the power itself is not an unqualified power. It is a restricted power to the grantee to dispose of her share after her death by any revocable deed. This may include some deeds that are not strictly testamentary, but practically it means that what is here given is only a power to affect the succession to the estate, and not a power to disturb the trustees in the possession of it during the grantees' lives. The object of this limitation was no doubt that the income of the estate should thereby be secured to the beneficiaries. I have no doubt that under this instrument the daughters take only a liferent with a power to dispose *mortis causa*. I do not comment on the language of the disposition, because I agree with all that your Lordship and Lord Adam have said with regard to it.

LORD KINNEAR was absent.

THE COURT answered the first alternative of the first question in the negative and the second alternative in the affirmative.

J. & J. TURNBULL, W.S.—SKENE, EDWARDS, & GARSON, W.S.—Agents.

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Nov. 25, 1904.*
Inland Revenue v. Cadwalader.

INLAND REVENUE, Appellants.—*Sol.-Gen. Dundas—A. J. Young.*
JOHN LAMBERT CADWALADER, Respondent.—*Lorimer, K.C.—Crurie Steuart.*

*Revenue—Income-Tax—"Residing in the United Kingdom"—Income-Tax Act*, 1853 (16 *and* 17 *Vict. cap.* 34), *sec.* 2, *Schedule D—Income-Tax Act*, 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 39.—An American citizen, having his ordinary residence, and practising his profession, in New York, held for some years a lease of a furnished shooting-lodge and shootings in Scotland. He resided at the shooting-lodge for two months in each year, and the lodge was ready for his use at any time. His residence in New York was also kept open for his use at any time. *Held* that he was a person "residing in the United Kingdom" within the meaning of section 2, Schedule D, of the Income-Tax Act, 1853, and was therefore liable to assessment for income-tax, and that he did not fall within the exemption in sec. 39 of the Income-Tax Act, 1842, of a person in Great Britain "for some temporary purpose only, and not with any view or intent of establishing his residence therein."

[1] 3 Macph. (H. L.) 68.
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Inland Revenue v. Cadwalader.
1st Division.
Exchequer Cause.

JOHN LAMBERT CADWALADER appealed to the Commissioners for the General Purposes of the Income-Tax Acts for the district of Brechin, in the county of Forfar, against an assessment made upon him under Schedule D of the Income-Tax Act for the year 1903-4. The assessment was made under authority of the Finance Act, 1903 (3 Edward VII. cap. 8), sec. 5; the Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D; and the Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Cases Fourth and Fifth.*

The following were the facts as found or admitted:—"1. The appellant is an American citizen, and has his ordinary residence at No. 13 Thirty-fifth Street, New York, where he practises his profession as a barrister.

"2. By minute of lease entered into between the factors and commissioners for the Right Honourable the Earl of Dalhousie of the first part, and the appellant of the second part, dated 16th March and 2d and 3d April 1900, there was let to the appellant for the period of three years from 1st February 1900, at the yearly rent of £1500, payable in advance on 1st February yearly, All and Whole the sole and exclusive right of shooting and sporting over the grouse shootings of Millden, together with Millden Lodge and the furniture therein, and also with a right of fishing in the rivers and streams within the bounds of the territory, let, upon, *inter alia*, the conditions following: —(*a*) The furniture and other effects in the lodge and out-buildings were to be delivered over per inventory to the second party . . . (*b*) The first parties undertook to maintain the whole buildings wind and water tight, and to bear the expense of keeping in order the grounds attached to the lodge, to pay all rates and taxes imposed in respect of said tenancy, and also to pay the wages of a housekeeper and housemaid and one gamekeeper and a watcher, all of whose services should be at the disposal of the second party; (*c*) The shootings were to be under the entire management of the present keeper, or any other keeper to be appointed by the first parties, but the service of said keeper and under-keeper to be at the service of and under the control of the second party during the shooting season. . . .

"3. The said lease, a copy of which was put in and forms part of this case, was continued by agreement for one year, to 1st February 1904, and by subsequent agreement, dated 3d and 6th October 1903, the lease was renewed for a period of two years from 1st February 1904. . . .

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* The Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), enacts, sec. 2, Schedule D, that income-tax is to be payable "for and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situated in the United Kingdom or elsewhere . . ."

The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, Fourth Case, dealing with the computation of duty to be charged in respect of interest from securities in foreign countries, enacts,—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed), which have been or will be received in Great Britain in the current year without any deduction or abatement."

Fifth Case, dealing with the computation of duty to be charged in respect of possessions in foreign countries,—"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain. . . ."

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"4. The appellant is a bachelor. He and his valet, whom he brings with him from America, reside at Millden continuously for a period of two months each year during the grouse shooting season. He employs a caterer from London, who supplies all food and servants. . . . When the appellant takes possession of Millden, the housekeeper and housemaid remove from the lodge and do not return until he goes away. The female servants are paid board wages by the first parties.

"5. In the Valuation-roll of the county of Forfar the appellant is entered as tenant and occupier of the Millden shooting-lodge and shootings, and he is charged to all the local and imperial rates and taxes applicable to such occupancy, though the proprietor relieves him of these taxes under the provisions of the lease. . . .

"6. When the appellant or his friends are not living at Millden, the lodge is under the care of the female servants referred to in fact 2 (*b*), and is available for the appellant's return at any time.

"7. The appellant has no place of business in the United Kingdom.

"8. During the appellant's stay in the United Kingdom he maintains and keeps open for his return his residence in New York, to which he could have returned at any time. He also pays all taxes due by him in New York in respect of his dwelling-house or his profession.

"The appellant contended that he was not a person 'residing in the United Kingdom,' within the meaning of the Income-Tax Acts,* and quoted in support of his contention sec. 39 of 5 and 6 Vict. cap. 35, *Lloyd* v. *Sulley*, Court of Exchequer, Scotland, 12th March 1884, 11 R., p. 687; and *Colquhoun* v. *Brooks*, House of Lords, (1889), 14 A. C. 493.

"The Surveyor of Taxes, on the other hand, contended that *Lloyd* v *Sulley* proved the appellant's liability, and in support of his contention that section 39 of 5 and 6 Vict. cap. 35, did not exempt the appellant, he quoted *The Attorney-General* v. *Coote* (1817), 4 Price, 183, a decision given on section 51, 46 Geo. III. cap. 65, which was a provision similar to that contained in section 39 of 5 and 6 Vict. cap. 35."

On these facts the Commissioners, after hearing parties, "being of opinion that the appellant was not liable, sustained the appeal, and discharged the assessment."

The Surveyor of Taxes required the Commissioners to state a case, which they did, setting forth the facts given above.

Argued for the appellant;—The respondent was a person "residing in the United Kingdom" in the sense of section 2, Schedule D, of the Income-tax Act, 1853.[1] Domicile had nothing to do with the question of residence. A man could not have two domiciles at one time, but he might have many residences.[2] The authority of the case of *Lloyd*[2] upon this point had not been overruled. The respondent was not in Great Britain for some temporary purpose only, and accordingly, he was not within the exception contained in section 39 of the Income-tax Act, 1842.* The case of

[1] Quoted *supra*, p. 147.

[2] Lloyd v. Solicitor of Inland Revenue, March 12, 1884, 11 R. 687.

* The Income-tax Act, 1842 (5 and 6 Vict. cap. 35), enacts, section 39, (After providing that temporary absentees from Great Britain are to be charged as residents),—"Provided always that no person who shall on or after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain at

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*Coote*[1] was decided upon section 51 of the Act 46 Geo. III. cap. 65, but that section was in the same terms as section 39 of the Act of 1842. The respondent had a residence in the United Kingdom to which he could resort at any time, and the fact that he was absent for the greater part of the year did not prevent him from being a person residing in the United Kingdom.[2]

Argued for the respondent;—The word "residing" was defined in section 39,[3] and the respondent was within the exception contained in that section, because he was here for a temporary purpose only, with no intention of establishing his residence, and he had not resided for six months. "Residing" meant ordinarily residing.[4] The test of liability was not having a residence, it was actually residing in the United Kingdom.[5] The decision in *Lloyd* v. *Inland Revenue*[4] had been overruled by *Colquhoun* v. *Brooks*.[6] The question was one of intention,[7] and the respondent did not come to Scotland with the view of making it his ordinary residence.

At advising,—

LORD PRESIDENT.—The question in this case is whether the appellant, Mr Cadwalader, is assessable to income-tax in respect of his occupancy of a house and shootings belonging to the Earl of Dalhousie at Millden, in Forfarshire.—(His Lordship narrated the facts set forth in the case.)

The answer to the question depends upon whether the appellant was, during the year of assessment, a "person residing in the United Kingdom," within the meaning of Schedule D of the Act of 1853, section 2. The appellant maintained that he was not a person "residing in the United Kingdom" within the meaning of that section, while the Surveyor of Taxes contended that he possessed that character, and the Commissioners sustained the appeal and discharged the assessment, whereupon the Surveyor of Taxes expressed his dissatisfaction with their determination, and required a case to be stated for the opinion of this Court.

I am of opinion that the decision of the Commissioners was erroneous, and that the appellant is assessable. He has, in effect, a lease of heritage in Scotland, he occupies personally the subjects let to him for a considerable portion of each year, and when he is absent in America these subjects are kept in readiness for his return. His occupation of the subjects is not of a casual or temporary character, but is substantial, and as regards some of its incidents it is continuous.

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one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain, in respect of the profits or gains received from or out of . . . any foreign possessions . . . or foreign securities."

[1] Attorney-General v. Coote, 1817, 4 Price, 183.

[2] Rogers v. Inland Revenue, June 28, 1879, 6 R. 1109; Young v. Solicitor of Inland Revenue, July 10, 1875, 2 R. 925, 1 Tax Cases, 57.

[3] Quoted *supra*, p. 148.

[4] Lloyd v. Solicitor of Inland Revenue, March 12, 1884, 11 R. 687, *per* Lord Shand, at p. 692.

[5] Turnbull v. Inland Revenue, Oct. 25, 1904, *supra*, p. 1.

[6] 1889, L. R., 14 A. C. 493.

[7] Attorney-General v. Coote, 1817, 4 Price, 183, *per* Richards, C. B., at p. 187.

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Domicile has no bearing on the question, and where a person has in fact a residence in the United Kingdom, he is chargeable as a person residing there, although he may also have a residence, or residences, out of the United Kingdom—*Lloyd* v. *Sulley*.[1] In that case the Lord President said, "The only question which can be raised upon that" (the statute) "is whether Mr Lloyd was, for the year 1883-84, to which alone this case applies, residing in the United Kingdom. There is no mention in this taxing clause of the character of the residence as being ordinary residence, or temporary residence, or residence for any particular part of the year, or proportion of it, 'residing in the United Kingdom' are the only words we have to guide us." I am not leaving out of view that if or in so far as the case of *Lloyd* v. *Sulley*[1] may be held to be an authority for charging a person resident in the United Kingdom with duty in respect of the profits of a trade carried on exclusively abroad and not received in this country, it must be taken to have been overruled by the decision in *Colquhoun* v. *Brooks*,[2] but this does not, in my judgment, affect its authority for the purpose for which I now refer to it. The judgment in *Lloyd* v. *Sulley*[1] does not appear to have proceeded to any extent upon the fact of Mr Lloyd being a British subject.

A master mariner having a house in the United Kingdom in which, when at home, he resided personally, and in which, when he was absent, his wife and family continued to reside, was held liable to be assessed for income-tax as a "resident in the United Kingdom"—*in re Young*,[3] and the fact of his absence from the United Kingdom during the year of assessment was held not to relieve him from liability. If a person continues to have a residence in the United Kingdom, he is resident there in the sense of the Acts—*Rogers* v. *Inland Revenue*.[4] A person may have more than one residence, if he maintains an establishment at each of them. Further, it is not necessary that the trade or business, or other source of the income of the person sought to be charged, should be carried on or exercised in this country.

It was maintained on behalf of the appellant that his case fell within section 39 of the Income-Tax Act, 1842, by which it is, *inter alia*, provided "that no person who shall on and after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein, and who shall not actually have resided in Great Britain" (now the United Kingdom—see the Act of 1853, sec. 5), "at one time or several times for a period equal in the whole to six months in any one year, shall be charged with the said duties mentioned in Schedule D as a person residing in Great Britain, in respect of the profits or gains received from or out of any possessions in Ireland or any other of Her Majesty's dominions, or any foreign possessions, or from securities in Ireland or any other of Her Majesty's dominions, or foreign securities; but nevertheless every such person shall, after such residence in Great Britain for such space of time as aforesaid, be chargeable to the said duties for the year commencing on the 6th day of April preceding." This

[1] 11 R. 687.
[2] 1889, L. R., 14 A. C. 493.
[3] 2 R. 925, 1 Tax Cases, 57.
[4] 6 R. 1109.

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provision seems to be directed primarily to prevent temporary residents for less than six months in one year from being charged in respect of profits received from abroad, but it does not appear to me to apply to a case like the present. I do not think that the appellant can reasonably maintain that he is in the United Kingdom "for some temporary purpose only, and not with any view or intent of establishing his residence therein," in the sense of the section, as he took Millden with the view of residing there during a material part of each year, and maintaining his connection with it as tenant during the rest of the year, as he has a residence always ready for him if he should choose to come to it. It is not necessary in order to a person being chargeable that he shall have his sole residence in the United Kingdom. A man can reside in more countries than one, although he can only have one domicile.

For these reasons, I am of opinion that the decision of the Commissioners was erroneous, and that the appellant is liable to the assessment in question, the amount of the assessment being, as was conceded, open to adjustment.

LORD ADAM.—The question in this case is whether the respondent was a person residing in the United Kingdom in such circumstances as to make him liable to assessment under Schedule D of the Income-Tax Act of 1853. The respondent is an American citizen, but that makes no difference in the application of the Act, as the Act says that any person residing in the United Kingdom shall be liable. Now, in order to reside, a person must have a residence, and the question is, what residence has the respondent here? He is tenant under a lease of some two or three years of Millden Lodge and shootings. Millden Lodge is a furnished house. It is kept up for him, and is placed at his disposal to go to at any time of the year he chooses. In fact, he has occupied it in the past, and probably will in the future, continuously for two months in each year, with all the comforts and necessaries of a man of wealth, as if it were his own house. That is the mode of residence of this gentleman. Can it be said that during, for example, these two months in which he is residing continuously in Millden Lodge, he is not residing there? Where is he residiug? He is residing, in my humble opinion, in Millden Lodge, and, therefore, residing in the United Kingdom; and if that be so, then it humbly appears to me that he is a person, in the sense of the Act, residing in the United Kingdom and assessable under the Act. We know that numerous persons have two houses with two residences in the United Kingdom, but in such a case as that the question does not arise, because, if they are residing in the United Kingdom, it does not matter what house they reside in. But when you come to a person who has one residence in this country and one residence abroad, what is to be said? It arose, as your Lordship has said, in the case of *Lloyd*.[1] There Mr Lloyd had a residence in this country of his own, because he had bought it, in which he resided for three and a half months in each year, but his business lay in Italy. He had his principal residence in Italy. Now, it was held that, although Mr Lloyd had this other resi-

[1] 11 R. 687.

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dence in which he resided part of the year in Italy, he had a residence in Scotland where he resided three and a half months, and he was found liable to be assessed, and, as your Lordship has said, that case is not, so far as I am aware, questioned in that respect. There is another case from Ireland, which was in the position of a foreign kingdom at the date of the Act in respect of the income-tax, because I understand Ireland was not made assessable, and that was the case of *Coote*.[1] There this Irish gentleman, who had his residence in Ireland, came over to London, acquired a house, and set up an establishment there. It appears that he resided the whole year in Ireland except for ten weeks, and there was a case of two residences, one in a district which was subject to income-tax, and one in Ireland which was not; but the Court held that he nevertheless was residing in England for a certain time of the year. Now, I confess I cannot draw a distinction between the ten weeks in *Coote's* case[1] and the three and a half months in *Lloyd's* case,[2] and the two months in this case. In this case there is residence in each country, and it is not a question of principal residence at all. It is simply a question of residence in this country. Is the person residing in this country? In my humble opinion Mr Cadwalader was residing in this country and was liable to assessment. That is, unless his case comes under section 39 of the Act of 1842, and I do not think it does. What that Act says is this,—"That no person who shall after the passing of this Act actually be in Great Britain for some temporary purpose only, and not with any view or intent of establishing his residence therein," and so on. Now, there might have been a question whether coming here to shoot for a few months in the year was to be considered, under the construction of this Act, as a temporary purpose. I should have thought it was not, because evidently this part of the Act applies to much more temporary purposes than that; but, then, in the next sentence it says "for some temporary purpose only and not with any view or intent of establishing his residence therein." If we are right, then it was with the view of establishing his residence that Mr Cadwalader came to this country. On these grounds I agree with your Lordship.

Lord M'Laren.—I think the important question in this case is whether Mr Cadwalader comes within the exempting clause, because, if he does not come within the exemption there is the strong presumption, supported, think, by previous decisions, that the general enacting words are broad enough to apply to his case. Now, the exemption is one that walks upon two legs. It is, first, that the party is here for a temporary purpose only; and secondly, that he is here not with a view or intent of establishing a residence. If the argument is lame in one of the limbs, then the party does not get the benefit of the exemption, because he is not able to affirm both members of the double proposition. There might, I think, be a possible room for difference of opinion as to the meaning of the words "view or intent of establishing a residence." The words are somewhat vague, but they seem to me to recognise what may be called a constructive residence as distinguished from actual residence. It is that you may take a house or country place

[1] 1817, 4 Price, 183. [2] 11 R. 687.

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with a view or an intention of establishing a residence, although you may not have had time to become a resident. Yet if you are looking forward to it, apparently that makes you liable to taxation, because in order to get the benefit of the exemption you must be able to say that you have no view and no intention of acquiring a residence. But, then, I think for the purposes of the present case the first point in the exempting clause is sufficient, because I do not think that Mr Cadwalader is in a position to affirm, when he comes year after year during the currency of his lease to spend the shooting season in Scotland, that he is here for a temporary purpose only. I do not mean that you might not frame a definition which would bring this within the scope of temporary purposes, but, taking the ordinary meaning of the word, I should say that temporary purposes means casual purposes as distinguished from the case of a person who is here in the pursuance of his regular habits of life. Temporary purpose means the opposite of continuous and permanent residence. Nobody ever supposed that you must reside twelve months in the year in order to be liable for income-tax, and therefore "temporary" does not mean the negation of perpetuity, but means that it is casual or transitory residence as distinguished from a residence (of which there may be more than one), which is habitual or permanent. I agree with all that has been said by your Lordships, and I think the decision in this case must be in favour of the Crown.

LORD KINNEAR.—I concur.

THE COURT reversed the determination of the Commissioners, and sustained the assessment.

SOLICITOR OF INLAND REVENUE—MACKENZIE & KERMACK, W.S.—Agents.

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Nov. 25, 1904.
Barr v. Ireland.

ALEXANDER BARR, Appellant.—*A. M. Anderson.*
THOMAS IRELAND, Respondent.

*Election Law—Lodger Franchise—Erroneous declaration by claimant—Evidence of value of lodgings—Representation of the People (Scotland) Act,* 1868 (31 *and* 32 *Vict. cap.* 48), *sec.* 4—*Registration Amendment (Scotland) Act,* 1885 (48 *and* 49 *Vict. cap.* 16), *sec.* 14.—The Representation of the People (Scotland) Act, 1868, sec. 4, enacts:—"Every man shall . . . be entitled to be registered as a voter . . . who . . . (2) As a lodger has occupied in the same burgh separately, and as sole tenant for the twelve months preceding the last day of July in any year, lodgings of a clear yearly value, if let unfurnished, of ten pounds or upwards."

The Registration Amendment (Scotland) Act, 1885, sec. 14, enacts:—"In the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall for the purposes of revision be *prima facie* evidence of his qualification."

A claimed to be enrolled in the register of voters of a burgh as a lodger in respect of "Bedroom and use of Public Room" in a house occupied by his mother. In the declaration annexed to his claim A declared that he had been "the occupier as lodger tenant of the above-mentioned lodgings" during the requisite period; and "that such lodgings are of the clear yearly value, if let unfurnished, of £10 or upwards." The Sheriff having after objection admitted the claim, the objector appealed. The case for appeal set forth that the claimant had for the qualifying period under contract with his mother the right to occupy as a lodger the said bedroom with board and use of the public room; and that for this he paid 20s. per week; that other members of the family used the public room; that no evidence was

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led as to the rental of the house, or as to the value of the bedroom and the use of the public room separately.

The Court (following *Green* v. *Donaldson*, 4 F. 245) *sustained* the appeal on the ground that there was no evidence of the letting value of the bedroom alone.

Registration Appeal Court.
Lord Kinnear.
Lord Trayner.
Lord Kincairney.

AT a Registration Court for the burgh of St Andrews, held on 5th October 1904, Thomas Ireland, cabinetmaker, 23 Market Street, St Andrews, claimed to be entered on the list of voters for the burgh as a lodger.

The particulars of the qualification set forth in the notice of claim were as follows:—

| Christian Name and Surname at Full Length. | Profession, Trade, or Calling. | Description of Lodgings. | Description of House or Houses in which Lodgings situate, with number, if any, and Name of Street. | Name, Description, and Residence of Persons or Person to whom Rent Paid. |
|---|---|---|---|---|
| Thomas Ireland. | Cabinet-maker. | Bedroom and use of Public Room. | Dwelling-house, 23 Market Street, St Andrews. | Mrs Jessie Ireland, Widow, 23 Market Street, St Andrews. |

The declaration annexed to the claim was in the following terms:—"I, the above-named Thomas Ireland, hereby declare that I have been, during the twelve months immediately preceding the last day of July in this year, the occupier as lodger tenant of the above-mentioned lodgings, and that I have resided therein during the twelve months immediately preceding the said last day of July; and that such lodgings are of a clear yearly value, if let unfurnished, of £10 or upwards.

"Signature of Claimant, THOMAS IRELAND."

This declaration was in the form given in Schedule (I.) annexed to the Representation of the People (Scotland) Act, 1868, except that the words "lodger tenant" in the claimant's declaration were substituted for the words "sole tenant" in the statutory declaration.

Alexander Barr, a voter on the roll, objected to the claim on the ground that the claimant was not a lodger in the sense of the Representation of the People (Scotland) Act, 1868, sec. 4,* in respect that he did not occupy the rooms claimed for separately and as a sole tenant.

The Sheriff (Mackenzie, K.C.) admitted the claim, and at the request of the objector stated a case for appeal.

The case set forth:—"The Sheriff found the facts to be as follows:—That the claimant, who was the only witness examined, had, for the qualifying period under contract with his mother, the said Mrs Jessie Ireland, the right to occupy as a lodger the said bedroom, with board and use of public room; that for this the claimant paid 20s. per week; that there are three rooms in the house and five of a family; that other members of the family use the public room. No evidence was led as to the rental of the house, or as to the value of the bedroom and the use of public room separately, nor was there any evidence adduced that anyone but the claimant used the bedroom."

* See rubric.

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The question of law was,—"Whether under the said contract, in the circumstances of the case, the claimant could be held to have occupied separately and as sole tenant, within the meaning of the statute, lodgings of sufficient value?"

The objector and appellant argued that the case was ruled by *Green* v. *Donaldson*.[1]

No appearance was made for the claimant.

LORD KINNEAR.—I think this case is governed by the decision in the case of *Green* v. *Donaldson*,[1] in the reasoning of which I entirely concur.

The question must therefore be answered in the negative and the claimant's name struck out of the list of voters.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT sustained the appeal.

NORMAN M. MACPHERSON, S.S.C., Agent.

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Nov. 25, 1904.
Dunlop v. Mackenzie.

WILLIAM HAMILTON DUNLOP, Appellant.—*Blackburn.*
HENRY MACKENZIE, Respondent.—*A. M. Anderson.*

*Election Law — Ownership Franchise — Property situated in one and Residence within seven miles of another Parliamentary Burgh in the same district of burghs—Representation of the People (Scotland) Act*, 1832 (2 *and* 3 *Will. IV. c.* 65), *sec.* 11—*Representation of the People (Scotland) Act*, 1868 (31 *and* 32 *Vict. c.* 48), *sec.* 59.—The owner of heritage situated in one of the burghs forming a Parliamentary district of burghs has not resided within seven miles of the burgh in the sense of sec. 11 of the Representation of the People Act, 1832, sec. 11, by residing for the qualifying period within seven miles of another of the burghs of the same district.

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney.

AT a Registration Court for the burgh of Oban, held on the 30th September 1904, William Hamilton Dunlop, residing at Doonside, Ayr, claimed to have his name inserted in the list of persons entitled to vote in the burgh of Oban in the election of a Member of Parliament for the Western District of Burghs, in respect of his ownership of houses, lands, and heritages in the burgh of Oban.

Henry Mackenzie, a voter on the roll, objected that the claimant had not resided within seven miles of the boundary of the Parliamentary burgh of Oban for six months previous to 31st July 1904, and from that date up to 30th September 1904.*

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[1] Nov. 29, 1901, 4 F. 245.

* The Representation of the People (Scotland) Act, 1832 (2 and 3 Will. IV. c. 65), sec. 11 (after a clause dealing with occupancy qualification, repealed by the Act 48 and 49 Vict. cap. 3, sec. 12), contains an enactment —(see *Davidson* v. *Johnston*, Dec. 16, 1903, 6 F. 239) in the following terms:—"Provided also that no such person shall be entitled to be registered or to vote in the present or any future year unless he shall have resided for six calendar months next previous to the last day of August in the present, or the last day of July in any future year within such city, burgh, or town, or within seven statute miles of some part thereof: provided also that persons so resident shall be entitled to be registered and to vote if they are the true owners of such premises as are hereinbefore mentioned within such city, burgh, or town of the yearly value of £10 or upwards, although they should not occupy any premises within its limits, or although

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The Sheriff-substitute (MacLachlan) disallowed the claim, on the ground stated by the objector, and at the request of the claimant stated a case for appeal.

The case set forth that the following were the facts:—"1. That the claimant is true owner of houses, lands, and heritages at Oban Hill and Glencruitten Road, within the limits of the Parliamentary burgh of Oban. 2. That these houses, lands, and heritages exceed £10 in annual value. 3. That the claimant has been owner of these subjects for several years prior to 31st July 1904, and his ownership continued up to 30th September 1904, the date of the Registration Court. 4. That the burgh of Oban is one of the Western District of Burghs—the other burghs being Ayr, Irvine, Campbeltown, and Inveraray. 5. That the claimant has resided within seven miles of the burgh boundary of the Parliamentary burgh of Ayr for six months continuously preceding the 31st day of July 1904, and such residence has continued up to the date of the Registration Court, namely, 30th September 1904."

The question of law was,—"Upon the facts above set forth is residence within seven miles of the boundary of a Parliamentary burgh forming one of a district of burghs for six months prior to 31st July preceding the date of the Registration Court, and residence up to the date of the Registration Court, combined with ownership of property of the annual value of £10 within another burgh of the district, sufficient to entitle a claimant to have his name inserted in the list of persons entitled to vote in the election of a Member for the said district of burghs in the burgh in which said property is situate?"

Argued for the appellant;—By section 59 of the Representation of the People (Scotland) Act, 1868, "burgh" was defined to include "district of burghs," and consequently the seven miles might be measured from any of the burghs comprised in the particular district, although the property belonging to the claimant might be in another

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the premises actually occupied by them should be of less yearly value than £10. . . ."

The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. c. 48), enacts:—

Sec. 59. "The following terms shall in this Act have the meanings hereinafter assigned to them, unless there is something in the context repugnant to such construction; that is to say," *inter alia*:—

> "'Burgh' shall mean any city, town, burgh, or district of cities, towns, or burghs returning a member or members to serve in Parliament."

The Burgh Voters Act, 1856 (19 and 20 Vict. c. 58), enacts,—

Sec. 34. "The distance of seven statute miles in the first-recited Act mentioned" [the Act of 1832], "and therein prescribed, as to the residence of voters for any burgh, shall be understood to be the distance of seven miles as measured in a straight line on the horizontal plane from any point from which such distance is to be measured according to the direction in that behalf given in the said Act. . . ."

The Redistribution of Seats Act, 1885 (48 and 49 Vict. c. 23), enacts,—

Sec. 13, subsec. (3). "For the purpose of determining the distance of the residence of any voter, and for all purposes of and incidental to the registration of voters in a Parliamentary borough divided into divisions, and for the purpose of the enactments respecting the division of any such borough into polling districts, all the divisions shall be deemed to form the same Parliamentary borough."

of the burghs. The Redistribution of Seats Act, 1885, section 13, subsection (3), proceeded on this principle. No. 28.

The argument for the respondent sufficiently appears from the opinions.[1] Nov. 25, 1904. Dunlop v. Mackenzie.

LORD KINNEAR.—I think the judgment of the Sheriff-substitute is right. The statute entitles a person to be registered as a voter who is the true owner of premises of the yearly value of £10 within the burgh wherein the vote is claimed. It is provided, however, that no such person shall be entitled to be registered unless he shall have resided for six calendar months next previous to the last day of July in any year within the limits of such burgh, or within seven miles of some part thereof. The question is, what is meant by "such burgh"? I think it means the burgh in which the claim to be registered is made, and that this provision is not affected by the interpretation clause of the 1868 Act. The interpretation clause requires us to construe the term used in the particular clause with reference to the context. A district of burghs is not a specific locality from which it is possible to measure distances. It means a number of burghs grouped together for the purpose of electing a member of Parliament. But the burghs are still locally separate, and a man who is living within seven miles of one of them is not therefore within seven miles of another. The conditions of the present case therefore do not comply with the statutory requirements, and I think the decision of the Sheriff ought to be affirmed.

LORD TRAYNER.—I agree. I have no doubt about the effect of section 11 of the 1832 Act. The section requires residence within seven miles of the burgh in which the vote is claimed, and I do not think that the provisions of the section have been affected or extended by the definition clause of the Act of 1868.

LORD KINCAIRNEY.—I agree. I think the words of the interpretation clause in the Act of 1868 do not apply to the provision in the Act of 1832.

THE COURT refused the appeal.

RUSSELL & DUNLOP, W.S.—ALEX. RAMSAY, S.S.C.—Agents.

GEORGE URQUHART, Appellant.—*A. M. Anderson.* No. 29.
DAVID DANIEL ADAM, Respondent.—*Ferguson, K.C.—M. P. Fraser.*

Nov. 25, 1904.* Urquhart v. Adam.

*Election Law—Household Franchise—Defeasibility of Tenure—Representation of the People (Scotland) Act*, 1868 (31 *and* 32 *Vict. cap.* 48), *sec.* 3—*Representation of the People Act*, 1884 (48 *and* 49 *Vict. cap.* 3), *secs.* 2, 3, *and* 7 (4).—Where a workman has been an inhabitant occupier of a dwelling-house belonging to his employer whether under his contract of service or under a contract of lease for the twelve months necessary to give a qualification for the franchise, his qualification will not be affected by the fact that his occupancy might have been terminated by his employer at any time during the twelve months.

*Observed* that there is only one household franchise enacted by the

[1] Nicholson on Elections, p. 113.

* Decided Dec. 9, 1904.

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**Representation of the People Act, 1884—that of inhabitant occupier as owner or as tenant of a dwelling-house—and that all that a claimant for the franchise as tenant has to prove in order to establish his right is that he is of full age and has occupied the house for the qualifying period, whether under a contract of service or under an ordinary contract of lease.**

Registration Appeal Court. Lord Kinnear. Lord Trayner. Lord Kincairney.

AT a Registration Court for the county of Peebles, held on 8th October 1904, George Urquhart, foreman joiner, Talla, Tweedsmuir, claimed to have his name inserted in the list of voters for the counties of Peebles and Selkirk as tenant of house at Talla, Tweedsmuir, in the county of Peebles.

David Daniel Adam, a voter on the list, objected.

The Sheriff-substitute (Orphoot) rejected the claim, and at the request of the claimant stated a case for appeal.

The case set forth:—"It was admitted or proved that George Urquhart had been and was in the service of John Best, contractor for the Talla Water-Works, as a foreman joiner, and had occupied a dwelling-house belonging to John Best at Talla, in the county of Peebles, for the qualifying period; that the terms upon which the workmen were engaged by their employer Mr Best to work at Talla were these:—When the contract of employment was made and their wages fixed, the workman was asked if he wished to get a house at Talla, and upon stating that he did, he was told that he would get one. It was agreed that 5s. a week as the rent of the house and as the price of coal to be supplied to him should be deducted from his wages fortnightly, and that sum was deducted from his wages during the qualifying period. Nothing was said on either side as to notice to be given on terminating the employment or as to quitting the house. The employer and the workman admitted that upon neither side was previous notice of terminating the employment required. By both parties that contract was terminable at pleasure. This arrangement was common on public works, and it was preferred by both parties. Both parties admitted that on the termination of the contract of employment by either party the house was at once to be vacated by the employee, but it was the custom of the employer, provided their houses were not required by him, to give as matter of favour married workmen a few days in which to remove their families and effects from the houses. Only workmen in Mr Best's employment occupied his houses at Talla. The premises upon which the qualification is claimed are not entered in the Valuation-roll.

"In these circumstances, the agent for the appellant contended that the said George Urquhart was entitled to have his name inserted in the said list of voters for the county of Peebles under the Service Franchise, introduced by section 3 of 48 and 49 Vict. cap. 3, or, alternatively, under the Household Franchise for counties, introduced by sections 2 and 7 (4) of said Act.*

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* The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), enacts:—

Sec. 3. "Every man shall . . . be entitled to be registered as a voter . . . at elections for a member or members to serve in Parliament for a burgh, who, when the Sheriff proceeds to consider his right to be inserted or retained in the register of voters, is qualified as follows—that is to say,

"1. Is of full age, and not subject to any legal incapacity; and

"2. Is and has been for a period of not less than twelve calendar months

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"Counsel for the objector maintained—(1) that the said George Urquhart occupied his house, not in virtue of his service or employment, but in respect that he paid rent for said house, and that therefore he was not entitled to be enrolled in said list under section 3 of said Act; and (2) that he was not an inhabitant occupier as tenant in respect that his occupation was contingent upon his employment; that he could be dismissed from such employment at any time, and put out of said house *simul ac semel* with such dismissal, and therefore his title being defeasible at any time, he was not entitled to be enrolled under sections 2 and 7 (4) of said Act.

"I sustained both objections, and I therefore rejected said claim."

The questions of law were:—"Whether the said George Urquhart possesses the qualification created by the Act 48 and 49 Vict. cap. 3, sec. 3, and is therefore entitled to have his name inserted in the list of persons entitled to vote in the election of a member for the counties of Peebles and Selkirk, or if he is not so entitled, whether the said George Urquhart is entitled to have his name inserted in said list, in respect that he is an inhabitant occupier as tenant of the premises claimed upon and so qualified, in terms of the said Act, 48 and 49 Vict. cap. 3, secs. 2 and 7, subsec. 4, and Acts therein mentioned?"

Argued for the appellant;—(1) The claimant occupied the house in virtue of a contract of employment and nothing else, and consequently he was entitled to be enrolled in virtue of sec. 3 of the Act of 1884. The fact that a small sum weekly was deducted from his wages in respect of his occupancy of the house did not alter the character of the occupancy.[1] (2) If, however, the claimant was to be regarded as a tenant, the fact that he had occupied as tenant for the

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next preceding the last day of July an inhabitant occupier as owner or tenant of any dwelling-house within the burgh. . . ."

The Representation of the People Act, 1884 (48 and 49 Vict. cap. 3), enacts:—

Sec. 2. "A uniform household franchise and a uniform lodger franchise at elections shall be established in all counties and burghs throughout the United Kingdom, and every man possessed of a household qualification or a lodger qualification shall, if the qualifying premises be situated in a county in England or Scotland, be entitled to be registered as a voter, and when registered to vote at an election for such county. . . ."

Sec. 3. "Where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant."

Sec. 7, subsec. 4. "The expression a 'household qualification' means, as respects Scotland, the qualification enacted by the 3d section of the Representation of the People (Scotland) Act, 1868, and the enactments amending or affecting the same, and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland, and for the purpose of the said section and enactments the expression 'dwelling-house' in Scotland means any house or part of a house occupied as a separate dwelling, and this definition of a dwelling-house shall be substituted for the definition contained in section 59 of the Representation of the People (Scotland) Act, 1868."

[1] Strachan v. Binnie, Jan. 19, 1888, 15 R. 308; Wallace v. Borrie, Nov. 28, 1896, 24 R. 376.

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qualifying period was enough to entitle him to be enrolled under sec. 2 and sec. 7, subsec. 4, of the Act of 1884. It might be that his tenure was defeasible, but he was not a mere squatter, as in *Campbell* v. *MacLachlan.* [1]

Argued for the respondent;—(1) To entitle a man to be enrolled under sec. 3 of the Act of 1884, he must occupy the house in virtue of an "office, service, or employment," [2] and the claimant occupied his house in virtue of payment of 5s. a week, which made his title of occupancy that of a tenant. (2) The claimant as a tenant was not entitled to be enrolled under sec. 2 and sec. 7, subsec. 4, of the Act, for his tenancy was defeasible at the will of his employer.[3]

At advising,—

LORD KINNEAR.—The appellant in this case claims to be registered as tenant of a house at Talla, in the county of Peebles. The facts on which the question in dispute arises are that he had agreed to serve as a foreman joiner in the employment of Mr John Best, contractor for the Talla Water Works; that when the amount of his wages had been fixed, it was further agreed that he should occupy a dwelling-house belonging to his employer, that five shillings a week should be deducted from his wages fortnightly as the rent of the house and as the price of coal to be supplied to him, and that he should vacate the house on the termination of the contract of employment by either party. In terms of this agreement he had occupied the house for the qualifying period.

In these circumstances he bases his claim, firstly, on section 3 of the Act of 1884, and secondly and alternatively on section 2 and section 7, subsection 4, of the same Act. The Sheriff has held that he is not entitled under the first of these enactments because he has not occupied his house by virtue of a service or employment; and that he is not entitled under the second because his title of occupation was defeasible, inasmuch as it is dependent upon the continuance of a contract of employment which was terminable at the pleasure of the employer. This last objection is admitted to be inapplicable if the first ground of claim is established; and the first question argued therefore was whether on the facts stated the appellant must be held to have occupied by virtue of employment or by virtue of an ordinary verbal lease for payment of rent. I think it unnecessary to decide between these conflicting views, because in either case I am of opinion that the appellant has a good claim as tenant.

Some unnecessary confusion has been introduced into the discussion by what I think an inaccurate use of language in the appellant's statement of his case as a claim under what he calls the service franchise, or alternatively under the household franchise for counties. These are not two different franchises. There is only one household franchise enacted by the statute of 1884 on which he founds; and the question is whether his claim to that

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[1] Campbell v. MacLachlan, Dec. 22, 1898, 1 F. 212.

[2] Aitchison v. Lothian, Dec. 1, 1890, 18 R. 337.

[3] Rose v. Grant, Dec. 19, 1868, 7 Macph. 309, 41 Scot. Jur. 183; Forbes v. Webster, Dec. 19, 1868, 7 Macph. 310, 41 Scot. Jur. 183; Deans v. Blackwood, Oct. 18, 1869, 8 Macph. 1, 42 Scot. Jur. 13; Murray v. M'Gowan, Oct. 20, 1869, 8 Macph. 4, 42 Scot. Jur. 14; Campbell v. MacLachan, 1 F. 212.

franchise can be supported. The second section of the statute enacts that a uniform household franchise shall be established in all counties and burghs throughout the United Kingdom, and that every man possessed of a household qualification shall be entitled to be registered as a voter. The seventh section, subsection 4, defines the expression "household qualification" to mean, as respects Scotland, the qualification enacted by the third section of the Representation of the People Act, 1868; and that qualification is that a man of full age and not subject to any legal incapacity is and has been for a period of not less than twelve calendar months next preceding the last day of July an inhabitant occupier as owner or tenant of any dwelling-house. So far, therefore, all that the claimant has to prove is that at the time when the Sheriff proceeded to consider his right to be inserted in the register of voters he was an inhabitant occupier as tenant of his dwelling-house at Talla, and that his occupation of the house as the tenant had endured for twelve months preceding the last day of July. The third section of the Act of 1884, which is supposed to introduce a new and different franchise, seems to me to do no more than define the franchise already enacted by the second section so as to make it include a particular case which had not previously been held to fall within the language of the Act of 1868. It enacts that "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves, he shall be deemed for the purposes of the Representation of the People Acts to be an 'inhabitant occupier' of such dwelling-house as a tenant." What the claimant has to prove, therefore, is still inhabitant occupancy as a tenant for the qualifying period and nothing more. He may establish his right in that character by proving that he has occupied by virtue of a service or employment, or by proving that he has occupied by virtue of an ordinary contract of lease for the payment of rent. But in either case the only condition he has to satisfy beyond proving his title of tenancy is to shew that he has in fact occupied the house as inhabitant for twelve months before the last day of July. It is conceded that this is enough if his title of tenancy is a contract of service or employment. In that case it is admittedly of no consequence that his occupancy may be terminable on the termination of his employment, as indeed it must be if he occupies by virtue of his employment alone.

But it is maintained, and the Sheriff has held, that an additional condition of indefeasibility of title is required if he occupies as tenant not under a contract of employment but under a lease. I think this distinction is baseless. What is required is tenancy for the prescribed period, and I am unable to find any reason for holding that a condition which is admittedly consistent with tenancy in the sense of the statute when it attaches to a contract of employment is yet fatal to the statutory conception of tenancy when it is found in a direct contract of lease. The conditions which the statute requires are, first, that the man must be an inhabitant occupier as tenant at the time when his claim is considered, and secondly, that he must have been so for a period of twelve months. If these two conditions are satisfied there is nothing in the statute to suggest that he is disqualified by reason of his title of occupancy having been potentially defeasible, if it has

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not been in fact defeated during the prescribed period of possession. If it has stood as a valid title for that period, there is no ground for inquiry as to the risks to which it may possibly have been exposed in events which have not happened.

I will only add with reference to the cases cited by the respondent's counsel that the authority of *Rose* v. *Grant* [1] and other cases, in which it was held that occupancy under a contract of service could not qualify as a tenant, appears to me to be displaced by the third section of the Act of 1884; and on the other hand that *Campbell* v. *M'Lachlan* [2] is not in point, because it decided only that possession by virtue of no title or contract whatever was not occupation as a tenant. There is nothing in the view I have stated to imply that a merely precarious possession without any title at all is equivalent to tenancy either under a lease or a contract of employment; and so far as they only negative that suggestion the previous cases are not altered by the new Act.

If your Lordships take the same view, I would propose that we should not answer the question put to us in the terms in which it is stated, but that we should find that the appellant has a qualification as inhabitant occupier as a tenant, and remit to the Sheriff to insert his name in the register.

LORD TRAYNER and LORD KINCAIRNEY concurred.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the appeal, sustain the same; recall the judgment appealed against; remit to the Sheriff to add the name of George Urquhart, foreman joiner, Talla, Tweedsmuir, to the roll of voters for the counties of Peebles and Selkirk as tenant of the house at Talla aforesaid," with a finding as to expenses.

P. GARDINER GILLESPIE, S.S.C.—RUSSELL & DUNLOP, W.S.—Agents.

No. 30.
Nov. 30, 1904.
Busby v. Clark.

JAMES BUSBY, Petitioner.—*Morton.*
JAMES CLARK, Respondent.

*Parent and Child—Petition for custody of child—Process—Respondent obstructing execution of service.*—In a petition by a father for the custody of his infant child against his father-in-law, in whose possession the child was alleged to be, the latter deliberately obstructed and prevented service of the petition upon him. The Court *granted* the prayer of the petition without service having been effected.

1st DIVISION. JAMES BUSBY, machinist, 2 Union Place, Dalmuir, Dumbartonshire, presented a petition for the custody of his infant child, Thomas Clark Busby, against James Clark, Dalmuir, the petitioner's father-in-law.

The petitioner averred that on 2d October 1904 his wife gave birth to the child in question; that his wife died on 9th October 1904; that after her death the child was carried off by the petitioner's mother-in-law, and had since been residing in the custody of the petitioner's father-in-law, James Clark, watchman, 7 Gladstone Place, Dalmuir; that the petitioner was desirous of having the custody of

[1] 7 Macph. 309. [2] 1 F. 212.

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his child, but Clark, although he had been asked by the petitioner and his agent on four different occasions to hand over the child, refused to do so.

The petitioner further averred that since his wife's death he had resided in family with his mother and stepfather; that his wages were 33s. per week; and that his stepfather and mother were willing to receive the child, and do their best for its welfare.

The petitioner accordingly craved the Court to find that he was entitled to the custody of his child, and to ordain James Clark to deliver up the child to the petitioner, or to any other person having his authority.

On 24th November 1904 the Court ordered intimation and service of the petition.

On 30th November counsel for the petitioner, in the Single Bills, stated to the Court that an attempt had been made to serve the petition upon Clark by registered letter, but the letter had been returned by the post-office to the Clerk of the process, marked "Absolutely refused." An attempt had then been made to serve the petition personally on Clark, but a telegram had been received from the messenger-at-arms in these terms:—"Have been unable to effect service to-night."

Counsel for the petitioner moved the Court to grant the prayer of the petition in respect the matter was urgent, and Clark had deliberately obstructed service of the petition.

No appearance was made for Clark.

LORD PRESIDENT.—In this case the respondent has obstructed and prevented service, and as he has taken no steps to explain or justify his conduct, I think that we should grant decree of custody as craved.

LORD ADAM concurred.

LORD M'LAREN.—I agree. The obstruction here was directed not only against receiving a registered letter, but also against allowing personal service. It seems to me, therefore, that the respondent was deliberately avoiding service, and that decree of custody should therefore be granted.

LORD KINNEAR concurred.

THE COURT granted the prayer of the petition.

W. A. FARQUHARSON, S.S.C., Agent.

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Stewart v. Chalmers.

MRS MARY ANN MUNRO OR STEWART AND OTHERS, Petitioners.—*Young.*

THOMAS CHALMERS, Respondent.—*Campbell, K.C.—Graham Stewart.*

*Trust—Removal of Trustee.*—A, one of two trustees, who were law-agents, wrote to B, his co-trustee, who was law-agent in the trust, making a claim for half fees on all business to be done by B for the trust, and added that on this condition being agreed to he would consider the question of investing the trust funds. B refused to agree to this arrangement. A thereafter refused to approve of an investment suggested by B, assigning no reason for his refusal. He also refused to assume new trustees, or to resign. On a petition by the beneficiaries the Court *removed* A from the office of trustee, but continued the petition until B had lodged a minute of assumption of two new trustees.

No. 31.

Nov. 30, 1904. Stewart v. Chalmers.

1st Division.

The late Peter Stewart, of the Kinnoull Arms Inn, Perth, who died on 6th January 1897, by his trust-disposition and settlement, dated 3d October 1892, conveyed his whole estate, heritable and moveable, to John Stewart, Thomas Chalmers, and James Harper, all solicitors in Perth, as trustees for the purposes therein mentioned. The trustees were given power to sell, power to assume new trustees, and power to appoint one of themselves to be factor or agent. The three trustees named all accepted office. John Stewart acted as law-agent of the trust until his death, on 12th February 1904. At that date James Harper having also died, Thomas Chalmers was the only surviving trustee. On 7th March 1904 Chalmers assumed as trustees George Robert Douglas, painter, Perth, and Robert Stewart, solicitor, Perth, a nephew of the testator, and they both accepted office. On 10th March 1904 Robert Stewart, who had succeeded to John Stewart's business, was appointed law-agent of Peter Stewart's trust. On 18th April 1904 George Robert Douglas resigned office as a trustee.

In September 1904 Mrs Mary Ann Munro or Stewart, widow of Peter Stewart, and his children, being the whole beneficiaries interested in the trust-estate, presented a petition for the removal of Thomas Chalmers from the office of trustee, or otherwise for the appointment by the Court of John Anderson Stewart, solicitor, Perth, and John Munro, jeweller, Perth, or such other person or persons as the Court might think fit, to be trustees or trustee.

The petitioners averred that at Whitsunday 1904 there was in the hands of the trustees a large sum available for investment, consisting mainly of a sum of £4410, being the price realised by the sale as at that term of the Kinnoull Arms Inn; that upon Robert Stewart, in April 1904, proposing that provision should be made for investing the trust funds, Thomas Chalmers, on 21st April 1904, had written:—"As your position and mine as trustees are now equal, I am to insist on half fees for all business to be done by you for this trust. On hearing from you that you agree to this condition I will consider the question of investing the trust funds"; that he had adhered to this position, and had continued to hinder trust investments, and to obstruct the administration of the trust; that he had also refused to assume new trustees, although the names of two persons who were willing to act were put before him, and had refused to resign office as a trustee; that his whole conduct had been improper and unjustifiable and hurtful to the interest of the beneficiaries; and that he had persisted in preferring his own personal interests to those of the trust.

In support of these averments the petitioners founded upon certain letters, the material portions of which are quoted in the opinion of the Lord President.

Thomas Chalmers lodged answers, in which he expressed regret for the terms of the letter of 21st April 1904, in which he had made the demand for half fees. He explained that his firm were agents in John Stewart's trust; that Robert Stewart, who had succeeded to John Stewart's business, was aggrieved at not being appointed agent in John Stewart's trust; that he had proposed to the respondent that if the respondent's firm were to be agents he should receive one half of their fees; and that it was with this in his mind, and irritated by the tone of Robert Stewart's letters, that he had written the letter of 21st April. He also stated that notwithstanding that letter he did

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not impede the work of the trust or decline to consider investments; that accordingly on 13th May 1904 he signed the disposition of the Kinnoull Arms Inn; and that with regard to the only investment submitted to him he considered it, and disapproved it in respect that the valuation of the security was obtained for the borrower, and was greatly too high, and that at its real value the security did not shew the requisite one-third margin.

From the letters it appeared that when the investment referred to was submitted to the respondent he did not state any of the objections now put forward, but merely wrote that he disapproved of it without assigning any reason.

Argued for the petitioners;—The respondent's conduct here had been such as to justify his removal from office. He had obstructed the business of the trust in order to compel assent to his proposal that he should get half fees for the work done by the law-agent of the trust. When he refused to approve the investment submitted to him he did not suggest the objections now stated, or intimate that he was prepared to approve an investment if a proper one was found.

Argued for the respondent;—The respondent admitted that his letter, making the claim for half fees, was unjustifiable and regrettable, but it was never seriously meant, and was not acted upon, as he considered the only investment submitted to him and disapproved it for sufficient reasons. In order to justify the extreme step of removing a trustee there must be conduct amounting to decided malversation of office,[1] and there was nothing of that kind here.

LORD PRESIDENT.—This is a petition at the instance of Mrs Stewart and others, for the removal of Thomas Chalmers, solicitor, Perth, from the office of trustee under the trust-disposition and settlement of the late Peter Stewart, who was the husband of the leading petitioner, dated 3d October 1892. It is always a serious thing to remove a trustee, and it is not done without good and sufficient reason. But I am clearly of opinion that the conduct of the respondent has been of such a character as to make it unsuitable, if not unsafe, that he should be allowed any longer to remain one of the trustees under this trust.

The trustees nominated in the trust-disposition and settlement were three in number, all solicitors in Perth, and after the death of the truster on 6th January 1897, all the persons nominated trustees accepted office. The trust was not a large one, and there need not have been any difficulty in its administration if everyone connected with it had been reasonably desirous of doing his duty, and not of making profit out of it for himself.

The incidents with which we have specially to deal began in the month of April 1904, when Robert Stewart, who after the death of the respondent's two original co-trustees was assumed as a trustee, and was appointed law-agent to the trust, wrote to the respondent what seems to me to have been a perfectly proper letter expressing his desire to consult him as his co-trustee in regard to the investment of the trust-estate. The respondent's answer to that letter was not of a proper or I hope of a usual character. He said in it "As your position and mine as trustees are now equal, I am to insist on

[1] Gilchrist's Trustees v. Dick, Oct. 20, 1883, 11 R. 22, *per* Lord President Inglis, at p. 24; Harris v. Howie's Trustee, Oct. 20, 1893, 21 R. 16.

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half fees for all business to be done by you for this trust. On hearing from you that you agree to this condition, I will consider the question of investing the trust funds." The ruling consideration to which the respondent refers was not the interest of the trust but of the respondent himself. He insists on receiving half fees for which he had not given and was not to give any professional service, and he makes payment of this indefensible claim a condition of his attending to the business of the trust which he had accepted. It would be difficult to conceive of anything more improper than this proposal, that a trustee should make a profit out of the execution of his trust and at its expense. He insists that if he allows Mr Stewart to receive professional fees for work done by him (Stewart) for the trust, the respondent shall receive half of them. I have seldom known of anything more improper than this proposal by a trustee, that he be allowed to pocket a portion of the trust funds. The proposal was quite indefensible, and shews that the respondent is unfit to be trusted with the position of a trustee. Mr Stewart's reply to the respondent's proposal was this:—"I am not aware that a gratuitous trustee is entitled to sacrifice the interests of the beneficiaries to his own. I certainly have no intention of being a party to such a bargain."

The correspondence goes on and Mrs Stewart wrote on 4th May to the respondent, suggesting that two new trustees should be assumed. And on 6th May the respondent replied that he could not see his way to agree to assume new trustees at present, and on the same date he wrote to Mr Stewart that he had objection to assume any new trustees at present, and upon being asked by Mr Stewart what his objection was, he wrote on 7th May that he did "not feel called upon to give you any further reason for refusing to assume new trustees." I do not know what his reason could have been unless to create a deadlock in the management of the trust with the view of concussing the trustees to allow him to receive half the fees payable to the agent of the trust.

On 6th May Mrs Stewart wrote to the respondent,—"My nephew Mr Robert Stewart informs me that you insist on getting half fees for all the business to be done in my late husband's trust, and unless he agrees to the conditions you will not consider the question of investing the trust funds; I do not consider this any reason for delaying the business of the trust." In reply to this letter the respondent wrote expressing regret that he could not discuss with Mrs Stewart the question to which she refers, "which is entirely a personal one between Mr Robert Stewart and myself." If anything had been necessary to shew that the respondent's object was to get a private profit for himself out of the trust funds, this last letter would have been sufficient to do so. The respondent said that if he was not allowed to commit a breach of trust, he would bring the trust to a deadlock. When Mr Robert Stewart wrote on 14th May suggesting a particular investment, the respondent replied:—"I do *not* approve of this investment"; but he gave no reason for his disapproval. When on 22d June he wrote, asking Mr Robert Stewart to arrange for a meeting of trustees for the purpose of appointing a law-agent, he said nothing about the proposed investment or his objections to it, and he made no suggestion in regard to it.

I do not think it is necessary to go further into the details of this case,

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except to repeat that the position taken up by the respondent was quite indefensible, and that he not only displayed a total disregard of the benefit of the trust, but also acted in a way contrary to its interests and calculated to bring it to a deadlock, all for the purpose of getting some of the trust funds for himself. If he thought Mr Stewart was acting wrongly with regard to the investment, it was his duty to say so, and to take steps for obtaining a proper investment, but instead of doing this he sought to prevent anything at all being done. Such an attitude on his part was quite indefensible, and it appears to me that the proper course is to remove him from the office of trustee.

LORD ADAM concurred.

LORD M'LAREN.—I am of the same opinion. I do not think it would have been incompetent for Mr Chalmers to make an arrangement with his co-trustee, if the beneficiaries did not object, that they should act as joint law-agents to the trust. Although such an arrangement would be unusual I cannot think that, if it were entered into by agreement between the parties, it would be open to objection on the grounds argued. But here Mr Chalmers' proposal was that he should receive half the fees earned by the law-agent to the trust, and this demand he attempted to enforce by taking up an attitude of obstruction towards the administration of the trust until his demand should be complied with. I think such an attitude as this, insisted upon as it has been here, is quite sufficient to justify the present application to the Court for his removal.

I cannot accept the explanations offered as in any way sufficient. The respondent can have been under no misapprehension as to the nature of his proposal, for every law-agent knows perfectly well that he is not entitled to make a profit for himself as trustee out of the administration of the trust. The attitude of the respondent here towards the trust seems to have amounted simply to the desire to make what money he could out of the trust funds for distribution among the lawyer trustees. If then responsible and suitable persons are willing to act as trustees, I think that the respondent should be removed from his position and new trustees be appointed. It is never a good thing that a trust should be left in the hands of a sole trustee, and, whatever confidence the Court may have in the ability and the integrity of the remaining trustee, it is always unwilling to bring about such a state of affairs.

LORD KINNEAR.—I entirely agree with your Lordship in the chair and with Lord M'Laren, and I would only add that I do not think that the removal of this trustee for the conduct that has been brought to our notice should depend in any way on arrangements being made for the assumption of new trustees, but that he should be displaced at once irrespective of the new assumption. At the same time I quite agree that it would be well that arrangements should be made to prevent the trust falling into the administration of a sole trustee.

ON 22d November 1904 the Court pronounced the following interlocutor:—"Remove the said Thomas Chalmers from the

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office of trustee under the trust-disposition and settlement of the deceased Peter Stewart of the Kinnoull Arms Inn, Perth, dated 3d October 1892, and decern: Find the said Thomas Chalmers liable in the expenses of the petition and the procedure following thereon, and remit the account thereof to the Auditor to tax and to report: Further continue the cause to allow Robert Stewart, the remaining trustee, to lodge in process the deed of assumption to be executed by him in favour of the two persons whose names are suggested in the petition."

On 30th November 1904 the Court pronounced this interlocutor:—"The Lords in respect that there has now been lodged in process the deed of assumption (No. 47 of process) referred to in the foregoing interlocutor, find it is no longer necessary to continue the cause."

ISAAC FURST, S.S.C.—J. T. DONALDSON, Solicitor—Agents.

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WILLIAM BROWN WILSON, Pursuer (Respondent).—*T. B. Morison—Dunbar.*

1ST EDINBURGH CITY ROYAL GARRISON ARTILLERY VOLUNTEERS AND LIEUT.-COLONEL JAMES FRANCIS MACKAY, Defenders (Reclaimers).—*Sol.-Gen. Dundas—Pitman.*

*Limitation of Action—Public Authorities—Process—Commencement of Action—Colonel Commanding Volunteer Regiment—Public Authorities Protection Act*, 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1.—The Public Authorities Protection Act, 1893, enacts, *inter alia*, that any action, prosecution, or other proceeding against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, shall not lie or be instituted unless it is commenced within six months after the act complained of.

In an action for damages against a regiment of volunteers and against the officer commanding the regiment, as representing the regiment, and as an individual, by the father of a child, who was killed on the public street by an ammunition waggon, the horses of which had bolted, the pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade.

The action was not raised within six months after the date of the accident.

The Lord Ordinary (Kyllachy) dismissed the action as against the regiment and its commanding officer as representing it, on the ground that the funds of the regiment belonged to the Crown, and that the Crown could not be sued for damages caused by the wrongful acts of its officers, and allowed a proof before answer as against the commanding officer as an individual.

*Held* (*rev.* judgment of Lord Kyllachy on the last point) that the action against the commanding officer, as an individual, was excluded by the statute, on the ground that the fault averred against him was neglect of duty in his public capacity as commanding officer.

1ST DIVISION. Ld. Kyllachy.

ON 27th November 1903 William Brown Wilson, tramway inspector, 7 Kemp Place, Edinburgh, raised an action against the 1st Edinburgh City Royal Garrison Artillery Volunteers, and James Francis Mackay, Lieutenant-Colonel commanding the regiment, for himself, and as representing the regiment, concluding for payment of £500 as damages for the death of his child.

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The pursuer averred that on 14th March 1903 his child, aged six, while standing on an island platform, opposite the Lothian Road Board School, was knocked down and killed by an ammunition waggon belonging to the defenders and drawn by two horses hired by them, which came from the direction of Grindlay Street, at a furious and runaway pace.

The pursuer further averred, *inter alia*:—(Cond. 1) "The parade of 14th March 1903 was not a parade for military purposes. It was what is called a 'march-out'—that is, a parade of the guns, &c., on the public streets merely for the purpose of attracting public attention, and thereby securing recruits to the corps. The 'march-out' is not a parade which the members of the corps are required to attend, and no drill or instruction are given at it." (Cond. 4) "It was the duty of Colonel Mackay to take special precautions for the public safety. In particular, it was said defender's duty to see—(1) That quiet horses, suitable for such work, should be used; (2) that experienced and competent drivers able to control the horses drawing the guns and ammunition waggons were employed; and (3) that the arrangements for harnessing the horses to the guns and waggons, and parading them on the streets, should be superintended by a commissioned officer of experience familiar with such work. But these duties the said defender disregarded: as, having issued his orders for the 'march-out,' which his subordinates were bound to carry out, he left the entire control to the non-commissioned officers and men of the volunteer regiment." (Cond. 5) "In point of fact, the horses which the said defender instructed to be used were wholly unaccustomed to such work, and had never been previously engaged in it. . . . The said defender took no steps to ascertain the suitability of the horses, or their fitness to be harnessed with the special harness necessary for drawing the guns and ammunition waggons." (Cond. 6) ". . . Had the defender himself been present, or had he instructed any responsible commissioned officer to attend the yard, he would have seen that it was both improper and dangerous to have permitted the said horses to enter the public streets. But the sergeant to whom the defender entrusted the whole control, and who was instructed by the defender to bring the ammunition waggons to St Andrew Square for the purposes of the 'march-out,' appointed two inexperienced gunners to drive the said horses. The said gunners were not competent drivers, and had no experience in horses. . . . Since the closing of the record the pursuer has ascertained, and it is the fact, that the ammunition waggons so used were those of the 12-pounder gun, and the said gunners were instructed by the defender, Colonel Mackay, or those acting with his authority, to lead the horses through the streets in the manner appropriate to the much heavier waggons of the 4·7 gun. This was contrary to the military regulations, which require 12-pounder ammunition waggons to be driven by drivers seated on horseback, and was dangerous, as a driver leading the horses drawing such a waggon in the manner described has not sufficient control of his horses to enable them to be driven through the streets with due regard to the safety of the public." (Cond. 7) "The said accident was thus caused through the fault of the defenders in permitting said ammunition waggons to be drawn through the public streets by young and restive horses unused to such work and in unaccustomed harness, and driven by incompetent drivers. The accident was further caused by the fault of the defender, Colonel

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Mackay, in failing to appoint a commissioned officer of experience, delegated with authority to countermand the order which had been given to parade the said ammunition waggons if the horses proved unsuitable and restive."

The pursuer pleaded, *inter alia*;—(1) The pursuer's daughter having been killed through the fault of the defenders, they are liable in reparation.

The defenders pleaded, *inter alia*;—(1) The action is excluded by the Act 56 and 57 Vict. cap. 61, sec. 1, and the defenders are entitled to expenses as between agent and client. (2) The action is incompetent—(*a*) As laid against the said corps and the said James Francis Mackay, as commanding officer, for himself and as representing the said corps; (*b*) because an action for damages does not lie against the defenders, or all or any of them, as servants of the Crown, in the execution of their duties as such.

On 2d November 1904 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that the action as laid against the defenders, the 1st Edinburgh City Royal Garrison Artillery Volunteers, and James Francis Mackay, as Lieutenant-Colonel of said Regiment and Officer Commanding and representing the same, cannot be sustained; therefore dismisses the same, and decerns: *Quoad ultra* finds that the claim for damages may be pursued against the said James Francis Mackay as an individual: Before answer, allows to the parties a proof of their averments, and to the pursuer a conjunct probation; reserving expressly in the circumstances the applicability of the Statute 56 and 57 Victoria, caput 61. . . ."*†

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* The Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), sec. 1, enacts,—"Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof."

† "OPINION.—In this case I have come to the conclusion that the action cannot be sustained as against Colonel Mackay, as representing the Volunteer Regiment, and as holder and administrator of its funds. These funds belong to the Government—that is to say, the Crown—and it is, I think, an accepted doctrine that the Crown cannot be liable or sued for damages in respect of the 'Torts'—the wrongful act of its officers. I therefore propose to dismiss the action so far as directed against Colonel Mackay as representing the regiment.

"On the other hand, I have come to the conclusion—(1) That the action is sufficiently well laid as against Colonel Mackay as an individual; and (2) that, although he is sued in both capacities, the failure of the action as against him in the one capacity—or, if it is preferred to put it, the failure of the action as against the regiment, or as against the Crown—does not prevent the conclusion for damages—a conclusion which relates to a single wrong—being pursued as against Colonel Mackay individually.

"I also consider, having regard to the pursuer's averments, particularly his averment in the last paragraph of condescendence 1, and the additional statement now introduced at the close of condescendence 6, that I cannot

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The defenders reclaimed, and argued;—(1) The action was excluded by the Public Authorities Protection Act, 1893, sec. 1.[1] The averments made against Colonel Mackay were all based upon his alleged neglect of duty as a volunteer officer. (2) The action conjoined several defenders, against whom different grounds of action were alleged, and was therefore incompetent.[2] The result of the Lord Ordinary's interlocutor might be to make Colonel Mackay liable for the whole sum claimed instead of for his *pro rata* share.

Argued for the respondent;—(1) The action was competent against Colonel Mackay as an individual. The fault averred against him was neglect of duty in his private capacity, and not as a volunteer officer. He could not, therefore, claim the protection of the statute.[3] (2) *Barr*[2] and *Sinclair*[2] were not in point. In these cases different grounds of action were averred, here there was only one ground of action. In *Milne* v. *Smith*,[4] an action had been dismissed as against one of the defenders, and allowed to proceed against the other defender.

LORD PRESIDENT.—The important question which we have to decide here is whether the case stated on record does or does not fall within the restrictions imposed by the Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61). The 1st section of that Act provides—(His Lordship quoted the section).

In reading this Act it is necessary to note that it applies not only to acts done in pursuance or execution of any public duty or authority, but covers intended execution also. Of course if the person can shew he was not in fault, the action would fail independently of the statute, but here fault is averred, and what we have to decide is whether that fault is covered by the provisions of the statute, in respect that it was committed in pursuance or execution, or intended execution, of a public duty or authority.

The Lord Ordinary has found that the action cannot be sustained as against the Volunteers or against Colonel Mackay, as commanding officer and as representing the regiment. So far as the Volunteers and Colonel Mackay were performing military duty, the finding of the Lord Ordinary

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*de plano* hold the action excluded by the Statute of 56 and 57 Vict. (Public Authorities Act) founded on by the defenders. I think it is necessary that, before dealing with that question, the exact facts should be ascertained. Accordingly, not being prepared to hold either that the action is excluded by the statute, or that its averments as against Colonel Mackay, as an individual, are plainly irrelevant, I propose to allow a proof before answer, reserving expressly the question as to the applicability of the statute, and also reserving the question of expenses."

[1] Quoted *supra*, p. 170; Christie v. Glasgow Corporation, May 31, 1879, 36 S. L. R. 694; Spittal v. Corporation of Glasgow, June 17, 1904, 6 F. 828; Conolly v. Managers of Stranraer Reformatory, Feb. 4, 1904, 11 S. L. T. No. 356; Cree v. St Pancras Vestry [1899], 1 Q. B. 693; Markey v. Tolworth Joint Isolation Hospital District Board [1900], 2 Q. B. 454.

[2] Sinclair v. Caithness Flagstone Co., Limited, March 4, 1898, 25 R. 703; Barr v. Neilsons, March 20, 1868, 6 Macph. 651.

[3] M'Ternan v. Bennett, Dec. 21, 1898, 1 F. 333; Bell v. Black & Morrison, June 28, 1865, 3 Macph. 1026; Sharpington v. Fulham Board of Guardians [1904], 2 Ch. 449; Marks v. Frogley [1898], 1 Q. B. 888.

[4] Nov. 22, 1892, 20 R. 95.

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gives them the protection of the statute, but he finds that the action may be pursued against Colonel Mackay as an individual. Now, if the record shewed that the Colonel had done something as an individual and not as colonel of the regiment, I could agree with this view. But if on an examination of the record we find that he is not alleged to have done anything as an individual, but only in his military capacity and in the discharge of a public duty or authority, the provisions of the Act will apply. Upon a careful consideration of the record, I am unable to find that the pursuer has well alleged that anything was done by Colonel Mackay except in pursuance of his duty as commanding officer of the corps.

The pursuer, in the first place, alleges that Colonel Mackay is the commanding officer of the corps and as such represents it, but he maintains that in this instance he was acting in an individual capacity. He avers that this was not a parade for military purposes, that attendance at it was not compulsory, and that it was merely a "march-out" for the purpose of attracting recruits to the corps. Colonel Mackay is not alleged to have done anything except in the performance of what he intended and believed to be his duty as the commanding officer of the regiment. It would be strange indeed if it were held that a recruiting sergeant is not performing his duty when he is engaged in the important task of obtaining recruits for the army. And if we are asked to hold that this was a private expedition, not a military parade, we would require some averments as to how private and unofficial persons came to order out the guns and ammunition waggons belonging to a military corps and the men of that corps. On this first point then, I cannot see that the pursuer has made any relevant averments that in what Colonel Mackay did on the occasion in question he was not acting in exercise of his military duty and authority. In cond. 3 we have the averment that Colonel Mackay gave orders for this parade, and I cannot read this as an averment that he gave these orders otherwise than as the officer commanding the corps. In cond. 4 there are averments as to his duty with regard to the horses, the drivers, and the appointment of an experienced officer to superintend. These appear to me as clear a definition of the military duties of a commanding officer as could be wished for. It is also averred that he failed to be present himself, and failed to delegate the superintendence of the horses to a responsible officer, but if there was failure in that respect, it was failure in a military duty, and just such a failure as the Act was intended to prevent from founding an action at law after the expiry of the specified time. There are also averments that the waggons were not in accordance with regulations, but if there was a breach committed it was a breach of military duty. I think, therefore, that we must recall the Lord Ordinary's interlocutor in so far as he finds that the claim may still be pursued against Colonel Mackay as an individual, and that this part of the action should also be dismissed.

Lord Adam.—The question in this case can be shortly stated. It is an action brought by the parent of a child who was killed by two runaway horses against a regiment of volunteers and the person who is the commanding officer of the regiment. The allegations against the defender Mackay are all found summed up in article 4 of the condescendence. It is there

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averred that the defender neglected his duty in not seeing (1) that quiet horses suitable for the work were used ; (2) that experienced and competent drivers were employed ; and (3) that the harnessing of the horses to the guns and waggons and the parading them on the streets was superintended by a commissioned officer experienced in such work. These are the duties which, it is averred, lay on this defender to see to, and alleged neglect of which forms the ground of action against him. The other averments in the subsequent articles of the condescendence only set forth in detail the particulars of the alleged neglect and the consequences following therefrom.

What, then, is the meaning of these averments of neglect? Was it neglect of duties lying on this defender in his public capacity as commander of Volunteers or as a private citizen? It is clear that these duties lay not on Mr Mackay as a citizen, but on Lieutenant-Colonel Mackay as commander of the Volunteers. Now, the Public Authorities Protection Act, 1893, section 1, enacts that where an action is commenced against any person for any act done "in pursuance or execution . . . of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such . . . duty or authority," the action shall not lie unless it is commenced within six months after the act, neglect, or default complained of. In my view, what is here averred is clearly an accident resulting from an alleged neglect on the part of Lieutenant-Colonel Mackay in the execution of his public duty as commander of Volunteers. That is the only question in the case. There is no charge against him of doing anything or neglecting to do anything as an individual. The only charge against him is that of neglect in his capacity of commander of Volunteers.

LORD M'LAREN.—The Lord Ordinary's interlocutor dismisses the action in so far as directed against Colonel Mackay as representing the Volunteer Regiment. His Lordship then goes on to consider the application of the Public Authorities Protection Act in relation to the conclusions against Colonel Mackay as an individual. His Lordship's judgment on that point is that he is unable to deal with the question of the applicability of the Act until the facts are ascertained. With all respect, it would, I think, be a very inefficient protecting Act which left the protection to stand over until the conclusion of a contested case. The Act declares that no such action "shall be instituted" after the lapse of six months. What we have to consider is whether a competent action has been instituted. That we are able to determine now. I am far from saying that a summons might not be so skilfully drawn as to conceal that it was directed against a defender in respect of an act done in execution of a public duty. Then, if it came out at the trial that the action was one in which the defender was entitled to the protection of the Act, the provisions of the Act would be applied, and the action dismissed. But in this case the nature of the action is quite clear on the face of the summons, and therefore the defender is entitled to our judgment now. I agree with your Lordships that it is impossible to read the condescendence without seeing that it is an action for neglect or default in the performance of a military duty. The neglect charged is that

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Colonel Mackay took his responsibility too easily, and that he did not use all the precautions that were necessary for the protection of the public. It is argued that, in acting as he did, the Colonel was not acting in execution of his duty. But if he did his public work badly, that does not convert his acts into private acts. To say that this was individual negligence, will not exclude the Act. All negligence is in a sense individual, and the argument we reject would exclude altogether the protection given by the Act to persons performing public duties.

LORD KINNEAR concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and dismissed the action.

R. S. RUTHERFORD, Solicitor—INGLIS, ORR, & BRUCE, W.S.—Agents.

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Dec. 1, 1904.
Scottish Union and National Insurance Co. v. Smeaton.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY, Pursuers (Respondents)—*Johnston, K.C.*—*M'Clure.*
MRS MARY MARGARET SMEATON, Defender (Appellant).—*T. B. Morison*—*A. A. Fraser.*
ELIZABETH MARGARET SMEATON, Defender.

*Right in Security—Bond and Assignation in Security by liferentrix—Summary Ejection—Heritable Securities (Scotland) Act*, 1894 (57 *and* 58 *Vict. c.* 44), *sec.* 5.—The Heritable Securities Act, 1894, enacts,—Sec. 5. "Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant. . . ."

The creditors in a bond and assignation in security, granted by a liferentrix by constitution over her liferent interest in certain lands and a mansion-house, brought an action in the Sheriff Court under sec. 5 of the Heritable Securities Act, 1894, for the summary ejection of the liferentrix from the mansion-house, of which she was in personal occupation. *Held* that the liferentrix was not a "proprietor" in the sense of sec. 5 of the Act, and that therefore the summary remedy of ejection was incompetent.

1ST DIVISION. Sheriff of Perthshire.

MRS MARY MARGARET SMEATON, the widow of Patrick Burgh Smeaton, of Coul, Auchterarder, was the liferentrix of the estate of Coul, including the mansion-house and other offices, conform to disposition by the said deceased Patrick Burgh Smeaton, of Coul, in favour of himself and the said Mrs Mary Margaret Smeaton, in conjunct fee and liferent, and the heirs of their marriage in fee, dated 10th April and recorded 4th October 1872. Elizabeth Margaret Smeaton was the only child of the marriage.

Both Mrs Smeaton and her daughter resided in the mansion-house of Coul.

In March 1891 the Scottish Union and National Insurance Company advanced on loan to Mrs Mary Margaret Smeaton the sum of £1000, and in consideration thereof Mrs Mary Margaret Smeaton, her daughter Elizabeth Margaret Smeaton, and another, by bond and assignation in security, dated 12th March, and recorded 26th March 1891, bound and obliged themselves, jointly and severally, and their respective heirs, executors, and representatives whomsoever, without the necessity of discussing them in their order, *inter alia*, to repay

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the said sum of £1000 to the Scottish Union and National Insurance Company and their assignees at the term of Whitsunday 1891; and in security and for more sure payment to the pursuers of the whole sums of money, principal, interest, and others therein specified, and generally in security of the several personal obligations and others contained in the said bond and assignation in security, *inter alia*, made over to and in favour of the Scottish Union and National Insurance Company, their rights in and to the lands and estate of Coul, including the mansion-house, garden, stables, and offices.

The interest on the loan having fallen into arrear, the Scottish Union and National Insurance Company, on 16th February 1903, intimated a formal demand for payment of the principal sum contained in the bond under and in terms of the Titles to Land Consolidation (Scotland) Act, 1868.

The loan was not repaid within the statutory period of three months, and on 14th August the Scottish Union and National Insurance Company obtained a decree of rents, maills, and duties of the estate of Coul in the Sheriff Court at Perth.

On 29th April 1904 the Scottish Union and National Insurance Company brought a petition in the Sheriff Court at Perth against Mrs Mary Margaret Smeaton, residing at Coul, and Elizabeth Margaret Smeaton, also residing at Coul, for warrant to summarily eject the defenders from the lands and estate of Coul, and particularly from the mansion-house of Coul, garden, stables, and offices in connection therewith, in terms of the Heritable Securities (Scotland) Act, 1894.*

The pursuers, after setting forth the facts above narrated, averred that the principal sum in the bond was still unpaid, and pleaded, *inter alia*;—1. The pursuers being heritable creditors in possession of the estate of Coul, in virtue of the decree of maills and duties in their favour founded on, and the defenders being in personal occupation of the said mansion-house, garden, stables, and offices forming part of the pursuers' security subjects, the pursuers are entitled to decree of ejection in terms of the Heritable Securities (Scotland) Act, 1894.

The defender Mrs Mary Margaret Smeaton pleaded, *inter alia*;—(1) The action is incompetent. (2) The defender not being proprietor of the subjects in question, ought to be assoilzied, with expenses.

On 10th August 1904 the Sheriff-substitute (Sym) granted warrant of ejection against the defender Mrs Mary Margaret Smeaton in

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* The Heritable Securities (Scotland) Act, 1894 (57 and 58 Vict. cap. 44), enacts, sec. 5,—"Where a creditor desires to enter into possession of the lands disponed in security, and the proprietor thereof is in personal occupation of the same, or any part thereof, such proprietor shall be deemed to be an occupant without title, and the creditor may take proceedings to eject him in all respects in the same way as if he were such occupant: Provided that this section shall not apply in any case unless such proprietor has made default in the punctual payment of the interest due under the security, or in due payment of the principal after formal requisition."

Sec. 6. "Any creditor in possession of lands disponed in security may let such lands held in security, or part thereof, on lease, for a period not exceeding seven years in duration."

Sec. 7 gives power to a creditor in possession to grant a lease for more than seven years, but not exceeding twenty-one years, provided he gets the sanction of the Sheriff.

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terms of the conclusion of the petition; and refused the same as regarded the defender Elizabeth Margaret Smeaton.*

The defender Mrs Mary Margaret Smeaton appealed to the Court of Session, and argued;—At common law a petition for summary ejection was not competent against a person in occupation on a good title, and not possessing viciously or precariously.[1] The action was equally incompetent under section 5 of the Heritable Securities Act, 1894.[2] The word "proprietor" in that section meant a person who was in fact proprietor of lands, and not as here a mere liferenter. Sections 6 and 7[2] made this quite clear, because these sections gave to a creditor in possession a right to grant leases for long periods. A liferenter had no such right, and it was impossible to suppose that the Legislature intended to give the creditors of a liferenter, to the prejudice of the fiar, a right which the liferenter did not possess. A liferenter could not grant a disposition of the lands, and all the respondents held was an assignation of the defender's right to the profits of the lands.[3]

Argued for the respondents;—It was admitted that a petition for summary ejection was in this case incompetent at common law, but it was competent under section 5 of the Act of 1894.[2] The appellant had conveyed to the respondents her whole liferent right in the mansion-house and lands of Coul. A right of liferent made real by infeftment was a heritable right,[4] and the word "lands" included all heritable subjects.[5] The appellant was therefore a proprietor of lands in the sense of section 5.[2] Further, by the definition clause of the Titles to Land Consolidation (Scotland) Act, 1868,[6] which was incorporated in the Act of 1894,[7] "creditor" included a person in whose favour a conveyance constituting a security over the rents and profits of lands had been granted. The respondents could not make good their right to the rents and profits of the lands unless the appellant was ejected from the mansion-house.

Lord President.—The question in this case is whether the Sheriff-substitute was right in granting a warrant of ejection against the defender. She is the liferentrix of the estate under a disposition granted by her husband in her favour. I do not understand it to be disputed that, unless the provisions of the Heritable Securities (Scotland) Act apply, the interlocutor

* "Note.—It is thought that the liferent of Mrs Smeaton could form the subject of a heritable security. She is in possession. Though the word proprietor is used in the fifth section of the Heritable Securities Act, 1894, and this defender is not in the full sense proprietor, but a liferenter (the lands having been conveyed by her husband to him and her in conjunct fee and liferent and to the heirs of the marriage in fee), the Sheriff-substitute considers that the remedy given to the creditor against the debtor in possession is available. . . ."

[1] Hally v. Lang, June 26, 1867, 5 Macph. 951; Robb v. Brearton, July 11, 1895, 22 R. 885.

[2] Quoted *supra*, p. 175.

[3] Ersk. ii. 9, 41; Juridical Styles, 3d ed., Conveyance of Liferent, vol. i., p. 366, note.

[4] Bell's Prin., secs. 1037 and 1478.

[5] The Heritable Securities (Scotland) Act, 1894 (57 and 58 Vict. c. 44), sec. 18.

[6] 31 and 32 Vict. c. 101, sec. 3.

[7] 57 and 58 Vict. c. 44, sec. 18.

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cannot be supported. The question therefore is, whether the case does or does not fall under the provisions of section 5 of that Act, which provides— (His Lordship quoted the section). I cannot see any adequate ground for holding that this provision applies to the present case so as to bring the defender into the position of an occupant without a title. Mr M'Clure admitted that if he fails on the construction of the statute, he cannot make good his case, and accordingly, I am of opinion that the judgment of the Sheriff-substitute is erroneous, and that his interlocutor should be recalled.

LORD ADAM.—The defender here is in possession of the mansion-house of Coul, under a liferent right by constitution, which includes both the mansion-house and the lands. The pursuers are an insurance company who are heritable creditors of the defender under a bond and assignation in security. Proceeding on this bond the pursuers have obtained decree of mailla and duties of the estate of Coul, and have entered into possession of the lands, and are drawing the rents of the lands. This lady, the defender, being herself in possession of the house is not affected by this decree, and the pursuers in order to get possession have had recourse to this summary remedy.

Mr M'Clure quite properly admits that, treated as an ordinary common law case of ejection, the action would be incompetent, in respect the occupier is not in the position of a person occupying without a title. But then he said the power of summarily ejecting the defender in this way is to be found in section 5 of the Heritable Securities Act, 1894. That raises a question of the construction of section 5, viz., whether it applies to a person in the position of the present defender.

I agree with your Lordship that section 5 applies to a person who is in fact proprietor of lands, and cannot be extended to a person, like Mrs Smeaton, who is not a proprietrix, but a mere liferentrix. If one refers to section 6 of the Act, we find that if Mr M'Clure's argument is right, the creditor on getting possession of the lands would be in a position to let the lands on lease for seven years. I should be very unwilling to put such an interpretation on section 5 as would involve giving the creditors of a liferentrix a power of management of the estate greater than that possessed by the liferentrix herself. The liferentrix does not have such a power to grant leases, and it would be very startling to find given to her assignee a power not possessed by her. In the Act stringent powers are given, which are all very well when the owners of the land are themselves in possession, but are not applicable to the case of a mere liferentrix. Accordingly, I am of opinion that the word "proprietor" in section 5 is not to be extended to include liferenters, who are not proprietors.

LORD M'LAREN.—The facts of this case are simple. The liferentrix of an estate granted in security to an insurance company an assignation of her liferent interest in the estate of Coul, including the mansion-house. The debt not having been paid on demand, the Insurance Company obtained decree of mailla and duties, and now bring this action to obtain possession of the mansion-house and curtilage, which are in the natural possession of the liferentrix. They found on sec. 5 of the Heritable Securities Act, 1894.

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That section is intended to apply to the case of a proprietor who is in the natural possession of the security subjects, so that the holder of the security may be able to dispossess him by summary process.

The question is whether this section extends to a liferenter in possession, or whether it is confined to the case of a proprietor in fee. In order that a creditor should have the benefit of this section, he must shew that he comes within the language of the section—*i.e.*, that he is in the position of a mortgagee of "lands disponed in security."

I was inclined at an early stage of the argument to the view that while a liferent may be in certain respects not heritable and not specifically transmissible, yet as it may be the subject of a real security and may be attached by real diligence, the section would apply. On further consideration I now think that such an extended construction of the statute is not maintainable. No doubt the liferent is a real security, but it is not capable of being transferred so as to give the transferee a feudal right. As Mr Erskine points out,[1] there cannot properly be an assignation of the heritable liferent estate. An assignation carries nothing more than the life interest, which is a different thing from the transfer of the liferent estate. The heritable estate is not transferred. One reason suggested from the bar is that the liferenter has no power to give an entry or warrant for infeftment. Another difficulty is that our law does not recognise the giving seisin for another man's life. The notary could only give liferent sasine to the Insurance Company, which would have no meaning.

This general argument is confirmed by sec. 6 of the Act which provides —(His Lordship quoted the section). Now, it is plain that a liferentrix could not grant a lease for seven years, but only for so long as her liferent subsisted. We are not to assume that it was intended that the assignee of a liferenter should exercise larger powers than the liferenter himself could have exercised.

I agree then that this summary process of ejection cannot be maintained. Whether there is any other process independent of statute by which the heritable creditor can get possession may be a question of considerable moment, but it is not before us.

LORD KINNEAR.—I agree. This is a process by which it is proposed to turn the defender out of the house she occupies by summary ejectment. That is a severe remedy, and we must see that it is carried out in rigorous conformity with the legal conditions upon which alone it can be employed.

It is conceded by the creditors that the process cannot be supported unless it falls under the provisions of section 5 of the Heritable Securities (Scotland) Act, 1894, and therefore the whole question is whether that section applies to the creditors of a liferenter in possession. I think with your Lordships that it does not. The section begins with the words "when a creditor desires to enter into possession of the lands disponed in security," and it therefore assumes that the creditor has obtained a disposition of the lands from the proprietor, and nobody who is not in that position is enabled to take the summary proceedings afterwards authorised.

[1] Ersk. ii. 9, 41.

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The enactment goes on to say that the proprietor from whom the creditor's right is derived may be treated as an occupant without a title. The creditors in the present case are not in the position assumed by that enactment. They hold no disposition of the lands in security, but only an assignation in security of the fruits and profits of the lands during the subsistence of a liferent right. And this was all that the liferenter could give. The power of the liferenter to confer right on a transferee is quite clearly defined by Mr Erskine,[1] who points out that the liferenter cannot give a disposition of the lands, but merely an assignation of the fruits. That alone is sufficient to exclude the interpretation maintained by the respondents. But when the 5th section is read along with sections 6 and 7 the matter becomes even more clear. The powers conferred on a creditor necessarily assume that he is to be put in the place of a proprietor in fee. By section 6 a creditor in possession may grant a lease not exceeding seven years, and by section 7 he may grant a lease for a longer period, not exceeding twenty-one years, provided he gets the sanction of the Sheriff. It is impossible to suppose that the Legislature intended to give the creditors of a liferenter a right which the liferenter himself does not possess, and that to the prejudice of the undoubted rights of the fiar, who has nothing whatever to do with the creditors of the liferenter or their securities. For these reasons I think that the 5th section must be construed as your Lordship proposes.

THE COURT sustained the appeal, and dismissed the action.

COWAN & DALMAHOY, W.S.—SIBBALD & MACKENZIE, W.S.—Agents.

No. 34.
Dec. 2, 1904.
M'Adam's Executor v. Souters.

ALEXANDER SOUTER (Mrs M'Adam's Executor), First Party.—*Hon. P. Balfour.*
ALEXANDER SOUTER, Second Party.—*Hon. P. Balfour.*
WILLIAM SOUTER AND OTHERS, Third Parties.—*W. Mitchell.*

*Succession—Heritable and Moveable—Conversion—Judicial Factor.*—The curator bonis of a lunatic expended the whole moveable estate of the ward on her maintenance, and thereafter, on the advice of the Accountant of Court, and by the authority of the Sheriff, sold the ward's heritable property, the income of which was not sufficient to maintain her. *Held* that the balance of the ward's estate remaining at her death was moveable *quoad* succession, on the ground that in order to maintain the ward it was necessary for the curator to sell her heritable estate.

1ST DIVISION.

MRS MARY SOUTER OR M'ADAM, widow of Alexander M'Adam, inspector of works, Aberdeen, was committed to the Royal Lunatic Asylum, Aberdeen, as a person of unsound mind in August 1896. On 12th September 1896 Alexander Simpson, accountant in the Aberdeen Savings Bank, was appointed her curator bonis by the Sheriff of Aberdeen, Kincardine, and Banff.

At the date of the appointment of the curator bonis Mrs M'Adam's estate consisted solely of certain house property in Aberdeen, of which the net rental was £19 per annum. Under her husband's will Mrs M'Adam was entitled to the free income of his estate, amounting to £7 per annum. The cost of boarding Mrs M'Adam in the asylum was £30 per annum, exclusive of clothing.

[1] Ersk. ii. 9, 41.

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In November 1896 the curator bonis, on the advice of the Accountant of Court, claimed Mrs M'Adam's legal rights in her husband's estate, and having obtained payment of £109, 16s. 1d. from her husband's trustees, proceeded to expend that sum on her maintenance.

On 24th February 1901 the curator bonis reported to the Accountant of Court that the whole of his ward's moveable estate, being the fund derived from her husband's trustees, was practically exhausted, having been expended for her maintenance and the expenses of the curatory, and that it would be necessary to sell the ward's heritable property in order to obtain a fund for her maintenance, the income derived from the rental of her heritable property being insufficient for that purpose.

The Accountant of Court, after consideration of the circumstances, was of opinion that it had become necessary either to borrow on the security of the property or to sell the same, and advised that the property should be sold.

On 14th March 1901 the curator bonis was authorised to sell the property by the Sheriff of Aberdeen, Kincardine, and Banff.

Thereafter the curator bonis sold the property for the sum of £576, and continued to aliment the ward out of the proceeds until her death.

The sum of £400, being part of the proceeds of the sale, was immediately after the sale invested upon a heritable bond. The remainder was deposited in bank.

Mrs M'Adam remained permanently insane until her death upon 9th September 1903. She died intestate, and was survived by two brothers and the children of deceased brothers and sisters.

At the date of Mrs M'Adam's death the balance of funds remaining in the hands of her curator amounted to £452, 4s. 1d., consisting of the above-mentioned heritable bond and £52, 4s. 1d. in bank.

Questions having arisen as to whether Mrs M'Adam's estate was to be treated as heritable or moveable, a special case was presented to the Court, in which the foregoing facts were set forth. It was not stated that the curator could have borrowed money on the property.

The first party was Alexander Souter, Mrs M'Adam's executor-dative; the second party was the said Alexander Souter, as her heir-at-law; the third parties were William Souter and others, her whole next of kin and representatives *in mobilibus*.

The questions of law were:—"(1) Was the estate left by the deceased Mrs Mary Souter or M'Adam heritable *quoad* succession at the date of her death? Or (2) Was the said estate moveable *quoad* succession, and does it fall to be divided among the parties of the third part? Or (3) Was the estate partly heritable and partly moveable *quoad* succession, and, if so, in what proportions?"

Argued for the first and third parties;—The estate was moveable *quoad* succession. The sale was necessary, and the ward could not have been maintained otherwise. The conversion which had actually taken place must therefore rule the question of succession.[1] It would have been different if the sale had been a mere act of wise administration on the part of the curator.[2]

Argued for the second party;—A curator was not entitled to alter

[1] Macfarlane v. Greig, Feb. 26, 1895, 22 R. 405.

[2] Kennedy v. Kennedy, Nov. 15, 1843, 6 D. 40, *per* Lord Fullerton, at p. 49, 16 Scot. Jur. 75.

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the succession to his ward's estate.[1] The sale was a mere act of administration, and was not necessary though it might have been beneficial, because the curator might have borrowed on the security of the property. "Necessary" meant "legally necessary."[2] The price was therefore a surrogatum for the property.[3]

LORD ADAM.—(After narrating the facts)—The question is whether this estate left by the deceased is heritable or moveable *quoad* succession. Now, at the date of the ward's death the estate was, in the first instance, to be treated as moveable property, but that presumption may be displaced by shewing that the money was the result of the conversion of the heritable estate in circumstances insufficient to alter its character *quoad* succession. It may not be enough to shew that it was an act of wise administration. The duty of a curator bonis is to preserve intact so far as may be the estate of the ward. His duty is to do his best in the interest of his ward. It is no function of his to change the character of the estate from heritable to moveable, even though the Accountant of Court and Sheriff thought the realisation of the heritage a necessary act. That alone would not be enough. But then the facts here shew that the change was inevitable. This woman had to be maintained, and for that purpose it was necessary that money should be got, and it could be got in no other way than by the sale of the heritage. The facts are, in my opinion, sufficient to shew that this change was necessary, and, accordingly, I think the estate falls to be dealt with as moveable estate.

LORD M'LAREN.—The questions that arise out of acts of administration by a legal guardian, such as a factor *loco tutoris* or curator bonis, are not the same as we are familiar with in connection with trust administration. There is this notable distinction, that a trustee sells on his own responsibility, while a judicial officer can in general only do so with the authority of the Court of Session upon the report of the Accountant of Court. Now, I agree with Lord Adam that the primary duty of a curator bonis is to preserve the estate in the same form and condition in which it comes into his hands for the benefit of the ward. The ward may recover, if it is a case of mental incapacity, or attain majority in the case of a pupil, and will then come into the possession of his estate, and it ought to be preserved unaltered for his use in that event. Out of this duty of preservation there has been developed the principle that the curator cannot by any act of administration alter the succession to the estate. Now, there are two rules which are applicable to the consideration of such a question, one is that the succession cannot be affected by any act of ordinary administration, but only by an act done of necessity, and to that, as far as I know, there is no exception. But there is this further rule, that everything must be presumed in favour of honest administration. Here the curator had represented to the Court

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[1] Macfarlane v. Greig, Feb. 26, 1895, 22 R. 405, *per* Lord M'Laren, at p. 409.

[2] Moncrieff v. Milne, July 16, 1856, 18 D. 1286, *per* Lord Deas, at p. 1293, 28 Scot. Jur. 649.

[3] Kennedy v. Kennedy, Nov. 15, 1843, 6 D. 40; Moncrieff v. Milne, July 16, 1856, 18 D. 1286.

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that this sale was an act of necessity, and therefore the *onus* is on the other party to convince us to the contrary. I can find nothing set forth in this case to convince me that the curator was wrong in the view that he had taken as to the necessity of a sale, and I can well understand that, in view of the expense and difficulty of borrowing on the security of a small heritable property, the curator may have had no choice but to have recourse to a sale. If it was practically necessary, that is sufficient for the decision of the case, because the estate has been turned into money for the benefit of the ward, and conversion has taken place in fact and in law.

LORD KINNEAR.—I think the rule of law in this case is clear. The rule is that succession must be regulated by the condition of the property at the death of the deceased, and in the present case the property left by the ward consisted of money and not of land. But it is said that it must still be treated as heritage, because the curator had no power to convert land into money except in case of necessity, and there was no legal necessity in the present case. I confess I do not understand the distinction between what is called legal, and practical, necessity. But then a sale may be necessary for one purpose and not for another; and the question in the particular case must be whether the purpose for which a curator thought it necessary to sell is one which the law recognises as a sufficient justification for converting land into money. Now, in the present case the necessity was to provide for the maintenance of the ward, because she could not be maintained without money; and the curator accordingly applied for and obtained the sanction of the Court to sell heritage. It is said that the curator could have borrowed money on the property, but it is not so stated in the case, and we must take the case as containing a correct and exhaustive statement of all the facts which the parties have agreed are to form the basis of the judgment, and I am afraid therefore that any statement of fact which is not made in the case must be assumed to be either irrelevant or inaccurate. I therefore agree that the property in question must be treated as moveable.

The LORD PRESIDENT concurred.

THE COURT answered the first question in the negative, and the second question in the affirmative.

H. HUME M'GREGOR, S.S.C.—JAMES F. MACKAY, W.S.—Agents.

No. 35.

Dec. 3, 1904. Hamilton v. Kerr.

JOHN HAMILTON, Pursuer (Respondent).—*W. Thomson.*
MRS ANN KERR AND SPOUSE, Defenders (Appellants).—*Younger—Burt.*

*Sheriff—Debts Recovery Court—Citation—Objection to citation by party appearing—"Ordinary Sheriff Court"—Sheriff Courts (Scotland) Act*, 1876 (39 *and* 40 *Vict. cap.* 70), *secs.* 2 *and* 12—*Debts Recovery (Scotland) Act*, 1867 (31 *and* 32 *Vict. cap.* 96).—The Sheriff Courts (Scotland) Act, 1876, sec. 2, enacts:—"Unless otherwise expressly provided, this Act shall apply only to civil proceedings in the ordinary Sheriff Court."

Sec. 12, subsec. (2), enacts that "a party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

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*Held* (*dub.* Lord Moncreiff) that sec. 12, subsec. (2), applied to an action raised by summons under the Debts Recovery (Scotland) Act, 1867, in respect that such an action was "a civil proceeding in the ordinary Sheriff Court."

*Sheriff—Debts Recovery Court—Interlocutor—Necessity for findings in fact and in law—Debts Recovery (Scotland) Act*, 1867 (30 *and* 31 *Vict. cap.* 96), *secs.* 9 *and* 10.—*Held* that in actions under the Debts Recovery (Scotland) Act, 1867, the Sheriff is not bound to pronounce an interlocutor containing findings in fact and findings in law, unless in cases in which he has taken a note of the evidence upon the requisition of one or both of the parties.

2D DIVISION. Sheriff of Fife and Kinross.

ON 10th August 1904 John Hamilton, farmer, Grange Farm, West Calder, took out a summons under the Debts Recovery (Scotland) Act, 1867, in the Sheriff Court at Dunfermline, against Mrs Ann Thomson or Kerr, and George Kerr, dairyman, Park House Dairy, Crossgates, her husband, concluding for decree for £29, 16s. as per account produced.

On 11th August the defenders were cited to appear at a Court to be held on 16th August, by service of a copy of the summons, with a citation thereto annexed, and a copy of the account sued for.

The defenders appeared on 16th August, and stated, *inter alia*, the following plea (as noted by the Sheriff-substitute in the minutes of procedure):—"1. Under the provisions of section 3 of the Small-Debt Act, 1837, incorporated by section 5 of the Debts Recovery Act, 1867, the summons is a sufficient warrant for citing the defenders to appear and answer at the time and place mentioned in the summons, 'not being sooner than the sixth day after such citation.' The citations given to the defenders were served by the officer on 11th August 1904, taken away again by him on same day, and re-served on 12th August 1904. Neither service complies with the statutory enactment as to the *inducie* of citation. The summons, not being a warrant for the citations given to the defenders to appear at a Court to be held on 16th August 1904, should be dismissed, with expenses to the defenders."

The Sheriff-substitute (Shennan) appointed the cause to be tried on 13th September.

On 13th September the Sheriff-substitute granted decree for the sum sued for, the formal decree being in the following terms:—

"At Dunfermline, the 13th day of September 1904,—The Sheriff of Fife and Kinross finds the within-designed Mrs Ann Thomson or Kerr and George Kerr, defenders, jointly and severally, liable to the pursuer in the sum of £29, 16s., with £3, 15s. 8d. of expenses.

"JAS. S. MUIR, Sheriff-Clerk Depute."

Neither party requested the Sheriff to take any note of the evidence, and no such note was taken.

The defenders appealed to the Sheriff (Mackenzie), who on 5th October 1904 pronounced this interlocutor:—"The Sheriff having heard parties' procurators, and considered the cause, refuses the appeal, and adheres to the judgment appealed against."

The defenders appealed.*

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* The following were referred to at the hearing:—

The Debts Recovery (Scotland) Act, 1867 (30 and 31 Vict. cap. 96), enacts:—

Sec. 8. "Where both parties shall appear at the diet mentioned in the summons and complaint . . . the Sheriff shall inquire into the nature

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At the hearing the pursuer admitted that the citation was bad for want of the proper *inducice*.

Argued for the defenders;—(1) The citation being admittedly bad, the defenders were not barred from taking the objection by sec. 12, subsec. (2), of the Sheriff Courts Act, 1876. Sec. 2 of that Act enacted that, unless where otherwise expressly provided, the Act should apply only to civil proceedings in "the ordinary Sheriff Court." There certainly was no express provision applying sec. 12, subsec. (2), to proceedings in the Debts Recovery Court, and consequently the question was as to whether actions in the Debts Recovery Court were actions in the "ordinary Sheriff Court." They were not. That was shewn by sec. 8 of the Debts Recovery Act, 1867, which made provision for the remit of Debts Recovery Act cases to the Sheriff's ordinary roll in the same manner as Small-Debt Court cases might be

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of the action and of the defence thereto, and shall make a short note of the pleas of parties (hereinafter called the note of pleas), which shall form part of the process; and where it shall appear to the Sheriff that the case is of such a nature that it cannot, with due regard to the ends of justice, be disposed of according to the summary procedure provided by this Act, he may remit the same to his ordinary roll; and the case, being so remitted, shall be proceeded with in the same manner as cases remitted under the first recited Act from the small-debt roll to the ordinary roll of the Sheriff Court are now proceeded with; . . . but if it shall not appear to be necessary for the ends of justice that the case should be remitted to the ordinary roll, the Sheriff shall fix a time (which shall be as early as may be) and place for proceeding to try and determine the same, . . . and at said time and place . . . the Sheriff shall proceed to hear the parties *viva voce*, and examine witnesses or havers upon oath, . . . and thereupon the Sheriff may pronounce judgment, and the judgment shall, unless appealed from as after mentioned, be as nearly as may be in the same form, and shall have the same force and effect, and be followed by the like execution and diligence as a decree obtained under the 13th section of the first recited Act" [*i.e.*, the Small-Debt (Scotland) Act, 1837].

Sec. 9. "Unless required by either party, it shall not be necessary for the Sheriff to take any note of the evidence or of the facts admitted by the parties, but upon such requisition, which shall only be competently made before any parole evidence has been led, and not afterwards, he shall take a note of the evidence and of the facts admitted (hereinafter called the note of evidence), setting forth the witnesses examined and the testimony given by each, and the documents adduced, and any evidence, whether oral or written, tendered and rejected, with the ground of such rejection, and a note of any objections taken to the admission of evidence, whether oral or written, allowed to be received, which note of the evidence shall be forthwith lodged in process; . . . and where the evidence has been recorded as above provided for, the Sheriff shall pronounce and sign and date an interlocutor, setting forth the separate findings in law and in fact upon which he has proceeded in giving judgment; and such interlocutor shall form part of the process, and if not appealed from, as hereinafter provided, shall be final and conclusive, and not subject to review by any Court whatever; and the judgment of the Sheriff shall, at the expiry of the time allowed for appeal hereinafter mentioned, and if not appealed from during the same, be extracted, as nearly as may be in the mode provided in the 13th section and relative schedule of the first recited Act, and shall have the same force and effect, and be followed by the like execution and diligence, as a decree obtained under the last-mentioned section of the said first recited Act."

Sec. 10. "Where neither party has, in the manner above provided,

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remitted under the Small-Debt Act, 1837, to the Sheriff's ordinary roll, the Debts Recovery Court and the Small-Debt Court being thus put *in pari casu* as Courts distinct from the ordinary Sheriff Court. Then the whole forms of the ordinary Court differed from those of the Debts Recovery Court. In particular, sec. 6 of the Sheriff Courts Act, 1876, required all actions in "the ordinary Sheriff Court" to be commenced by petition, whereas the initial writ in the Debts Recovery Court was a summons, and subsec. (2) of sec. 12 of the Act of 1876 in terms applied only to objections to the regularity of the service of "petitions." The Small-Debt Amendment Act, 1889, sec. 5, expressly made sec. 12 of the Act of 1876 applicable to Small-Debt Court cases, the word "summons" being directed to be read for the word "petition"; but there was no corresponding enactment with reference to the Debts Recovery Court. The *dicta* in *Fraser* v. *Mackintosh*,[1] referred to by the pursuer, came to no more than this, that the Debts Recovery Act, 1867, did not extend the orbit of the Sheriff's jurisdiction, but merely enabled him to exercise his ordinary jurisdiction in a summary form—that was to say, not in the forms and according to the rules of the ordinary Sheriff Court, but according to the forms and the rules of the Debts Recovery Court as laid down in the Debts Recovery Act of 1867—and the question here was one of form. (2) The Sheriff-substitute's interlocutor was wrong in point of form. It ought to have contained both findings in fact and findings in law.[2] Sec. 10 of the Debts Recovery Act, 1867, made it clear that the interlocutor must in all cases con-

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required the Sheriff to take a note of the evidence, it shall not be competent to appeal against the judgment which he shall pronounce, in so far as the findings in fact pronounced by him are concerned, and the said findings shall be final and conclusive, and not subject to review by any Court whatever: Provided also, that it shall not in any case be competent to appeal until judgment has been pronounced by the Sheriff finally disposing of the cause, but an appeal when taken shall have the effect of submitting to review all the previous proceedings and interlocutors."

The Sheriff Courts (Scotland) Act, 1876 (39 and 40 Vict. cap. 70), enacts:—

Sec. 2. " . . . Unless where otherwise expressly provided, this Act shall only apply to civil proceedings in the ordinary Sheriff Court."

Sec. 6. "Every action in the ordinary Sheriff Court shall be commenced by a petition in one of the forms, as nearly as may be, contained in Schedule (A) annexed to this Act . . ."

Sec. 12. "With regard to the service of writs issuing from the Sheriff Courts, the following provisions shall have effect; that is to say," *inter alia*,—

"(2) A party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened."

The Small-Debt Amendment (Scotland) Act, 1889 (52 and 53 Vict. cap. 26), enacts:—

Sec. 5. "The provisions contained in," *inter alia*, sec. 12 of the Sheriff Courts (Scotland) Act, 1876, "shall apply to all causes in the Small-Debt Court competent under this or the before recited Acts, the word 'summons' being read for 'petition,' and the word 'appear' for the words 'enter appearance,' wherever they occur in the said sections" of the Act of 1876.

[1] Dec. 19, 1867, 6 Macph. 170, 40 Scot. Jur. 98.

[2] Dove Wilson, Sheriff Court Practice, 4th ed., p. 532.

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tain both findings in fact and findings in law, but where no notes of the evidence had been required to be taken, the findings in fact were to be final. An interlocutor in the form here pronounced practically made it impossible to review the judgment on the merits even on questions of law, which under sec. 10 it was plainly the appellants' right to have brought under review.

The argument for the pursuer on the first point sufficiently appears from the opinions of the Court.[1] He was not called upon to argue the second point.

LORD JUSTICE-CLERK.—There are two points raised in this case. The first arises on an objection taken by the appellants to the regularity of the citation. Now, whether that objection is one which could be stated and considered in the present case depends upon whether the Court of the Sheriff when sitting under the Debts Recovery Act of 1867 is or is not a Court of his ordinary jurisdiction, and whether the rules which govern the latter apply. I have no doubt myself that they do, and I agree with the late Lord President Inglis' opinion in the case of *Fraser* v. *Mackintosh*,[1] where he says "that in disposing of a case brought before him under the recent Debts Recovery Act, the Sheriff does not, properly speaking, exercise any new jurisdiction. What he does is to exercise his ordinary jurisdiction in the summary manner provided by that Act." I am therefore of opinion that section 12, subsection 2, of the Sheriff Courts Act of 1876 applies here, viz., that a party who appears shall not be permitted to state any objection to the regularity of the execution or service as against himself of the petition by which he is convened.

The second point taken by the appellants is that the proceedings were irregular because the Sheriff made no findings in fact or in law. There appears to be a considerable amount of confusion in the provisions of sections 8, 9, and 10 of the Act of 1867, but it is clear that the Sheriff is not to take a note of the evidence unless asked by either party to do so, and that it is in that case only that he is to make findings in fact and law. In the case where no record of the evidence is taken I can find no provision requiring him to make any findings, although of course there is nothing to prevent him doing so if he thinks fit. I am therefore of opinion that the appellants have failed upon both points.

LORD YOUNG concurred.

LORD TRAYNER.—The Debts Recovery Act makes provision for the trial of actions in the Sheriff Court in a more summary fashion than is required by ordinary Sheriff Court procedure. The Sheriff if he thinks fit can remit to his ordinary roll any case which he thinks ought not to be tried in so summary a fashion, but that does not appear to me to imply that the Debts Recovery Act created a separate jurisdiction from the Sheriff's ordinary jurisdiction. I know of no civil jurisdiction which the Sheriff has except his ordinary jurisdiction and his small-debt jurisdiction. I am therefore of opinion that section 12, subsection (2), of the Sheriff Courts Act, 1876, applies to the case of a party who appears in a case under the Debts

[1] Fraser v. Mackintosh, 6 Macph. 170.

Recovery Act, and prevents him from objecting to the regularity of the execution or service against himself. No. 35.

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On the second point it appears clear enough that the Sheriff-substitute was under no obligation to take notes of the evidence, and no notes having been taken the form of interlocutor which he has adopted is correct, being that prescribed by section 8 of the Act.

LORD MONCREIFF.—On the second point raised by the appellants—the form of the Sheriff's interlocutor—I agree with both your Lordships. There is some confusion between the terms of sections 9 and 10 of the Act of 1867, and the reference in section 10 to "findings in fact" is scarcely consistent with the provision in section 9 that it shall not be necessary for the Sheriff to take any note of the evidence or of the facts admitted unless required to do so by either party. But I am of opinion that when no note of evidence has been taken, the interlocutor is not incompetent merely because it contains no findings in fact.

On the other point—the competency of stating an objection to the citation after appearance has been entered—I have had some doubts. The question depends upon whether or not section 12 (2) of the Sheriff Courts Act, 1876, applies to an action raised under the Debts Recovery Act, 1867, and that in turn upon whether or not such an action is "a civil proceeding in the ordinary Sheriff Court." By section 8 of the Act of 1867 the Sheriff has the power of remitting to his ordinary roll an action brought under the Debts Recovery Act, and in such a case I cannot doubt that the procedure would in all respects be ruled by the provisions of the Sheriff Court Act, 1876. Further, section 12 of the Act of 1876 is by section 5 of the Small-Debt Act, 1889, made applicable to causes in the Small-Debt Court, and it would be anomalous that the intermediate Court should be in a different position. It may be that no corresponding provision was made in the case of the Debts Recovery Court, because in regard to such matters it was regarded as forming part of the ordinary Sheriff Court. Accordingly, although I do not consider the question as free from doubt, I am not prepared to differ from your Lordships on this point.

THE COURT dismissed the appeal.

HAMILTON, KINNEAR, & BEATSON, W.S.—CUNNINGHAM & LAWSON, Solicitors—Agents.

MRS MARGARET WRIGHT OR ANDERSON, Appellant.—*Watt, K.C.*—*Wilton.* No. 36.

THE LOCHGELLY IRON AND COAL COMPANY, LIMITED, Respondents.—*Campbell, K.C.*—*Hunter.*

Dec. 6, 1904. Anderson v. Lochgelly Iron and Coal Co., Limited.

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1) *and* (2)—*Mine—Siding—Private railway from mine to main line—Coal Mines Regulation Act*, 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 75.—The Workmen's Compensation Act, 1897, incorporates the definition of a mine given in the Coal Mines Regulation Act, 1887, under which the term "mine" includes any siding "adjacent to and belonging to the mine."

A mine was connected with a main line of railway by a private line, about a mile and a quarter in length. At a point in this private line, about

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800 yards from the mine, there was a drum-house and sidings connected therewith. At this point an engine-driver in the employment of the mine-owners was accidentally killed in the course of his employment. In an application by his mother for compensation under the Workmen's Compensation Act, 1897, *held* (*diss.* the Lord Justice-Clerk) that the place where the accident occurred was on, or in, or about a "mine," within the meaning of the Workmen's Compensation Act, 1897.

*Opinion* (*per* the Lord Justice-Clerk) that the whole of a private line leading from a mine to the main line of railway is not a siding adjacent to the mine within the meaning of sec. 75 of the Coal Mines Regulation Act, 1887.

2D DIVISION.
Sheriff of Fife and Kinross.

IN an arbitration under the Workmen's Compensation Act, 1897,* between Mrs Margaret Wright or Anderson, claiming compensation for the death of her son, John Anderson, engine-driver, and the Lochgelly Iron and Coal Company, Limited, the Sheriff-substitute at Dunfermline (Shennan) refused compensation, and at the request of Mrs Anderson, stated a case for appeal.

The case set forth the following facts as admitted or proved:—

"1. That the pursuer is the mother of John Anderson, who met with his death through injuries sustained by him on 11th November 1903, by accident arising out of and in the course of his employment with the respondents, the deceased being a 'workman' and the respondents the 'undertakers' within the meaning of the Workmen's Compensation Act, 1897. . . .

"4. That the respondents are owners or occupiers of two pits situated at Lochgelly, known as the Melgund and the Jenny Gray Pits. These are connected by a line of railway with the North British Railway system. The total length of this line from the Melgund Pit (the more distant) to its junction with the North British Railway is about a mile and a quarter. The Jenny Gray Pit is nearly a quarter of a mile from the Melgund Pit. This line of railway takes the following course—from the Melgund Pit it runs past the Jenny Gray Pit to a drum-house situated about 800 yards from the Jenny Gray Pit, crossing on its way a public road by a level crossing. Over that portion of its course the line is sufficiently level to be worked by a locomotive. From a point near the drum-house the line for about 340 yards runs down a steep incline (of about 1 in 9) known as a wheelbrae, and over that portion the haulage is worked by a wire rope (passed round a regulating drum in the drum-house), of which one end is attached to the full waggons at the top of the incline, and the other to the empty waggons at the foot. Near the foot of this wheelbrae the line joins the North British Railway system. At the Melgund Pit and the Jenny Gray Pit there are the usual colliery sidings, and there are also sidings at the drum-house and alongside the North British Railway line at the foot of the wheelbrae. The line of railway above described is of the usual gauge, and ordinary railway waggons are used on it.

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts, sec. 7, subsec. (1)—"This Act shall apply only to employment by the undertakers . . . on, or in, or about," *inter alia*, "a mine." By sec. 7 (2) it is declared that "mine means a mine to which the Coal Mines Regulation Act, 1887, . . . applies." By sec. 75 of that Act it is declared that "mine" includes "all the shafts, levels, planks, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine."

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"5. That at the time of the accident the deceased was employed by the respondents as an engine-driver, in conveying waggons between the Melgund and the Jenny Gray Pits and the drum-house. It was part of his duty, when the brae was being run, to leave his engine at the back of the drum-house, and go forward towards the top of the wheelbrae, in order to sprag the empty waggons when they came up, and, in doing so, he usually walked through under the drum-house by the side of the line. On 11th November 1903 the deceased, when proceeding to his duty, was caught by the wire rope, as it suddenly became taut with a jerk on the waggons being allowed to start, and was tossed in the air, receiving injuries, of which he died on 13th November. The place where the accident occurred was about 800 yards from the Jenny Gray Pit, the nearer of the two.

"6. That the line of railway connecting these two pits with the North British Railway system and the various sidings in connection therewith are the property of the respondents, and are used by them in connection with the working of these pits."

On these facts the Sheriff found "that the said accident arose out of and in the course of deceased's employment, but that said accident did not happen on, in, or about a mine in the sense of the Workmen's Compensation Act, 1897."

The following questions of law were stated:—

"1. Whether, on the facts stated, the place where the accident occurred formed part of a mine within the meaning of the Workmen's Compensation Act, 1897?

"2. Whether, in the circumstances stated, the said accident occurred on, in, or about a mine within the meaning of the said statute?"

Argued for the appellant;—Any part of a private line was a siding, from the point where it left the mine until it reached the main line.[1] If so, an accident happening on any part of the private line happened in the mine, under the definition of "mine" in the Coal Mines Regulation Act, 1887. That definition was not brought under the notice of the Court in *Caton* v. *Summerlee and Mossend Iron and Coal Company*,[2] and the decision there proceeded on the ground that the accident did not arise out of or in the course of the workman's employment. Even if the bare siding could not cover the whole private line, it was found, in fact, that there were sidings at the drum-house where the accident occurred. These were adjacent to the mine, and the workman was "on, or in, or about" them when he was killed.

Argued for the respondents;—The place where the accident occurred was not a siding. A private line and a siding were quite distinguishable, though for certain purposes they might be classed together. Even if a private line was to be considered as a siding, the place where the accident occurred was not a siding adjacent to the mine.[3] Even assuming that a private line from a mine to the main line was a siding, and that part of it was adjacent to the mine (as it must necessarily be) it did not follow that the whole line was adjacent

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[1] Monaghan v. United Collieries, Limited, Nov. 27, 1900, 3 F. 149; Factory and Workshop Act, 1901 (1 Edw. VII. cap. 22), sec. 106.

[2] July 11, 1902, 4 F. 989.

[3] Turnbull v. Lambton Collieries, Limited, May 7, 1900, 16 Times Law Rep. 369; Caton v. Summerlee Iron and Coal Company, Limited, July 11, 1902, 4 F. 989.

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to the mine. It was a question of degree, and in the present case the fact that the accident occurred 800 yards from the mine took it out of the statute.

At advising,—

LORD YOUNG.—I shall express my opinion in this case in a very few words. I do not need to read what is stated in the case; the statement of facts is before your Lordship. The Sheriff says:—"On these grounds" which he states, "I found that the said accident arose out of and in the course of deceased's employment, but that said accident did not happen 'in, on, or about a mine,' in the sense of the Workmen's Compensation Act, 1897." Now, I state my opinion in these few words, that upon the facts stated in the case I am of opinion that the accident did arise "in, on, or about a mine"—that is to say, the mine of which the company here were the undertakers—and in the course of the deceased's employment connected with the mine.

LORD TRAYNER.—From the description given of it, by the Sheriff-substitute, I entertain no doubt that the railway on which the deceased met with the accident which caused his death is a siding belonging to the respondents, connected with, and used by the respondents in connection with, their mines. The definition of "mine" given in the Coal Mines Regulation Act, 1887 (which is also the definition of "mine" under the Workmen's Compensation Act), includes as part of the mine any siding "adjacent to and belonging to the mine." That definition covers the railway siding in question, and as the deceased was fatally injured on the siding, he was so injured on or in the mine. I therefore think the judgment of the Sheriff-substitute was wrong, and am prepared to answer both of the questions put to us in the affirmative.

LORD MONCREIFF.—I have come to the conclusion that the Sheriff is wrong. The question is, whether the place where the accident occurred was in, on, or about a "mine" within the meaning of the Workmen's Compensation Act, 1897. It was not in, on, or about a "railway" within the definition of the word "railway" given in section 7 (2) of the Act; and therefore to bring the case within the Workmen's Compensation Act, it must be shewn that the accident occurred "on, or in, or about a mine," to which the Coal Mines Regulation Act of 1887 applies. We are thus sent to the 75th section of that statute for the definition of a "mine" to which the Act applies, and we find that the word "mine" includes, *inter alia*, "tramways and sidings, both below ground and above ground, in and adjacent to and belonging to the mine." Therefore, if an accident occurs "about" a siding which is adjacent and belongs to a mine, the person injured, provided he was injured in the course of his employment, will be entitled to compensation under the Workmen's Compensation Act. The question in the present case is one of some delicacy; but on considering the facts found by the Sheriff, I am disposed to think that, giving a liberal but fair interpretation, the appellant's son was injured in the course of his employment "about a mine" in the sense of the statute. The distance between the

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Jenny Gray pit, and the North British Railway system is in all a mile; but on account of a steep incline, loaded trucks cannot be drawn by an engine beyond the drum-house, situated less than half a mile from the Jenny Gray pit. It is found as a fact in the case, that at the Jenny Gray pit there are the usual colliery sidings, and that there are also sidings at the drum-house 800 yards away from the pit, and probably not so far distant from the sidings at the pit.

The next point is that the appellant's son, when he received his injuries, was not upon his engine, which could proceed no farther; he left his engine at the back of the drum-house, and went forward towards the top of the brae for the purpose of spragging the empty waggons when they came up, I suppose, into the sidings connected with the drum-house. There is no doubt that he was injured in the immediate vicinity of those sidings, and if those sidings can be regarded as adjacent to the Jenny Gray pit, the appellant is entitled to succeed.

I am disposed to hold that the sidings at the drum-house were really part of the equipment of the pit, and adjacent to it in the sense of the Coal Mines Regulation Act, 1887. The present case is somewhat stronger than the case of *Monaghan* v. *United Collieries, Limited*,[1] decided by the First Division, because in that case the accident occurred, not upon the branch line, but upon the Caledonian Railway with which it was connected. In deciding that case, the First Division had before them the case of *Turnbull* v. *The Lambton Collieries, Limited*.[2] The opinions in the latter case are very shortly given, but they seemed to have turned upon this, that the private line connecting the collieries with the North-Eastern Railway was twelve miles in length, and the Court of Appeal seem to have held that when the accident occurred the operations which were going on were those of transit, and not sufficiently connected with the work of the mine to make the *locus* adjacent to and belonging to the mine as distinguished from belonging to the mine-owner.

On the whole matter, I am for answering the questions put to us in the affirmative.

LORD JUSTICE-CLERK.—I cannot regret the conclusion at which your Lordships have arrived from one point of view, because it results in this widow receiving compensation for what was a very sad loss to her, but I regret that I am unable to concur in the judgment which is proposed, holding, as I do, that the decision of the Sheriff-substitute was right. This accident happened on a railroad constructed by the respondents' company to enable them to convey coals and materials from or to the North British Railway, with which their private line was joined up. At a place on that private railroad, 800 yards from the mine, there was a steep gradient which necessitated the use of a rope working on a drum, so that the weight of the loaded waggons descending the incline could be used to haul up the empty waggons from the bottom. It was, therefore, necessary to have a double line or loop at this place that the outgoing and returning waggons might

[1] Nov. 27, 1900, 3 F. 149.
[2] May 7, 1900 16 Times Law Rep. 369.

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pass one another on the incline. The injured man was an engine-driver, and in the course of his duty hauled the waggons to and from the incline, and he met with his accident, which caused his death, when spragging empty waggons which had been brought up by the rope to the top of the incline.

The question is whether this accident happened "on, in, or about the mine." I am of opinion with the Sheriff-substitute that it did not. The place at which the accident happened was 800 yards from the mine, and the work that was being done was being carried out, not at a siding at the mine, but on a road made for conveyance of material away from, or towards the mine. Had it occurred at the sidings at the mine itself—those sidings which were required there for loading waggons and making up trains—I should have held that it happened about the mine, but at the place where it did happen, I hold that it was as little "about" the mine as would have been the case had there been no railroad, and the work of transit from the mine had been done by horse haulage on a private road made for conveying the products of the work from the mine to some other place. My view is that, unless it can be held that every private railway made from a mine to a public railway is a siding, however long it may be, because it is coupled up to the public line, and that it is, therefore, a siding in the sense of the statute throughout its whole length, the railroad in this case cannot be held to be a siding to which the Act applies. I am not prepared to hold this entire line to be a siding. My opinion is that this was, at the place where the accident happened a road leading away from the sidings about the pit, and not itself a siding about the pit. It was not, in my opinion, "a siding" "adjacent to and belonging to the mine." If I were able to see that the decision in the case of *Monaghan* v. *The United Collieries Company*[1] ruled this case, I should have no hesitation in following it. I think the decision there may have been quite right. In that case only 80 yards of distance intervened between the pit and the public line of the Caledonian Railway. There was, in fact, no road there for conveyance to a distance, as distinguished from a short siding at the very pit itself, to hold the waggons clear of the railway line while being loaded and kept standing ready to be passed on to the public line. That is, in my opinion, a very different case from the present, where the place of the accident was nearly half a mile away from the pit, the waggons being at a place nearly half way on a journey of more than a mile between the main line of railway and the mine.

In the case of *Caton* v. *The Summerlee and Mossend Coal Company*,[2] I expressed the opinion that an accident, happening in a place on a private railway 230 yards away from the mine could not be held to have happened on, in, or about the mine, and it appears to me that, as regards the place of the accident in the present case, still less is there ground for holding that expression to apply to it. The case of *Turnbull* v. *The Lambton Collieries*[3] in the English Court, which was quoted at the debate, appears very much to resemble the present. There the injured man was driving waggons with coal along a private line, and was injured by his head striking a waggon on the coal company's private line near the end of the line furthest from the pit. It was held that the case was clearly not one to which "on, in, or

[1] 3 F. 149. [2] 4 F. 989. [3] 16 Times Law Rep. 369.

about" could apply, and that the word "adjacent" in the Act of 1887 meant physically adjacent. It is true that in that case the private line was some miles long, but the accident happened about three quarters of a mile from the pit, and I am unable to see—if the principle of that decision was right, as I hold it to have been—that a place 800 yards distant can be held to be "adjacent." It would be difficult, indeed impossible, to draw a line between "adjacent" and "non-adjacent," unless it be taken at the place where the sidings at the pit end, and the road for transit from the pit must be reasonably held to begin, the traffic having left the pit and being on its journey to another place.

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My opinion therefore is that both questions should be answered in the negative.

THE COURT answered the questions of law in the affirmative, and remitted to the arbitrator to award compensation.

P. R. M'LAREN, Solicitor—W. & J. BURNESS, W.S.—Agents.

JOHN BRYCE & COMPANY, Appellants.—*Campbell, K.C.—D. Anderson.*
PETER CONNOR, Respondent.—*M'Lennan—Welsh.*

No. 37. Dec. 6, 1904. Bryce & Co. v. Connor.

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule I. sec.* 11—*Review of Weekly Payments—Certificate of medical practitioner appointed under the Act.*—A mason's labourer, sixty-six years of age, whose left eye had been injured in the course of his employment, was awarded under the Workmen's Compensation Act, 1897, the maximum weekly payment for total incapacity.

Prior to an application by the employers to have the payment diminished, the workman was examined by one of the medical men appointed by the Secretary of State. The medical certificate bore that the workman's right eye was healthy, and the vision good, but that the left eye was seriously defective. "His disability is, however, at present great enough to unfit him for his usual occupation of a mason's labourer, though I am of opinion he is quite fit for any work where he would not have to exercise for the safety of life or limb that nice discrimination as to distances for which the sight of two eyes is necessary." Neither party moved for proof.

The Sheriff held (1) that the certificate was conclusive as to the workman's condition, and that other evidence as to the workman's present earning capacity was incompetent; and (2) that the certificate did not show that the workman's earning capacity had increased to such an extent as to justify a reduction of the weekly payment.

In an appeal, *held* (*diss.* Lord Young) (1) that the certificate of the medical practitioner under section 11 was conclusive evidence of the workman's condition; and (2) that as the certificate bore that the workman was unfit for his usual occupation, although fit for work of a particular character, and as his employers did not state or offer to prove that he could get such employment, the Sheriff was entitled to decide the question of compensation without further evidence.

2D DIVISION. Sheriff of Renfrew and Bute.

THIS was a case stated for appeal at the instance of the employers by the Sheriff-substitute at Paisley (Lyell) in an application made on 13th June 1904 by John Bryce & Company, builders, Paisley, to review a weekly payment payable by them under the Workmen's Compensation Act, 1897,* to Peter Connor, labourer, Paisley.

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts (Schedule I., section 11):—"Any workman receiving weekly pay-

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The case set forth:—"On 15th July 1903 the respondent was in the employment of the appellants as a workman, and was on that date engaged, in the course of his employment, at a building . . . when he was accidentally struck in the left eyeball by a chip. His eye was permanently injured, the sight being almost totally destroyed, and he was wholly incapacitated. Accordingly, on 7th December 1903 the appellants were ordained by me to make payment to the respondent of the sum of 11s. 9d. weekly, being 50 per cent of his average weekly earnings for the previous twelve months, and that as from the 29th July 1903, during the respondent's incapacity.

"On April 2, 1904, the respondent was required by the appellants to submit himself for examination by Dr Cluckie, a duly qualified medical practitioner, which he did. Being dissatisfied with Dr Cluckie's certificate, which was communicated to him on 8th April 1904, the respondent elected to submit himself for examination to Dr Fraser, of Paisley, one of the medical referees appointed by the Secretary of State; and accordingly, on 31st May 1904, the matter was referred to Dr Fraser by a joint letter, signed by the respective agents of the parties, which was in these terms:—'Dear Sir,—As medical referee under the Workmen's Compensation Act, you are requested to examine Peter Connor, a mason's labourer, who was injured on or about 15th July 1903, while in the employment of John Bryce & Co., masons, and to report as to his condition at the time of the examination.'

"On 1st June 1904, Dr Fraser granted the following certificate:—'Paisley, 1st June 1904.—I hereby certify that, as medical referee under the Workmen's Compensation Act, I this day examined at 3 Orr Square, Paisley, Peter Connor, mason's labourer, aged 61 years, as to the conditions of his sight. I find that his right eye is healthy and vision good; that the sight of his left eye is materially interfered with as the result of a white scar on the cornea so situated that it obscures the lower and central part of the pupil, so that sight is only possible through the clear parts of the cornea at the sides of this opacity. The left eye is otherwise a healthy eye with free movement possible in every direction, so that it is in a condition to give material help to the sound eye in judging of distances, *i.e.*, it is able to give him some of the advantages of binocular vision. His disability is, however, at present great enough to unfit him for his usual occupation of a mason's labourer, though I am of opinion he is quite fit for any work where he would not have to exercise for the safety of life or limb that nice discrimination as to distances for which the sight

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ments under this Act shall, if so required by the employer . . . from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer . . . but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act . . . and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. . . . (12) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

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of two eyes is necessary. This I certify on soul and conscience. DONALD FRASER, M.D., F.F.P.S. (Glas).'

"Neither party moved for proof; and the respondent having exercised the option given to him by the 11th clause of the First Schedule of the statute, I considered myself bound by the terms of the said clause, as interpreted by the Court in the case of *M'Avan* v. *The Boase Spinning Company*, 3 F. 1048, to take Dr Fraser's certificate as conclusive evidence of the respondent's condition, and to exclude any other evidence as incompetent.

"On a proper construction of the said certificate, I found no reason for holding that the respondent's earning capacity had increased to such an extent as to induce me to diminish or end my previous award."

The following questions of law were stated:—"1. Was the Sheriff-substitute right in holding that Dr Fraser's report was conclusive evidence of the respondent's condition, and in excluding as incompetent all other evidence as to the respondent's present earning capacity? or 2. Should he, before deciding the matter, have given parties an opportunity of leading evidence *aliunde* as to the present capacity of the respondent for earning wages at the kind of employment in which, according to the opinion of the medical referee, he is now able to engage? 3. Assuming that all other evidence is incompetent, then on a proper construction of Dr Fraser's certificate was the Sheriff-substitute bound to diminish or end the weekly payments previously awarded?"

Argued for the appellants;—The Sheriff-substitute should not have decided the question of compensation without evidence. The medical certificate, under section 11 of Schedule I., was no doubt conclusive as to the workman's physical condition. But the Sheriff, as arbitrator, in fixing the amount of compensation, was directed, by section 2 of that schedule, to take into consideration the "difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident." He could not determine what the workman was able to earn on a medical certificate which bore that though not fit for his former employment, he was fit for certain kinds of employment. Proof that such employment was attainable, and had been offered to the workman, would be relevant, and the Sheriff should have given the appellants an opportunity to lead it.[1]

Argued for the respondent;—It was settled that the medical certificate was conclusive as to the wage-earning capacity of the workman.[2] Whether, taking his wage-earning capacity as stated by the medical practitioner, the state of the labour market would enable him to earn any wages, was an entirely different question, which was not raised in the present case. If the employers proposed to shew that the workman had had in fact an offer of work for which he was fitted, they were bound to aver that, and offer proof of it. Here they had not done so.

At advising,—

LORD JUSTICE-CLERK.—The Sheriff-substitute had in this case a certi-

[1] Ferrier v. Gourlay Brothers & Co., March 18, 1902, 4 F. 711; Niddrie and Benhar Coal Co., Limited, v. M'Kay, July 14, 1903, 5 F. 1121; Dowds v. Bennie & Son, Dec. 19, 1902, 5 F. 268.

[2] M'Avan v. Boase Spinning Co., Limited, July 11, 1901, 3 F. 1048.

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ficate presented to him which had been issued by the statutory medical officer as to the workman's condition. In my opinion he was bound to accept that as conclusive evidence of the workman's condition as at that time. The matter has been considered on more than one occasion before, and that view of the case is in accordance with the decision already pronounced by us in former cases. I am therefore of opinion that the first question should be answered in the affirmative, and the second in the negative. As regards the third question, I am of opinion that the Sheriff was entitled, if he thought fit upon the certificate laid before him, which bore that the workman's disability was sufficient to "unfit him for his usual occupation," to decline to alter the scale of compensation then being paid to the workman, and that therefore the third question should be answered in the negative. It will of course be open to the employers to apply again to the Sheriff at any future time, if circumstances should change, either by the condition of the workman changing, so as to enable them to obtain a different certificate, or by the workman actually obtaining employment and receiving pay, or not entering on employment for which he is able.

LORD YOUNG.—The questions of law stated in the case for the opinion of the Court are very distinctly stated. The first is—was the Sheriff-substitute right in holding that Dr Fraser's report was conclusive evidence of the respondent's condition, and in excluding as incompetent all other evidence as to the respondent's present earning capacity. The question depends upon what the Sheriff had to decide. What he had to decide was what amount of compensation should be given to the workman. The case had been before him previously, and he had determined as arbitrator that the applicant's wage-earning capacity had been injured in a manner which entitled him to compensation. He awarded him compensation accordingly by a weekly payment, fixing the amount. But it is distinctly provided by the statute that any weekly payment may on the application of either party to the arbitrator be ended, increased, or diminished, and the application before the Sheriff on this occasion was an application by the employer who was paying the weekly amount ordered by the Sheriff to end it or diminish it. Now, what was the question before the Sheriff upon that application by the employer to end the weekly payment, or if not to end it, then to diminish it? The weekly payment which was in course of being made at the time of the application was upon the footing of total incapacity, and was the maximum amount of weekly payment which the statute allowed in the case of total incapacity. But on the application to end it or diminish it, the Sheriff had again to consider the question arising out of section 1, subsection 3, which provided that the amount of compensation if not settled by agreement should, subject to the provisions of the First Schedule, be settled by arbitration in accordance with the Second Schedule. Now, the First Schedule provides that any weekly payment may on the application of either party be ended, diminished, or increased, and it is distinctly provided that in determining the amount regard should be had to the average earnings of the injured workman before the accident, and the average earnings which he was making or was able to make after the accident. The statute says, in distinct terms, regard is to be had to the average earnings of the injured

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workman before the accident and the average earnings after it, and the latter necessarily means, in the event of an application to end, diminish, or increase the weekly payment, the average earnings which he is making or able to make at the date of the application. It necessarily means that regard is to be had to these two things in determining the amount.

Now, the question which I venture to put is, can either of these two questions be determined by a medical inspection? The medical inspection with which we are concerned was made under section 11 of the First Schedule. By that schedule a workman receiving compensation is required to submit himself to the inspection of a medical man selected by his employer, and if dissatisfied with the report of the inspection by that medical man, he may—that is the language of the section—he may submit himself to examination by a medical man appointed by the Secretary of State under clause 13 of the Second Schedule.

I may observe that an erroneous expression has been introduced into the stated case here, because the medical man appointed by the Secretary of State is called a medical "referee." The word "referee" is not used in the statute at all and would be quite inapplicable. The Secretary of State has authority to appoint a qualified medical man to give his aid under the Act, and the use or object of the whole of this is to provide medical men who shall give their aid, not at the expense of the parties before the arbitrator, or either of them, but at the expense of the Treasury to be paid out of money voted by Parliament. But there is no such word used in the statute, and no such man intended as is expressed by the word "referee." Now, under this section 11 of the First Schedule, a workman may if he pleases, submit himself, that is to say, his body, to examination by one of these medical men; but I again put the question—could one of these medical men determine or give their aid in determining either of the two matters to which the arbitrator is required by the statute to have regard—the average wages really earned before the accident, and the average wages which he is earning or is capable of earning when the application is made to the Sheriff? I venture to say that these are not questions upon which a report by a medical man under section 11 of the First Schedule can give satisfactorily a conclusive opinion. We happen to know in this case not from the medical report, which can give us no aid in the matter, but from the previous judgment of the Sheriff—and he knew—what were the average wages which the applicant was making before the accident, for he fixed the amount of the weekly payment having regard to that. There was no average earnings or earning capacity at the time the Sheriff so fixed, because he determined then upon the evidence, probably upon the admission of parties, that there was total incapacity to work. But when the application was made to him to end or diminish the weekly payment he had to consider the average wages the applicant was then earning or capable of earning. I venture to say that is not a matter for medical opinion. We have the report here of the medical man who examined the workman's body, and he had no authority to do anything else under section 11 of the First Schedule. It is to this effect, that his left eye was injured, but it had greatly improved. An injured eye which presents the appearance of having been worse, and having greatly improved, may very well be recorded by the medical man who

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makes the examination, and he does record that the left eye, which was injured by the accident, a splinter having gone into it, had greatly improved. But what were the average earnings or wage-earning capacity of the man at the time? Was that a matter to be determined by the inspection of his eye, and are you to exclude evidence of the fact as to the wages he was earning—it might be to exclude evidence that he was earning just as much as his average earnings before the accident? But according to the view taken by the Sheriff such evidence was incompetent, the Sheriff could not look at anything but the medical report. It was suggested that the Sheriff, looking at the medical report, might be satisfied that there was a wage-earning capacity to some extent, but not to such an extent as to induce him to end or reduce the amount of the weekly payments; and it was said that we had determined in this Court that the maximum amount specified in the statute for total incapacity for work was not confined in its application to the case of total incapacity, but that in the case of partial incapacity the Sheriff might well in the exercise of his judgment give the full amount. That was said to be the true reading of the statute, and if the Sheriff here upon proper evidence had been satisfied in point of fact that the average actual earnings or the earning capacity were only one half of what they had been before he was injured, he was entitled, according to our decision—which I agree in thinking was entirely in accordance with the statute—to give the full amount. But that has no bearing really upon the question whether he could determine the question what was the applicant's capacity for earning wages solely on the report of the medical man.

Now, upon these grounds I am of opinion, and I must say clearly of opinion, that the finding of the Sheriff excluding evidence which was required to enable him to determine whether the weekly payment should be ended or diminished is erroneous. I think he was entitled and bound to admit evidence to shew whether the man was earning wages, and if so, what was the average amount, and if he was not earning wages, what was his capacity to earn them. A medical man could not know that at all except by inquiring, or upon evidence laid before him or upon an investigation made by him, and he does not profess to know it. I am therefore very clearly of opinion that the question of law submitted for our consideration was erroneously regarded and dealt with by the Sheriff, and therefore that he was not right in holding that Dr Fraser's report was conclusive evidence of the respondent's condition. It may have been conclusive evidence of his condition at that time, namely, that his left eye was not so bad as it had been, and was greatly improved. In the case of *M'Avan*[1] my opinion was that it could not be conclusive even as to the actual condition at the time, that is to say, that it might be affected by evidence that the actual condition at the time was not occasioned by the accident at all, but by some prior or subsequent event, and that might be proved by the medical man himself examined as a witness, and also by the workman examined as a witness. But we have no occasion to consider that here, because it was not a matter of contest or question between the parties that by the accident the left eye was injured, the only question for the Sheriff being as I have said

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what wages he was actually earning or was capable of earning at the time. I have already said that the term medical "referee" is erroneously used in the statement in the case. There is only one other statement in it on which I have a word to say,—"Neither party moved for proof." I think that was a superfluous statement. We were told that the employer did so—that he desired to lead evidence, but did not make any further motion on the matter, the Sheriff having indicated an opinion which he expresses that any evidence in addition to the report was altogether excluded. The question he put was,—"Should he, before deciding the matter, have given parties an opportunity of leading evidence *aliunde* as to the present capacity of the respondent for earning wages at the kind of employment in which, according to the opinion of the medical referee, he is now able to engage?" I think his decision on that point was clearly wrong, and we ought accordingly to state our opinion to the effect which I have indicated and expressed.

LORD TRAYNER.—The respondent in this case having received injuries arising out of and in the course of his employment with the appellants was duly awarded compensation in December 1903. In April 1904 he was required by the appellants to submit himself to examination by a medical man nominated by them, and he did so. Being dissatisfied with the report or certificate granted as the result of that examination, the respondent submitted himself to examination by a medical man nominated by the Secretary of State, and on his report the appellants maintain that they are entitled to have the compensation awarded to the respondent either reduced or ended. The Sheriff has refused to do this, and I think his judgment should not be interfered with. It will be observed that the proceedings which have taken place are in strict conformity with those prescribed by the 11th section of the First Schedule of the Act. That being so, I hold the certificate of the medical practitioner nominated by the Secretary of State to be conclusive evidence of the respondent's condition at the time the examination was made. The statute says in express terms that it shall be so, and we have decided that it is so in the case of *M'Avan*.[1] I see no reason for going back on the question so decided. It may be that the certificate of such a medical man to whom a remit is made under section 13 of the Second Schedule is not conclusive. On that question I offer no opinion, it is not the case before us.

It has been observed that the statute does not call the medical man to be nominated by the Secretary of State a "referee." That is so, but the title is not inappropriate, the language of the statute makes the medical man a referee whose opinion is conclusive on the matter referred to him. I think therefore the title of referee is not inappropriate, and it is certainly convenient. I therefore use it.

In the certificate before us the medical referee says that the respondent is at present "unfit for his usual occupation of a mason's labourer," and if the certificate had ended there, it seems to me no question could have arisen. But the certificate goes on to say that the respondent is fit for any work in which he would not require to exercise for the safety of life or limb that nice discrimination as to distance for which the sight of two eyes is neces-

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sary. The certificate is as conclusive on this as it is on the fact that the respondent is not fit for his usual employment. It is plain that the employment for which the respondent is fitted is of a very limited character. But if the appellants had stated that there was work within that limit which they could offer to the respondent, or that such work was obtainable by him if he sought it elsewhere, proof of such a statement of fact would not be excluded by the referee's certificate, because such a statement would be the statement of one of the parties and not a statement of the injured man's condition by the medical referee. Of any such statement the Sheriff might, and probably should, take cognisance, and order such inquiry regarding it as he thought proper. But the appellants here made no such averment, and asked no proof. In these circumstances I think the Sheriff was quite entitled to hold as he did, that there was no sufficient ground for reducing the respondent's allowance.

I am prepared to answer the first question in the affirmative. The second question, I think, should be negatived, because no such proof as is there referred to was asked, and it was no part of the Sheriff's duty to propose allowing such proof. The third question is not, in my opinion, one for us to answer. The Sheriff as arbiter is alone entitled to consider what allowance should in the circumstances be made, and on that question (so long as he keeps within the statutory limit) his judgment is not subject to our review.

LORD MONCREIFF.—I am of opinion that this appeal should be dismissed; but the case is exceptional, and I wish to state distinctly my reasons for taking this course.

I think we must consider the case as it was presented to the Sheriff and decided by him, and if this is done it will be seen that the questions which are now put to us are afterthoughts, and do not properly arise out of anything that took place before the Sheriff.

An employer of labour who desires to have a weekly payment ended or diminished is bound, in my opinion, to state to the arbitrator definite grounds for his demand. Now, in the present case the only ground upon which the appellants asked that the weekly payment of 11s. 9d., previously awarded, should be diminished was that this demand was justified by the terms of the certificate of the medical referee. The Sheriff had no further evidence or statement before him, and it is expressly stated in the case that neither party moved for proof. Therefore the Sheriff's decision proceeded entirely upon the terms of the certificate.

As the Sheriff refers to the case of *M'Avan* v. *Boase Spinning Company, Limited*,[1] I should like to point out what precisely was decided in that case. It decided no more than this, that the certificate of the medical referee, obtained under subsection 11 of Schedule I., is final and conclusive evidence of the workman's condition at the time—that is, his condition from a medical point of view in regard to his earning capacity, either in his previous occupation or in some other way. The reason why the majority of the Court thought that the Sheriff-substitute's judgment should be reversed was that at his own hand (and even without other proof, which, I think,

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would have been incompetent) he decided in the teeth of the certificate that the workman had not entirely recovered from the injuries sustained. We could not refuse to give effect to the explicit words of the statute.

The present case is not precisely the same; because while the medical referee certifies that in consequences of the injury to the sight of one eye, the respondent, who is sixty-six years of age, is no longer fit for his usual occupation as mason's labourer, he is fit for any work which can be found for him in which, for the safety of life or limb, he would not require the unimpaired sight of both eyes.

Now, I do not understand that either of the parties dispute that this certificate is final and conclusive as to the workman's condition. It is conclusive against the appellants, in so far as it finds that the respondent is unfit for his usual occupation; and it is conclusive against the respondent, in so far as it finds that he is fit for any work which does not require unimpaired vision of both eyes. But then the appellants did not state to the Sheriff, and offer to prove, what work could be found for the respondent under these conditions; or that the workman was in point of fact earning wages in some other employment. The Sheriff was therefore driven to decide the case upon the certificate alone, and, rightly or wrongly, he held that on the only information before him he had not materials for reducing the weekly allowance.

Coming now to the questions put to us, the first question is ruled by the case of *M'Avay*.[1] No evidence is competent to contradict the certificate as regards the respondent's present condition.

The second question does not properly arise out of what took place before the Sheriff. I indicate no opinion that proof as to matters which are collateral to and do not contradict a certificate may not be admitted. Certainly the decision in the case of *M'Avan*[1] does not exclude it. But as no statement or offer of proof of that kind was made to the Sheriff, I do not think we are called upon to answer that question.

As to the third question, I think it was for the Sheriff, and not for us, to decide whether on the terms of the certificate he should or should not diminish or end the weekly payments.

I have only to add that I do not think that it would be proper in this case to remit the case to the Sheriff to allow a proof. We do not even now know precisely what proof the appellants desire.

It is always competent to the appellants to apply again to the Sheriff for a revision of the weekly payments if they are in a position to state facts which they desire to prove, which will not go to contradict the certificate, and which will instruct that there is work which the respondent either has got or might get for which he is fit in his present condition.

THE following interlocutor was pronounced:—"Answer the first question of law therein stated in the affirmative, and the second question of law therein stated in the negative: Find and declare accordingly: Therefore affirm the award of the arbitrator, and decern," &c.

MACPHERSON & MACKAY, S.S.C.—JOHN BAIRD, Solicitor—Agents.

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Dec. 6, 1904.* General Assembly of the Free Church of Scotland v. Lord Overtoun.

THE GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND AND OTHERS, Appellants (Petitioners).—*Johnston, K.C.—Salvesen, K.C.—J. R. Christie.*

LORD OVERTOUN AND OTHERS, Respondents.—*Shaw, K.C.—Guthrie, K.C.—Orr.*

*Process—Appeal to House of Lords—Petition to apply judgment—Discretion of Court to delay.*—In an appeal the House of Lords reversed the decision of the Court of Session, and remitted the case to them with a direction to declare in terms of certain declaratory conclusions.

On a motion in the Single Bills to apply the judgment the respondents stated certain objections to the motion being granted, and moved that the case should be sent to the Summar Roll.

The Court (Lord Young *dissenting*) *refused* the motion, and applied the judgment, holding that their functions in the matter were purely ministerial.

2D DIVISION.

(ANTE, 4 F. p. 1083, H. L. reports in the present volume, p. 1.)

In the appeal at the instance of the General Assembly of the Free Church of Scotland and others against Lord Overtoun and others, the House of Lords, on 1st August 1904, pronounced the following judgment:[1]—"That the said interlocutors, complained of in the said appeal, be, and the same are hereby, reversed: And it is further ordered, that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with a direction to declare (1) that the association or body of Christians calling themselves the United Free Church of Scotland has no right, title, or interest in any part of the whole lands, properties, sums of money, and others which stood vested, as at the 30th day of October 1900, in the Right Hon. John Campbell, Baron Overtoun, and others, as General Trustees of the Free Church of Scotland; and (2) that the said appellants (pursuers) and those adhering to and lawfully associated with them, conform to the constitution of the Free Church of Scotland, are and lawfully represent the said Free Church of Scotland, and are entitled to have the whole of said lands, property, and funds applied according to the terms of the trusts upon which they are respectively held for behoof of themselves and those so adhering to and associated with them, and their successors, as constituting the true and lawful Free Church of Scotland, and that the defenders, the said Right Hon. John Campbell, Baron Overtoun, and others, as General Trustees foresaid, or the defenders second enumerated, or those of the defenders in whose hands or under whose control the said lands, property, and funds may be for the time being, are bound to hold and apply the same (subject always to the trust after mentioned) for behoof of the pursuers and those adhering to and associated with them as aforesaid, and subject to the lawful orders of the General Assembly of the said Free Church of Scotland, or its duly appointed Commission for the time being, and in particular that they are bound to denude themselves of the whole of said lands, property, and funds in favour of such parties as may be nominated as General Trustees by a General Assembly of the Free Church of Scotland, or its duly appointed Commission for the time being, but subject always to the trusts upon which the said lands, property, and funds were respectively held by the said defenders for behoof of the Free Church of Scotland as at 30th October 1900; and

* Decided Oct. 22, 1904.

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to do therein as shall be just and consistent with this judgment and direction."

The appellants presented a petition praying the Court to apply the judgment, and to declare in terms thereof.

When the case was called in the Single Bills counsel for the appellants moved the Court to grant the prayer of the petition, and maintained that the Court was bound to pronounce an interlocutor in terms of the direction of the House of Lords without delay. The functions of the Court were merely ministerial, and excluded the exercise of any discretion.[1]

Counsel for the respondents moved that the case should be sent to the Summar Roll. He stated that he proposed to put in a minute shewing that the appellants had, since the date of the judgment, admitted that they could not carry on the trust thereby vested in them, and he maintained that the Court were entitled in their discretion to delay pronouncing an interlocutor in terms of the remit from the House of Lords. In answer to a question from Lord Young, he stated that the respondents proposed to apply to Parliament for legislation on the subject.

The Court took time for consideration.

At advising,—

LORD JUSTICE-CLERK.—The Court has in this matter a purely ministerial duty—the duty to give effect to the judgment of the House of Lords, as the highest constitutional Court of Appeal, by pronouncing a decerniture in accordance with its order. Whether it would be permissible in any circumstances to delay for a time on cause shewn the giving of such an executive judgment may be a question, but I am clearly of opinion that no ground has been brought forward in the present case for departure from the usual practice, under which, when a petition is presented to apply a judgment of the House of Lords, that petition is at once granted as an act of obligatory ministerial duty.

The only grounds hinted at for delay are (1) that the unsuccessful party intends to apply to Parliament to deal with the matter which was in dispute by legislation, and (2) that the petitioners have admitted their inability to administer the trust which as a consequence of the House of Lords judgment will be committed to them—an allegation which is denied. I am unable to see how this Court could be justified in declining to perform the duty laid upon it on any such grounds, and I would therefore move your Lordships to grant the prayer of the petition and to apply the judgment.

LORD YOUNG.—This petition to apply the judgment of the House of Lords, and to decern or declare in the terms therein specified, is one of a familiar character, occurring in the case of every unimplemented judgment of the House of Lords, and invariably granted without opposition, so far as my experience goes. The purpose of such an application, and the purpose of the order or decree upon it, such as is asked here, is to enable the applicants to take such steps as may be necessary for the compulsory enforcing

[1] Stewart v. Agnew, March 12, 1823, 1 Sh. App. 413, *per* Lord Redesdale, at p. 426; Stuart v. Moore, May 25, 1861, 23 D. 902, *per* Lord Justice-Clerk Inglis, at p. 913.

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of the judgment, which may require the intervention of officers of the law, from Sheriffs and magistrates down to messengers-at-arms and policemen, and jailors, who perform their duties under the supervising and overseeing power and authority of this Court. No other purpose has ever been, or possibly could be achieved by the application of any House of Lords judgment, such as the petitioners before us now desire. The judgment of the House of Lords is in itself final and conclusive, and this Court cannot change it in any way, or even criticise it, or properly permit it to be criticised, whether favourably or unfavourably, in any debate on the petition to apply. The motion of the respondents just now before us, and which was made when the petition was in the Single Bills, is only this—that we should in the meanwhile delay dealing with the petition. That motion was made in the view that this was an exceptional case, and that it was in the legitimate interests of a great multitude of people in this country, in the legitimate interests of the public, and reasonable in itself, that our interposition now to pronounce the first step with the view to the compulsory enforcement of the decree should be delayed. The existence or non-existence of any discretionary power on the part of this Court to delay giving decree for the application of the judgment is a question which I thought worthy of argument. If it does not exist, there is, of course, an end of the matter; we must grant decree as in a case presenting no exceptional circumstances for our delaying to grant decree as we usually do, so far as I know. As I have already said, such an application is never opposed. I never knew it opposed, and therefore the Court was never, as it is now, asked to delay granting it. Here we are asked to delay granting it upon the ground that the case is of an exceptional character, and that it is reasonable in the apparent interests of a very large part of the public of Scotland, that we should delay. Now, what are these circumstances? The judgment—the soundness of which I assume, and I shall not indicate any impression whatever against its soundness in every respect—the import of the judgment, and, indeed, the expression of it in language which is not doubtful, is to take the whole property that belonged to the Free Church before the union with the United Presbyterian Church from those in whose possession it now is, and to hand it over to those who dissented from the Union. That is to say, to put the congregations of the United Church—the Church which was united in October 1900—out of possession of the churches of which they have always hitherto been in possession, and the ministers out of the manses in which they have always hitherto dwelt, and to remove them from any use or enjoyment by them of the funds from which to a large extent the stipends of the ministers and the expenses of administration of the whole affairs of the Church must come—to hand that all over at once, I assume in pursuance of the very sound judgment—a judgment which may be found to be so, and which I regard as being so at present—and to put all that property, heritable and moveable, amounting in value to a number of millions, into the hands of a very small minority not one in a hundred, but about one in a thousand of those who agreed to the Union.

Now, if the judgment is to stand, if it is not to be interfered with by any power obtained to interfere with it, that must be the result, for the judgment is to the effect that such use and enjoyment and applica-

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tion of these funds as have been made during the last four years have been in breach of trust, so gross breach of trust that the trustees in whose possession it was and who made that expenditure, have to restore all the money out of which they made that expenditure. That may not be asked, but it is the effect of the judgment. Now, what we were told upon this motion, the only motion before us, is that we should delay pronouncing decree, which is the first step towards the compulsory enforcement of the judgment, that is the compulsory ejection from houses, and churches, and manses, and the stoppage of any payment from the funds which existed in the hands of the Free Church prior to October 1900—we were told in support of the motion that we should delay doing so in the meantime, that there was no urgency in the matter unless we thought it urgent that that should be immediately done, and we were assured, and I cannot take the assurance as idle, that the whole case was to be brought before Parliament. It may be by the Government of to-day—the proper officer of the Government of to-day, the Secretary for Scotland, or the Prime Minister, or any others; but if not brought before Parliament by the Government for their judgment upon the matter, it would, we were assured, be brought by one or more Members of Parliament either in one House or the other. I cannot but take the statement, coming as it did from responsible counsel representing such a body as the United Free Church of Scotland, that that is to be done. How Parliament may deal with it in the bill or in any other Parliamentary process, bringing the question before them—whether this divestiture of such numbers of people and investiture with the property of a few—whether that is to stand and be enforced—will be a matter for the consideration of Parliament. It would be very unbecoming on my part to indicate any opinion or any expression of opinion, if I had any, as to how Parliament would deal with it. If they refuse to deal with it at all, and leave the matter to the law without any intervention on their part, then the result will be undoubtedly that the judgment will stand and must be enforced with whatever force the law can afford to those desirous to enforce it. It must be enforced as it stands. It was represented to us that it was just possible that Parliament might take another view and interfere, and therefore it was reasonable that we in the meantime should delay our interposition to give immediate enforcement of the judgment, and the motion made to us in the Single Bills was that the case should go to the Summar Roll for argument upon the question as to whether it is within our power, if we thought it would be just and reasonable to do it, to delay in the meantime to grant the application in this petition—to allow it to stand off in the meantime.

Now, we were told by Mr Guthrie that he had a good deal to say on the matter, and that he had even facts to bring before us in the matter as to the consequences of handing over this estate to the minority who dissented from the Union, and who are now the Free Church. He desired to have the matter argued, and his concluding motion was that the matter should be sent to the Summar Roll, where arguments might be heard. I thought that was a reasonable motion, and I hesitate to express any opinion upon the question —although I have an opinion upon it—that we have the power to delay, if we think it is just and reasonable to exercise it. I should desire argument upon that, as such was the desire of the party who made the motion, and I

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should desire all the assistance that could be given to the Court by argument upon either side or any authority quoted by either side. Your Lordships are of another opinion, and think that the matter is so clear and so urgent that it would be unreasonable to listen to the request for any delay, and that we should put the successful party in the House of Lords into the position of now being able to invoke all the powers of the law and legal officers in order to enforce the immediate execution of the decree. As to the propriety or impropriety of granting delay, I should like to have had further argument from both sides. I think it is a proper matter for argument on both sides, and in accordance with the motion made by the respondents I think that the case should be sent to the Summar Roll for full discussion. Upon that matter your Lordships, I was informed only, I think, the day before yesterday, had come to a different opinion, and thought there was no occasion for argument at all, and that argument ought not to be allowed. I was desirous of having even the present advising put off — having heard that opinion only the day before yesterday—until next week, that I might consider the matter more carefully and be able to express my views more carefully than I have done; but your Lordships were of opinion that even that delay, which I personally requested, ought not to be granted, but that the prayer of the petition ought at once to receive effect. I assume that is the correct view of the majority of the Court and that that is to be done, but I must, in justice to my own views, express what I have done on the subject. I think we ought not to grant the prayer of the petition until we have heard argument as to whether or not it is within our discretion to delay dealing with the matter, and also whether there are grounds for exercising that discretion in the way moved for by the defenders and respondents.

LORD TRAYNER.—The House of Lords have remitted to us to pronounce a certain order. The terms of that remit are not ambiguous or open to construction. The petitioners now ask us to give effect to the remit by pronouncing an order in conformity therewith. The defenders move us to delay pronouncing any order, and ask in effect an opportunity of shewing cause why the order asked by the petitioners should not be pronounced. I think there is no occasion, and indeed no room, for any such discussion as that which the defenders ask us to hear. The duty which the remit from the House of Lords imposes on us is not in any proper sense judicial. It is purely ministerial. Our only duty is to do what we have been requested to do, and we have no choice or discretion in the matter. What may be the consequences of our present decree are matters of which we can take no account. I am therefore of opinion that the prayer of the petition should be granted *de plano*.

LORD MONCREIFF.—I agree with the majority of your Lordships that we should, without further discussion, pronounce decree of declarator in terms of the third and sixth conclusions of the summons.

The House of Lords has remitted this case with explicit and unambiguous directions to do so.

It is not open to us to question the judgment of the House of Lords, nor the binding authority of the remit; and it is equally beyond our power,

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were we so disposed, to delay giving effect to the remit from any considerations of consequences which may follow upon decree of declarator being pronounced—consequences which it must be presumed the noble and learned Lords foresaw when they pronounced judgment.

In these circumstances, there being no dispute as to the form or meaning of the remit, discussion is, and, in my opinion, was from the first incompetent.

Mr Guthrie, however, was allowed to state his objections at considerable length, but he did not state a relevant or practicable reason for granting delay, and did not cite a single authority for departing from our well-established constitutional duty to give implicit obedience to the orders of the Court of last resort without question or delay. If authority were required for the course we propose to adopt I may refer to the opinion of Lord Redesdale in the case of *Stewart*,[1] and that of Lord Justice-Clerk Inglis in *Stuart* v. *Moore*.[2]

THE COURT pronounced an interlocutor in terms of the prayer of the petition.

SIMPSON & MARWICK, W.S—COWAN & DALMAHOY, W.S.—Agents.

No. 39.
Dec. 6, 1904.
Brechin Parish Council v. Montrose Parish Council.

PARISH COUNCIL OF BRECHIN, Pursuers (Respondents).—*Salvesen, K.C.—Lamb.*
PARISH COUNCIL OF MONTROSE, Defenders (Reclaimers).—*Campbell, K.C.—Orr Deas.*
PARISH COUNCIL OF MARYKIRK, Defenders (Respondents).—*Ure, K.C.—Hunter.*

*Poor—Pauper Lunatic not forisfamiliated — Settlement — Residential Settlement of Father—Relief given to son while living with father—Admission of Liability—Lunacy (Scotland) Act*, 1857 (20 *and* 21 *Vict. cap.* 71), *sec.* 75.—In November 1876 a boy, aged fourteen, of weak intellect, and living with his father, received parochial relief from the parish of Montrose, in which his father was then residing. At that date the father had not acquired a residential settlement in Montrose, and, in March 1877, Brechin, the parish of the father's birth, admitted liability for the relief given to the son. In May 1877 the father had acquired a residential settlement in Montrose, unless he was to be regarded as a pauper in respect of the relief given to his son in 1876. The son was never forisfamiliated or able to maintain himself. In September 1891 he was placed in an asylum as a pauper lunatic by order of the Sheriff, and was subsequently supported there by the parish of Brechin.

On 6th October 1897 Brechin gave Montrose the statutory notice claiming repayment of the charges incurred on behalf of the pauper.

In an action by Brechin against Montrose for repayment of its disbursement since 6th October 1896, one year before the statutory notice, *held* that Montrose was liable, on the grounds (1) that the son followed the settlement of his father; (2) that the father was not made a pauper by the relief given to his son in 1876, and had acquired a residential settlement in Montrose in May 1877; and (3) that the admission of liability properly made by Brechin in March 1877 was not binding after the father had acquired a residential settlement in Montrose.

[1] 1823, 1 Shaw's Appeals, 413, at p. 426.
[2] 1861, 23 D. 902, at p. 913, 33 Scot. Jur. 474.

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1st Division. LdStormonth-Darling.

WILLIAM CROCKET was born in Marykirk on 4th November 1862. John Crocket, his father, was born in Brechin, and resided for some time in Marykirk. At Whitsunday 1872 he went to reside in Montrose, and remained there till his death in August 1898. On 15th August 1878 he was admitted to the poor's-roll of Montrose on the ground that he had a residential settlement there, and repeatedly received relief until his death.

In 1874 William Crocket lost his right hand by an accident, and was then and continued to be of weak mind and incapable of earning his livelihood. William Crocket first received parochial outdoor relief from Montrose on 11th November 1876, at which date he was residing in family with his father. This relief was continued till 11th April 1877. A claim for the relief thus afforded was made by Montrose on Brechin on the ground that William Crocket was not forisfamiliated, and that, his father having no residential settlement, the parish of his father's birth was liable. By letter, dated 6th March 1877, the Inspector of Poor of Brechin admitted this claim, and the advances made by Montrose were repaid by Brechin.

On 11th April 1877 William Crocket was placed in Montrose Royal Lunatic Asylum as a pauper lunatic by order of the Sheriff. He was discharged from the Asylum "recovered" on 18th December 1877. He was again sent to the Asylum from 12th May 1879 until 9th March 1891. On 11th September 1891 he was once more placed in the Asylum by order of the Sheriff,* and had since remained there supported by the parish of Brechin.

In the intervals when William Crocket was not confined in the Asylum he wandered about the country supporting himself by begging; he was imprisoned on two occasions for assault, and was also an inmate of poorhouses for short periods. He returned occasionally to his father's or mother's house, but was entirely beyond their control. From bodily and mental weakness he had never been able to maintain himself.

On 6th October 1897 the Inspector of Poor of Brechin gave notice in terms of section 71 of the Poor-Law Amendment (Scotland) Act, 1845,[1] and section 78 of the Lunacy (Scotland) Act, 1857,[2] to the Inspector of Poor of Montrose claiming relief and repayment of the charges incurred on behalf of William Crocket. A similar notice was sent to the Inspector of Poor of Marykirk on 25th October 1895.

On 23d April 1903 the Parish Council of Brechin brought an action against the Parish Council of Montrose for repayment of the sum disbursed on behalf of William Crocket from one year prior to the date on which the statutory notice of claim was sent to the defenders. The sums so disbursed were not in dispute.

The action was also directed against the Parish Council of Marykirk, in which parish the pauper was born, but it is not necessary to refer to their defence, which was sustained.

Both defenders denied liability.

The pursuers pleaded;—(1) The said William Crocket having

* The Lunacy (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), enacts:—Sec. 75. "Every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such asylum was granted, and the expense of his maintenance in such district asylum shall be defrayed by such parish accordingly."

[1] 8 and 9 Vict. cap. 83. [2] 20 and 21 Vict. cap. 71.

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been born in the parish of Marykirk, the pursuers are entitled to decree against the Parish Council of that parish. (2) Or otherwise, the said William Crocket not having been forisfamiliated, and being of weak intellect, the pursuers are entitled to decree against the Parish Council of Montrose as the parish of his father's settlement.

The Parish Council of Montrose pleaded, *inter alia*;—(2) The pursuers' predecessors having, through their inspector of poor, admitted liability to these defenders' predecessors for the relief of the said pauper on 6th March 1877, the pursuers are barred from insisting in the present action as against these defenders. (4) The pauper's father not having acquired a settlement in the parish of Montrose, these defenders are entitled to absolvitor from the conclusions of the summons, with expenses. (5) *Separatim*, the said William Crocket having been born in the parish of Marykirk, and having been forisfamiliated, the Parish Council thereof, and not the Parish Council of Montrose, are liable to relieve the pursuers. (6) Alternatively, the said William Crocket's settlement is, and has been since 1876, in the parish of Brechin.

A proof, which was allowed and led, established the facts set forth above.*

On 10th June 1904 the Lord Ordinary (Stormonth-Darling) decerned against the Parish Council of Montrose for payment and relief in terms of the conclusions of the summons, and assoilzied the Parish Council of Marykirk.†

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* At the proof John Spalding, Inspector of Poor for the parish of Montrose, stated,—"At the time William Crocket was relieved in 1876, I believe his father had been for some time invalided. It appears from the register, of which No. 27 is an excerpt, that John Crocket had been invalided for more than two and a half years before December 1877, and from No. 29 that he had been an invalid for three years prior to August 1878. The letter, No. 25, from Montrose to Marykirk of 13th November 1876 bears that he had been invalided for eighteen months."

† "OPINION.—The pauper in this case was born in the parish of Marykirk on 4th November 1862. He first received parochial relief from the parish of Montrose on 14th November 1876, and he has continued a pauper, with some quite insignificant intervals, ever since. On 14th November 1876 he was residing in family with his father, who was at that time, so far as the evidence goes, an able-bodied man; but the boy had, through an accident, lost his right hand, and he had always been somewhat weak-minded. A claim for the relief thus afforded was made by Montrose on the parish of Brechin, which was the parish of the father's birth, and the claim was, by letter of 6th March 1877, admitted by Brechin, there being no doubt that the lad, though a few days over the age of fourteen, was still in point of fact resident with and dependent upon his father, and there being also no doubt that the father had not at that time acquired any residential settlement.

"On 11th April 1877 the lad was admitted to the Montrose Lunatic Asylum by order of the Sheriff, but he was discharged on 18th December 1877. On 12th May 1879, however, he was again certified as a lunatic and readmitted to the Montrose Asylum, and once more, after an absence of only a few weeks, he was certified and readmitted on 11th September 1891. He still remains an inmate of the asylum on the Sheriff's order of 1891.

"Now, the Lunacy Act of 1857, by section 75, provides 'that every pauper lunatic detained in any district asylum under this Act shall be deemed and held to belong and be chargeable to the parish of the legal settlement of such lunatic at the time the order for his reception in such

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The Parish Council of Montrose reclaimed, and argued;—(1) The relief given to William Crocket, the son, in 1876 was in effect relief given to John Crocket, the father, who then became a pauper, and could not acquire a residential settlement in Montrose. The fact that the father was invalided * and not able-bodied distinguished this case from the cases of *Milne* v. *Henderson and Smith*[1] and *Milne* v. *Ross*.[2] Brechin was therefore liable as the parish of the father's birth. (2) Alternatively, the son had become chargeable to Brechin in his own right in 1876. He had never been rehabilitated, and therefore Brechin remained liable throughout.[3] The case of *Beattie* v. *Wood*[4] was distinguished, because there the pauper had been rehabilitated. Brechin had deliberately admitted liability in 1877, and that admission could not be withdrawn.[5]

Argued for the pursuers, the Parish Council of Brechin;—(1) Relief given to a lunatic son living with his father, who was able-bodied

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asylum was granted, and the expense of his maintenance at such district asylum shall be defrayed by such parish accordingly.' I am not sure whether Montrose is, strictly speaking, a 'district asylum,' but that is of no consequence, because it is at all events a public asylum, and the case of *Palmer* v. *Russell*, 10 Macph. 185, decides that there is no distinction in respect of chargeability between a pauper lunatic in a district asylum and a pauper lunatic in any other lawful asylum to which the Sheriff may have sent the lunatic. Accordingly the question of liability for the expense of this pauper's maintenance since 11th September 1891 must depend on what was the parish of his legal settlement at that date.

"Now, at that date there had been a change of circumstances from those existing on 6th March 1877, when the parish of Brechin made its formal and deliberate admission of liability. The change was this: John Crocket, the pauper's father, had at Whitsunday 1877 completed the period necessary to give him a residential settlement in the parish of Montrose, and he had been admitted to the poor's-roll of that parish on 15th August 1878. From that time onwards till his death in 1898 he retained his residential settlement, and was from time to time relieved by Montrose. Montrose now maintains, contrary to its own action at and subsequent to August 1878, that John Crocket, the father, never acquired a residential settlement. The contention is founded on the view that the relief afforded to the son on 14th November 1876 had the effect of pauperising the father; but that seems to me contrary to the decisions in *Milne* v. *Henderson*, 7 R. 317, and *Milne* v. *Ross*, 11 R. 273.

"If, then, there was a material change of circumstances after the time when Brechin made its formal admission of liability on 6th March 1877, I am of opinion that Brechin is not bound by that admission. I admit that in *Beattie* v. *Arbuckle*, 2 R. 330, *Young* v. *Gow*, 4 R. 448, and several other cases, it was decided that where one parish has deliberately admitted to another liability for the support of a pauper, it cannot withdraw that admission and open up the question of liability on the ground that the admission was made in error either as to the facts or as to the law. But it is fully

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* Proof, p. 209, *supra*.

[1] Dec. 3, 1879, 7 R. 317.

[2] Dec. 11, 1883, 11 R. 273.

[3] Beattie v. Adamson, Nov. 23, 1866, 5 Macph. 47; Inspector of Poor of Inverkip v. Inspector of Poor of Greenock, Nov. 14, 1893, 21 R. 64.

[4] Feb. 9, 1866, 4 Macph. 427.

[5] Beattie v. Arbuckle, Jan. 15, 1875, 2 R. 330; Young v. Gow, Feb. 9, 1877, 4 R. 448.

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and able to earn wages, did not pauperise the father.[1] It had not been proved that John Crocket, the father, was not able-bodied in 1876. It was not sufficient to prove that he was in bad health.[2] The father had therefore acquired a residential settlement in Montrose, and the son followed his father's settlement. (2) Brechin had rightly admitted liability in 1877 as the parish of the father's birth, because at that time the father had no residential settlement. That admission, however, was only binding so long as the circumstances remained the same,[3] and had no effect after the father had acquired a residential settlement in Montrose.

At advising,—

LORD ADAM.—This action is brought by the parish of Brechin against the parishes of Montrose and Marykirk, in order to recover from one or other of them the amount of certain disbursements made by the parish of Brechin in respect of a pauper—William Crocket. The amount of the disbursements is not in question.

The pauper, William Crocket, is at present an inmate of Montrose Lunatic Asylum, where he is detained under an order for his reception, granted by the Sheriff-substitute of the county of Forfar, of date 14th September 1891.

The 75th section of the Lunacy Act of 1857 provides that a pauper

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recognised in these cases that, although a deliberate admission must be treated as having been good when it was made, and therefore not to be gone back upon, circumstances may emerge to render it no longer binding. Thus Lord Gifford in *Arbuckle's* case says,—'If, then, the admission be binding, the only question that remains is, for how long? The answer is, as long as the pauper is chargeable and the circumstances remain the same.' Here I do not proceed on the specialty that Montrose knew the fact of its having admitted John Crocket, the father, to the poor's-roll, and did not communicate that fact to Brechin, because I do not impute *mala fides* to Montrose in thus failing to communicate a fact which it probably regarded as immaterial. It is enough, in my view, that there was a change of circumstances, and that Brechin was not to blame for not sooner discovering the change. The only effect of its not having been discovered earlier is greatly to limit the period for which Brechin can have recourse against Montrose. The disbursements for which repayment is sued date only from 6th October 1896, *i.e.*, from one year preceding the written notice required by the statute. For these disbursements I think Montrose is liable.

"There is no case against Marykirk, because the pauper has never been self-supporting in the sense of the poor-law. He has always either been in receipt of relief or has lived (for very short periods) by begging. His settlement therefore has been all along derivative. It was the father's birth parish, viz., Brechin, till Whitsunday 1877, when the father acquired a residential settlement, viz., Montrose. As Brechin was liable at the date of the lunatic's first admission to the asylum on 11th April 1877, the 75th section of the Lunacy Act had the effect of continuing Brechin's liability till his discharge on 18th December in that year. But after that date, and particularly at the crucial date of his final admission on 11th September 1891, the liability lay no longer on the parish of the father's birth, but on the parish of the father's residence."

[1] Milne v. Henderson and Smith, Dec. 3, 1879, 7 R. 317; Milne v. Ross, Dec. 11, 1883, 11 R. 273.

[2] Jack v. Thom, Dec. 14, 1860, 23 D. 173.

[3] Beattie v. Arbuckle, Jan. 15, 1875, 2 R., *per* Lord Gifford, at p. 337.

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lunatic detained in an asylum shall be chargeable to the parish of his settlement at the time the order for his reception in such asylum was granted.

The question, therefore, in this case is what was the parish of settlement of William Crocket on 14th September 1891—and that leads to the consideration of his past history.

He was born in the parish of Marykirk on 4th November 1862. When quite young he lost his right hand by an accident, and was then and is still of weak mind and incapable of earning a livelihood.

He was in the Montrose Lunatic Asylum from April 1877 until 18th December of that year, when he was discharged cured.

He was again in the asylum from 12th May 1879 till 9th March 1891, when he was discharged cured, and, as has been stated, he was again received in the asylum on 14th September of that year, where he remains.

In the intervals, when he was not confined in the lunatic asylum, he seems to have wandered about the country supporting himself by begging. He was in prison on two occasions for short periods, for assaults; he was also an inmate of poorhouses for short periods, and he returned occasionally to his father's or mother's house. He was, however, entirely beyond their control and never remained long with them. From bodily and mental weakness he has never been able to maintain himself.

He has never been forisfamiliated, or acquired an independent settlement for himself.

On 13th November 1876 he received parochial relief in the shape of weekly payments from the parish of Montrose where he was living in family with his father. These payments ceased on the 5th April 1877.

Montrose as the relieving parish claimed relief from the parish of Brechin as being the parish of his father, John Crocket's settlement, and that claim was admitted by Brechin on 6th March 1877. Brechin was the father's birth settlement.

At Whitsunday 1877, however, John Crocket had resided in Montrose for the five years requisite to give him a residential settlement there. On the 15th August 1878 he was admitted to the poor's-roll of that parish on the ground that he had a residential settlement there. From that time until his death in August 1898 there is no doubt that Montrose recognised him as having a settlement in that parish, and repeatedly gave him parochial relief. It is now maintained, however, by Montrose that this was done in error, and that the relief given to his son in November 1876 had the effect of pauperising the father, and therefore that he had never acquired a residential settlement in Montrose.

It was settled, however, in the case of *Milne* v. *Henderson*,[1] and *Milne* v. *Ross*,[2] that relief given to a son, who was unable to maintain himself, had not the effect of pauperising the father.

It was maintained, however, that these cases were distinguishable from the present in respect that in each of them the father was an able-bodied man and was not, therefore, and could not be, a proper object of parochial relief, whereas in this case the father was not an able-bodied man but was "invalided," whatever that may mean.

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[1] 7 R. 317. [2] 11 R. 273.

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There is no evidence to shew what John Crocket's bodily condition was at this time, or how he maintained himself, but the cardinal fact is not disputed that he had never applied for or received parochial relief, and accordingly when he had completed his five years of residence in Montrose he acquired a residential settlement in that parish.

I think, accordingly, that subsequent to Whitsunday 1877 William Crocket had a derivative residential settlement in the parish of Montrose. If that be so, I do not understand it to be disputed that Montrose continues to be the parish of his settlement.

It was further maintained by Montrose on the authority of the cases of *Arbuckle*[1] and *Young*,[2] that Brechin could not insist in its present claim of relief, being bound by the admission of liability for the pauper given on 6th March 1877. It appears to me that these cases have no application to the present case. What was decided in these cases was that an admission made as to the liability for a pauper was binding on the parish making it, and could not be withdrawn, although made in error as to the true facts of the case. But in this case when the admission was made, there was no error as to the facts, because Brechin was liable as the parish of the father's settlement, as it then was, and rightly made the admission.

The admission, no doubt, was binding so long as William Crocket was receiving relief in 1876 and 1877, but when that chargeability ceased, so also the admission made with regard to it ceased to have any further binding effect. The admission made by Brechin must be taken as true at the time it was made, *i.e.*, that John Crocket the father then had a birth settlement in Brechin. But when John Crocket acquired a residential settlement in Montrose, the admission had no bearing on the new facts of the case, and did not affect the liability of Montrose to aliment the pauper son, whose settlement followed that of the father. It is not the law that an admission of liability rightly made in one set of circumstances is binding in a totally different set of circumstances. There is no evidence that Brechin knew of, or made any admission of liability, with reference to the new state of facts which had emerged since their admission of liability in 1877.

These were the only questions argued to us, and I am of opinion that the Lord Ordinary's interlocutor is right and should be adhered to.

The LORD PRESIDENT, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT adhered.

R. ADDISON SMITH & Co., W.S.—W. & J. BURNESS, W.S.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

No. 40.

Dec. 6, 1904. Mann, Macneal, & Co. v. Ellerman Lines.

MANN, MACNEAL, & COMPANY, Pursuers (Respondents).—*Salvesen, K.C.—R. S. Horne.*
THE ELLERMAN LINES, LIMITED, Defenders (Appellants).—*Lord-Adv. Dickson—Younger.*

*Ship — Collision — Moving and stationary vessels—Onus—Compulsory Pilotage—Liability for defective equipment of ship.*—When a vessel in motion collides with a vessel at rest the presumption is that the former is

[1] 2 R. 330. [2] 4 R. 448.

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in fault, and this presumption will not be overcome by proof that the colliding vessel was compulsorily in charge of a pilot, unless it is also proved that the collision was due to the fault of the pilot.

The steamship "City of Edinburgh" while being towed out of the Queen's Dock at Glasgow by two tugs, and while compulsorily in charge of a pilot, collided with the "Glassford" which was lying moored to the quay. At the time of the collision the "City of Edinburgh's" anchors were not available for use, as the windlass was under repair.

In an action by the owners of the "Glassford," against the owners of the "City of Edinburgh" for damages for the collision, the defenders maintained that the pilot was in fault in moving the ship when her anchors were not available for use. It was proved that the pilot was aware of the want of anchors, but was not consulted as to whether it was safe to move the ship without them. The evidence was conflicting as to whether the use of anchors would have averted the collision.

*Held* that the defenders had not overcome the presumption of fault against them, as the owners of a moving ship colliding with one that was stationary, by proving that their ship was compulsorily in charge of a pilot at the time, as they had not proved that the collision was due to the fault of the pilot.

*Observed* that if the pilot was in fault in moving the vessel without having available anchors, the defenders were also in fault in not having the vessel duly equipped.

2D DIVISION. Sheriff of Lanarkshire.

ON 21st September 1903 the steamship "City of Edinburgh," belonging to the Ellerman Lines, Limited, collided with the steamship "Glassford," belonging to Mann, Macneal, & Company, Glasgow.

At the time of the collision the "Glassford" was lying moored to the quay at the west end of the Queen's Dock, Glasgow. The "City of Edinburgh" was being towed out of the dock by two tugs. She was under the charge of a duly licensed pilot, pilotage being compulsory in that part of the Clyde.

The "Glassford" was injured by the collision.

Mann, Macneal, & Company brought the present action for damages, in the Sheriff Court at Glasgow, against the Ellerman Lines, Limited.

The pursuers averred;—"The collision was due entirely to the fault or negligence of those in charge of the 'City of Edinburgh.' Explained that the 'City of Edinburgh' was not in a safe and proper condition for navigating the harbour; in particular, the tugs employed were not sufficiently powerful to keep her under control in the weather prevailing at the time, and her anchors were not ready to be let go."

The defenders answered;—"At the time of the collision the navigation of the s.s. 'City of Edinburgh' was in charge of a duly licensed pilot, and the vessel was being navigated in waters to which compulsory pilotage applied. Two tugs were employed, and every precaution taken by defenders to enable the 'City of Edinburgh' to be safely navigated. It is stated by the pilot, and is believed and averred, that just as the vessel was about to be straightened for taking the entrance to the gate to get out of the Queen's Dock, involving at all times a delicate operation, a sudden heavy and unexpected gust of wind occurred, and that in the circumstances no one can be blamed for the accident. Explained in answer that the pilot knew the power of the tugs and as to the condition of the anchors before undertaking the piloting, and the vessel was completely under control of the tugs. If there was any negligence, the whole navigation being in charge of the pilot, the defenders are freed from liability."

The defenders pleaded;—Said collision not having occurred from

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any fault of the defenders or those for whom they are responsible, they should be assoilzied, with expenses.

A proof was taken. It was proved that on the occasion in question the windlass of the "City of Edinburgh" was being repaired, so that her anchors were not available for use. It was also proved that the pilot was aware of this fact, but was not consulted as to whether it was safe to move her in that condition. The import of the evidence on the question whether the collision might have been avoided by the use of anchors is fully detailed in the note of the Sheriff-substitute, *infra*.

On 8th July 1904 the Sheriff-substitute (Balfour) pronounced an interlocutor in which he made, *inter alia*, the following findings:—"Finds that when the 'City of Edinburgh' was being squared up to the entrance, the 'Vanguard' being on the port bow and the 'Warrior' astern, a squall is said to have struck the starboard quarter of the 'City of Edinburgh' and brought her head to the north, and she ran into the starboard side of the 'Glassford,' but she struck the 'Glassford' with very little force and a space of 2 feet more would have avoided the collision: Finds that the squall struck the 'City of Edinburgh' when she was a distance of at least 200 feet from the 'Glassford,' and if an anchor had been dropped from the 'City of Edinburgh' when the squall struck her the collision would have been avoided: Finds that the tugs 'Vanguard' and 'Warrior' are powerful tugs, and they were strong enough to control the movements of the 'City of Edinburgh' on that occasion: Finds, however, that the anchors of the 'City of Edinburgh' were not available that morning, as the windlass had been sent ashore to get repaired, and part of it was taken on board just before the steamer started: Finds that the 'City of Edinburgh' is provided with patent anchors, and these are very often at the hawse pipe when the defenders' steamers are in dock, and if one of these anchors had been dropped from the port bow on the occasion in question the collision would have been avoided, and such anchors can be used in the dock: Finds that the defenders (on whom the *onus* lies) have failed to prove that a sudden, heavy, and unexpected gust of wind occurred which placed the 'City of Edinburgh' beyond the control of the tugs: Finds, under these circumstances, that the collision was caused through the failure of the defenders to have the patent anchors of the steamer ready for use, and that there was no such heavy squall of wind as to place the 'City of Edinburgh' beyond control of the tugs: Therefore finds the defenders liable in damages." *

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* "NOTE.—The steamship 'Glassford' was lying moored at the quay, and the 'City of Edinburgh' was being towed out of the dock in charge of two tugs, but without her own steam. The pursuers aver that the collision was caused by the 'City of Edinburgh' not being in a safe condition for navigating the harbour, in respect that the tugs were not sufficiently powerful to keep her under control, and her anchors were not ready to be let go. The defenders, on the other hand, say that the collision was caused by a sudden, heavy, and unexpected gust of wind, and that it was an inevitable accident.

"It is quite clear from the authorities that the *onus* is on the defenders to prove that the collision arose from inevitable accident, and not from negligent navigation.—See Marsden on Collisions at Sea, pages 35 and 36." (The Sheriff-substitute then dealt with the evidence as to a sudden squall arising on the occasion in question, and as to the alleged insufficiency of the

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The defenders appealed to the Court of Session, and argued;—There was no real distinction here between the present case and the case of *The "Springburn,"* [1] referred to by the Sheriff-substitute. The collision was due either to inevitable accident, arising from the exceptional squall which came on at the time, or to the fault of the pilot. It was submitted that inevitable accident was proved. The ship was being moved under competent management, in the ordinary way, and was deflected from her course by a sudden gust. If, on the other hand, the collision was due to the fault of the pilot there was no doubt that the owners were not responsible. The evidence shewed that the ship's anchors, even if they had been ready for use, would not have prevented the collision. But even on the assumption that the anchors would have prevented the collision, the defenders were not liable. The ship was compulsorily in charge of a pilot, and it was part of his duty to see that she was fully equipped for navigation,

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tugs, holding that neither of these causes materially contributed to the collision.)

"With regard to the question as to the anchors, this is a matter which relates to the equipment of the 'City of Edinburgh' and which concerns the owners themselves and not the pilot. The master and crew are held responsible for having the anchor clear and ready to let go when the pilot gives the order, and the owner or the master is responsible for the sufficiency of the ship as regards tackle and equipment for the purposes of navigation.—See Marsden, pages 265 and 269. The question therefore is whether the anchors ought to have been ready for use in the dock on the occasion in question. It must be kept in view that it would have taken very little to keep the 'City of Edinburgh' clear of the 'Glassford,' as the evidence goes to shew that the 'City of Edinburgh' touched the 'Glassford' very lightly, and 2 feet more would have cleared her. The 'City of Edinburgh' being the vessel in motion was bound by the exercise of ordinary care, caution, and maritime skill to have an anchor ready for dropping, and to have dropped it if that would have avoided the collision. It is idle to say that in a space of 200 feet, which was the distance between the alleged sheer and the 'Glassford,' a dropped anchor would not have brought her up to the extent of 2 feet. The evidence on the subject, while differing to some extent, is in favour of the anchor being ready and being used under such circumstances. Both the first and second mates of the 'Glassford' say that the anchors should be ready—9 A and 10 C. And the latter says that if the anchors had been let go when he saw the 'City of Edinburgh' about 300 feet off that would have saved the collision, and he says that she was stopped when about 300 feet off (10 B). M'Kellar, the deputy-harbour-master, says that possibly the dropping of the anchors would have saved the collision, she touched very gently, and he believes that if the anchors had been dropped at the time the 'Vanguard' stopped, the 'City of Edinburgh' would have been pulled up in time, and he says that anchors are used in the dock (14 F and G). M'Kellar afterwards says (20 F), that he does not think he would attribute fault to the 'City of Edinburgh' on account of her not dropping her anchors, but of course if she had dropped her anchors it might have saved the collision. This last statement is somewhat contradictory, but under the special circumstances of this case I would distinctly say that there was fault on the part of the 'City of Edinburgh' in not dropping her anchors when the result would have been to save the collision. Furthermore, we have evidence from the defenders' witnesses as to the dropping of an anchor. Andrew Muir, the first mate of

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[1] June 30, 1893, not reported. See last paragraph of the Sheriff-substitute's note.

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and his failure to fulfil that duty imposed liability on him, and not upon the owners.[1] A pilot was not bound to serve on a ship; he could refuse if his requirements were not complied with. If he took the risk of incomplete equipment he incurred liability, and relieved the owners.

Argued for the pursuers and respondents;—It was established law that when a moving ship collided with a ship moored to a quay, the *onus* lay on the former to prove that she was not in fault.[2] Here the defenders endeavoured to discharge that *onus* by averring (first) inevitable accident, and (secondly) fault of the pilot. Neither had been proved. Even granted there was an exceptional squall (which, it was submitted, the defenders had failed to prove), that was not enough. There were many ways in which the "City of Edinburgh" could have kept in her course in spite of the squall. She might have had her steam up; she might have had stronger tugs. A colli-

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the 'City of Edinburgh,' says that ships without steam are shifted in the Queen's Dock without the assistance of anchors (which of course may be true enough), and it did not occur to him *as absolutely necessary* that the anchors should be ready before the 'City of Edinburgh' started, and they generally put their trust in the strength of the tug boats and the towlines (33 A). It will be noticed how qualified these statements are, and he afterwards says that the effect of dropping an anchor over the port bow would stop the ship if they had plenty of room, and it has a tendency to throw her bow to the left. It would surely be plenty of room (as I have already indicated) in which to stop the ship when she had to go 200 feet and 2 feet only of that space were required to prevent her touching the 'Glassford.' Peter Arthur, the pilot, says (40 C and E) that he was not aware until he went on board that the windlass was ashore, but he has never used an anchor in the fifteen years he has been doing the shifting of the City Line steamers in the harbour, and that he very seldom bothers much about the anchors (44 C), and he admits that if he had dropped his anchors when squaring up for the dock gates it might and it might not have avoided the collision. He tries to get out of this position by saying that there was a danger of the anchor going through the vessel's bottom, but he afterwards says that that would have no influence on him as to whether he should use the anchor or not. John Forsyth, another deputy harbour-master, who was examined for the defenders (but who was in the harbour-house at the entrance to the dock when the collision took place), says that it was safe enough to shift the 'City of Edinburgh' from the Queen's Dock to the Prince's Dock without steam and without anchors being ready for use, and David Anderson, who holds the important position of marine superintendent of the defenders' line, says (50 C) the same thing, but Anderson admits that in the dock the patent anchors are very often at the hawse pipe, and (51 G) he admits that sometimes the anchors of ships are in readiness when they are in dock, and when they are going over to the Govan dock they very often get them ready for use in the river, and they could be used in the dock. As to whether or not they would be very useful in dock he says that that would depend on circumstances.

"The result of all this evidence appears to me to be that the wise and cautious proceeding is to have the patent anchors ready for use, and when

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[1] Owners of the "Strathspey" v. Owners of the "Islay," July 3, 1891, 18 R. 1048; Greenock Towing Co. v. Hardie, Nov. 2, 1901, 4 F. 215; London and Glasgow Engineering Co. v. Anchor Line (The "Assyria"), July 10, 1903, 5 F. 1089; The "Argo," 1859, Swabey's Adm. Rep. 462.

[2] The "Indus," 1886, 12 Prob. Div. 46; The "City of Peking," 1888, 14 App. Cas. 40.

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sion could not be said to be due to inevitable accident when the colliding ship omitted to take precautions which would have prevented it. It was no answer to say that it was the custom in the Queen's Dock to move ships as the "City of Edinburgh" was moved. No doubt it was lawful, but the ship which did so took the risk, and would be liable in the event of a collision.[1] Nor had the defenders established fault on the part of the pilot. The evidence shewed that if the anchors had been available and had been used the collision would not have happened. The want of anchors in working order was a defect in the equipment of the ship for which the owners, and not the pilot, were responsible, even if the pilot was aware of it.[2] The cases of *The "Strathspey"*[3] and *The "Assyria"*[4] were clearly distinguishable. In the former the pilot had voluntarily taken up a position in which he could not control the course of the ship, in the latter he had been consulted as to the defect in equipment, and had elected to run the risk. But even assuming fault on the part of the pilot that did not exonerate the defenders.[5] Both owners and pilot might be in fault, and here it was clearly fault on the part of the owners not to have the anchors of the ship in working order.

At advising,—

LORD TRAYNER.—On 21st September 1903, early in the forenoon, the defenders' vessel, the "City of Edinburgh," while being removed from the Queen's Dock in Glasgow harbour, and while under way, came into collision with the "Glassford," belonging to the pursuers, then lying stationary at

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it is a question of the ship in motion making a narrow shave with regard to the ship at rest she ought to take all precautions that can be readily taken, and which are usually taken, to avoid a collision. In this case we have it from the pilot of the 'City of Edinburgh' that the dropping of an anchor might have avoided the collision, and that the fact of the dropped anchor damaging the bottom of the 'City of Edinburgh' would not influence him in not dropping it, and we have it from the marine superintendent of the line that in their ships they leave the patent anchors very often at the hawse pipe in the docks, that they can be used in the dock, and that it would depend on circumstances whether they would be very useful in the dock. For my part I can picture no circumstances in which an anchor would have been more useful than in bringing up a steamer 2 feet within the space of 200 feet.

"The defenders' agent founded on the case of the '*Springburn*,' which was decided in the Court of Session on 30th June 1893 on an appeal from this Court. But that case, though somewhat similar to the present, differs from it in these essential particulars—that the 'Springburn' had been newly launched and was in an incomplete state, and she was moving from one dock to another under the orders of the harbourmaster, and the Court held that, although the anchor was not shackled and bent ready for dropping, an unfinished vessel such as the 'Springburn' was entitled to proceed from one dock to another without having her anchors ready for use. This case is quite different, because the 'City of Edinburgh' was loaded ready for sea and was going to another dock merely to take in bunker coals."

[1] The "Merchant Prince," [1892], P. 179.

[2] Hammond v. Rogers (The "Christiana"), 1850, 7 Moore, P. C. C. 160; The "Lirra," 1872, 1 Aspinall, 204; The "Ripon," 1885, 10 P. D. 65.

[3] 18 R. 1048.

[4] 5 F. 1089.

[5] The "Iona," 1867, L. R., 1 P. C. App. 426; Clyde Navigation Co. v. Barclay, 1876, 1 App. Cas. 790.

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her moorings in that dock, and caused damage to the extent, as agreed, of £1200. For this sum the pursuers seek decree against the defenders on the ground that the collision was caused by the fault of the defenders. It is quite settled that, when a collision occurs between two vessels, one of which is under way and the other stationary, the former is presumed to be in fault. The presumption, therefore, in this case is that the "City of Edinburgh" was in fault, and the defenders are *prima facie* liable for the damages sued for unless they can rebut the presumption. The first defence maintained is that the collision was caused by "inevitable accident." It is said that a sudden squall or gust of wind caught the "City of Edinburgh" just after she left her moorings, which drove her down upon the "Glassford." That defence, in my opinion, has not been established. I think it is proved that the wind on the morning and forenoon of the day in question was gusty. But it was not in character or intensity unusual, or such as could not and should not have been anticipated and provided against. The second defence is that the "City of Edinburgh" was, when the collision occurred, under the charge of a licensed pilot in waters where pilotage was compulsory. That is so, in point of fact. But it is not enough to exonerate the defenders to say that their vessel was under pilotage in compulsory waters. They must prove that the collision occurred through the fault of the pilot, and in this case the defenders do not even aver that the pilot was in fault, and their whole evidence is directed to shew that nobody was in fault. If they have not, as I think they have not, proved that the collision occurred through the fault of the pilot, their defence, based upon compulsory pilotage, fails—they have not rebutted the presumption against them.

The pursuers, however, have averred that the defenders were in fault by reason of their vessel not being duly equipped, in respect she had no anchors available for use in the event of their being required, and that the want of such equipment contributed to the collision. This leads the defenders to plead that, if the want of anchors contributed to the collision, such want was known to the pilot, and he was in fault in attempting to remove the defenders' vessel in her then condition. This fault on the part of the pilot is suggested or implied rather than averred. Whether the want of anchors contributed to the collision or not is a matter on which the proof cannot be said to be conclusive. I rather incline to the view of the Sheriff-substitute, that if there had been anchors, and these had been promptly used, the collision might have been avoided. But the want of anchors was the fault of the defenders, and the pilot cannot be said to be in fault in trying to shift the "City of Edinburgh" without them, because he was not consulted on that subject. He knew that the anchors were not available, because he saw a part of the windlass coming on board, but nothing was said to him on the subject. The chief officer of the "City of Edinburgh," who was in charge (for the captain was not on board), says "I never consulted with the pilot about it at all. He never spoke to me about the anchors, and I never spoke to him about them." This fact distinguishes the present case from the case of the "*Assyria*," where the defect in the trim of the vessel was brought under the direct notice of the pilot, and an offer made to remedy the defect, if he thought it advisable. The pilot in

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that case assumed the responsibility of navigating the vessel as she stood. Even if the pilot was in fault, in starting without available anchors, that would not absolve the defenders from liability. They had a duty as well as the pilot, that, namely, of having their vessel in navigable condition, and on the authority of the decision in the case of the "*Iona*"[1] (and it does not stand alone) I think the defenders' liability has been established on that ground. The additional ground of fault averred by the pursuers, that the tugs employed to shift the "City of Edinburgh" were not proper for the occasion, is, I think, not established. On the whole matter, my opinion is that the presumption of fault on the part of the defenders arising from the circumstance that the "Glassford" was stationary has not been rebutted, and that the defenders have failed to shew that the collision was occasioned through the fault of the pilot. I am, therefore, for dismissing the appeal.

LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF, not having been present at the hearing, gave no opinion.

THE following interlocutor was pronounced:—"Find in terms of the findings in fact in the interlocutor of the Sheriff-substitute, dated 8th July 1904, except the last two findings: Find further in fact (1) that the defenders have failed to prove that the collision in question was occasioned by any fault on the part of the pilot in charge of the defenders' vessel at the time of the collision; (2) that the said collision occurred through the fault of the defenders; and (3) that the damage occasioned by the collision to the pursuers' vessel amounts to the sum of £1200 sterling: Find in law that the defenders are liable to the pursuers for said sum: Therefore of new decern against the defenders for payment to the pursuers of said sum of £1200 sterling, with interest as concluded for."

WEBSTER, WILL, & Co., S.S.C.—J. & J. ROSS, W.S.—Agents.

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Dec. 6, 1904. Watson v. North British Railway Co.

MRS JANE GEMMELL OR WATSON, Pursuer.—*Watt, K.C.—Munro.* THE NORTH BRITISH RAILWAY COMPANY, Defenders.—*Guthrie, K.C.—Grierson.*

*Process—Jury Trial—Motion for new trial—Third Trial allowed—Contributory Negligence.*—The pursuer in an action of damages for the death of her husband, who had been killed while checking waggons on railway sidings, obtained a verdict, which was set aside on the ground that contributory negligence on the part of the deceased had been proved. At the new trial the pursuer, upon the same evidence, again obtained a verdict.

The Court *set aside* the second verdict, and *granted* a third trial.

1ST DIVISION.

ON 4th August 1902 Richard Watson, a checker in the employment of a firm of shipping-agents in Bo'ness, while engaged at his work of checking waggons in the railway sidings at Bo'ness Docks, was run over and killed by an engine, which was shunting empty waggons. The railway sidings and the engine were the property of the North British Railway Company, and the engine-driver was their servant.

On 7th September 1902 Mrs Jane Gemmell or Watson, the widow

[1] 1867, 1 P. C. App. 426.

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of Richard Watson, brought an action against the North British Railway Company for payment of £500 as damages for the death of her husband. The pursuer averred that her husband's death was due to the fault of the defenders or their servant, for whom they were responsible. In particular, she averred that no proper warning was given of the approach of the engine; that the engine was proceeding tender first; that the engine-driver was not keeping a proper lookout, and did not whistle; and that the defenders should have employed a "redcap" to walk in front of the engine.

The defenders averred that the engine-driver sounded his whistle, and took all usual and reasonable precautions, and that the accident was caused by the careless and reckless conduct of the deceased.

The defenders pleaded, *inter alia*;—(2) The accident to the pursuer's husband having been caused, or at least materially contributed to by his own fault or negligence, the defenders are entitled to absolvitor, with expenses.

On 22d December 1903 the case was tried before the Lord Justice-Clerk and a jury on an issue in ordinary form, whether the deceased received injuries, in consequence of which he died, through the fault of the defenders.

The jury found for the pursuer, and assessed the damages at £200.

The First Division set aside the verdict, and granted a new trial on the ground that the evidence shewed that the deceased had been guilty of contributory negligence by stepping on to the rails without looking to see whether a train was coming.

On 28th July 1904 the case was tried before the Lord President and a jury, when the jury again found for the pursuer, and assessed the damages at £100.

The evidence led at the second trial was substantially the same as at the former trial, and sufficiently appears from the opinions of the Court.

The defenders obtained a rule on the pursuer to shew cause why a new trial should not be granted.

At the hearing on the rule, the pursuer argued;—The question was one of fact. Both juries had found on the facts that there was fault on the part of the defenders, and none on the part of the deceased. There was evidence to support both findings, and that being so, the Court would not order a third trial.[1]

Argued for the defenders;—It was not necessary to consider whether fault had been proved on the part of the defenders. The only question was whether it had been proved that the deceased had been guilty of contributory negligence. The Court were of opinion on the evidence led at the first trial that there had been contributory negligence on the part of the deceased, and the evidence led at the second trial was substantially the same. The fact that the deceased did not look to see whether a train was coming amounted to contributory negligence.[2] Where contributory negligence was proved the Court would grant a third trial.[3]

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[1] M'Quilkin v. Glasgow District Subway Co., Jan. 24, 1902, 4 F. 462; Grant v. William Baird & Co., Limited, Feb. 20, 1903, 5 F. 459.

[2] Barnett v. Glasgow and South-Western Railway Co., Jan. 29, 1891, 28 S. L. R. 339.

[3] Flood v. Caledonian Railway Co., Nov. 30, 1889, 27 S. L. R. 127.

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LORD PRESIDENT.—We have now heard this case fully argued, and as it was before us on a previous occasion it is unnecessary to enter into a detailed examination of the evidence, with which we are now very familiar. It appears to me that it is unnecessary to consider whether there was original fault on the part of the railway company,—for the purposes of the question it may be assumed that there was or may have been such fault.

But the really important question is whether there was contributory fault or negligence on the part of the deceased. We expressed our view as to this question on a previous occasion with reference to the evidence adduced at the first trial, and upon the evidence which was led before me at the last trial I can see no reason to doubt that the same conclusion should be arrived at upon this point. The place was thoroughly well known to the deceased; he was a checker, and was performing his duty of checking the waggons at the time when he was killed. He must have been perfectly familiar with the kind of shunting carried on at the place in question, and if he had paid due regard for his own safety he would have kept a look out for shunting trains so as to avoid them. It appears to me to have been sufficiently established that, if the deceased had used ordinary care in the performance of his duty the accident would not have occurred. He knew perfectly well that trains were likely to come along the line at any moment, and accordingly it was his duty to look out and see whether any train was coming before crossing or stepping upon the line. If a train had come along at a speed different from that which is commonly adopted in a shunting yard, or if waggons had suddenly come from a place from where they were not in the way of coming, or when he had no reason to expect them, I can quite understand that a case might be made out to the effect that he was surprised that something had occurred or had been done which he had no reason to expect. But according to the evidence, it seems that a train coming along that particular line was a thing which the deceased ought to have expected. Although not a railway servant he was for the purposes of this question in no different position from a railway servant, because when a person is carrying on work of which the nature, character, and risks are well known, it is his duty for his own safety to be vigilant and to see that he does not place himself in a position where he may be run down. Although in the general case one feels a great disposition to support a second verdict, and not to give a new trial, still if it is clear, as it is here, that an erroneous view has been taken by the jury, then it seems to me that it is our duty to prevent an injustice being done. Accordingly I think we should set aside this verdict and grant a new trial.

LORD ADAM.—As I understand Mr Guthrie's argument, he did not raise the question whether any original fault had been made out at all, but rested his case, as he did on the former occasion, entirely on the question of the existence of contributory negligence on the part of the injured man. When we disposed of this case before we did so on the ground that the evidence led at the first trial disclosed a case of contributory negligence. Mr Watt now says that in the new trial there was fresh evidence led, which displaces that conclusion. He says that on the former occasion the case was disposed of on the ground that there was no evidence that this unfortunate man ever

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looked round to see if it was safe for him to cross the rails, while in the new case there is evidence to this effect at least, that his head was turned towards the west, and from that he asks us to draw the inference that he did look to see if any trains were coming. I do not think this additional piece of evidence makes any difference. The material question really is at what distance can a train approaching be seen from that point, and though I think there was some contradiction among the men who spoke about five yards, there was satisfactory evidence that it could be seen at from forty to fifty yards. From that it is clear that if he had looked he could not have failed to see the train coming in ample time, and I cannot think that the new evidence now referred to makes any difference to that conclusion. On the former occasion I felt that a case of contributory negligence had been made out, and here I must again come to the same conclusion, and that being so, I feel constrained, in spite of the inconvenience of ordering a third trial, to give my opinion that this verdict cannot stand.

LORD M'LAREN.—The Court granted a new trial when we last had occasion to review the evidence. The pursuer has gone to trial and, so far as I am able to judge, the evidence in the second trial is an exact repetition of the evidence in the first. Of course there are variations, because people will not repeat the same story in the same words at an interval of a year. But in my judgment there are no such differences as would amount to a material variation of the conditions of this question of fact. It follows that as the pursuer has not strengthened her case in any way, the defenders are entitled to have the verdict set aside. It is unfortunate, perhaps, that in a case of this kind the Court has not the power, or at least has not exercised the power, of directing a verdict to be entered for the defender, but it seems to me that a trial conscientiously conducted on the part of the jury can only lead to one result, that pointed out by your Lordships who have spoken. It is unnecessary to consider whether there was any fault on the part of the engineman in the speed or as to the signalling, because every man who uses a road is bound to take precautions for his own safety. When I say bound, I mean that it is a moral duty, and is one which must be discharged as a condition of any claim which may be against a third party. Now, if the deceased had looked in the direction from which the train was coming, he would have seen the train and would either not have attempted to cross the line in advance of the train, or if he made the attempt and was run over, that would be an error of judgment on his part for which he, and not the Railway Company, would be responsible. Unwilling as we are to continue the re-trial of cases indefinitely, I agree with your Lordship that we have no alternative but to set aside this verdict.

LORD KINNEAR concurred.

THE COURT set aside the verdict and granted a new trial.

PATERSON & SALMON, Solicitors—JAMES WATSON, S.S.C.—Agents.

No. 42.

Dec. 7, 1904.
Anderson's Trustees v. Anderson.

SIR CHARLES BOWMAN LOGAN AND OTHERS (William Anderson's Trustees), First Parties.—*Campbell, K.C.*—*Munro.*
MRS ANNIE ELIZABETH BOYD BURNETT OR ANDERSON AND OTHERS, Second Parties.—*Campbell, K.C.*—*Munro.*
DAVID BROWN ANDERSON, Third Party.—*Sol.-Gen. Dundas*—*Blackburn.*

*Succession—Vesting—Fee or Liferent—Right to payment—Repugnancy.*—A testator by the third purpose of his trust-disposition and settlement directed his trustees to divide the residue of his estate into four equal shares, "which several shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed." In the fifth purpose the testator directed the trustees to hold and invest in their own names one share for behoof of his second son. The trustees were further directed to pay to the son during his survivance the free income of the share, with power to them to make advances, not exceeding £2000, out of capital "in the event of the marriage of my said son to the satisfaction of my said trustees, or if for any other reason they may judge it expedient and prudent to make such advances." Power was also given to the son to provide, with consent of the trustees, an annuity for his widow out of the income of the share, and to apportion "by deed, *inter vivos*, or by testament, to take effect upon his decease," the share among his children. The testator further provided that in the event of the son "dying unmarried" the share should "be divided equally among his surviving nearest of kin *per stirpes*."

The son survived the testator, and married and obtained an advance of £2000 from the trustees.

In a special case the son maintained that he was entitled to payment of the share.

*Held* that the son was not entitled to payment, and that the trustees were bound to hold the share for his behoof during his lifetime.

1ST DIVISION. WILLIAM ANDERSON, of Hallyards, Peebles, died on 3d March 1879, leaving a trust-disposition and settlement, dated 19th January 1877, by which he conveyed his whole estate to Sir Charles Bowman Logan and others in trust for certain purposes.

By the fifth purpose the testator directed his trustees to hold one-fourth of the residue for behoof of his second son David Brown Anderson, with further directions hereinafter quoted. The second son David Brown Anderson having claimed payment of his share from the trustees on the ground that by the deed a right of fee had been conferred upon him, a special case was presented to the Court.

The parties to the special case were (first) the trustees acting under the testator's settlement; (second) Mrs Annie E. Burnett or Anderson and others, the widow and children of the testator's elder son, and also Mrs Harriet Cassels Anderson or Cassels and Miss Adamina Anderson, the testator's two daughters; and (third) the testator's younger son David Brown Anderson.

The only question of law dealt with by the Court was:—"Are the first parties bound to continue to hold, during the lifetime of the third party, the share of the testator's estate at present held by them for his behoof; or is he entitled to receive payment of the same now?"

The following trust purposes were referred to:—"(Third) I direct that the whole free residue and remainder of my said estate . . . shall, as soon as conveniently may be after my death, be divided by my said trustees into four just and equal shares, corresponding to the

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number of my present surviving children, which several shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed. (Fourth) I direct my said trustees, as soon as conveniently may be after the foresaid division, to pay, assign, or dispone one of said just and equal fourth shares to my elder son William Anderson. . . . (Fifth) I direct my said trustees to hold another of said just and equal fourth shares of said residue for behoof of my younger son David Brown Anderson, Writer to the Signet, and they shall cause the amount thereof to be transferred to and invested in their own names for his behoof, and they shall pay over to him during his survivance the free interest, dividends, or annual profits thence arising, and his receipt therefor shall be a valid and effectual discharge to my said trustees for the payments of said interest, dividends, or profits: But with power to said trustees (in the event of the marriage of my said son to the satisfaction of my said trustees, or if for any other reason they may judge it expedient and prudent to make such advances) to advance to him from the capital of said share held by them for his behoof a sum or sums not exceeding in whole the sum of £2000 sterling to meet expenses needful and proper to be incurred upon his marriage, or for the other purposes above referred to: With power also to my said son to make, with consent of the said trustees, provision for a suitable annuity or jointure for his widow out of the income of said share, and also in the event of there being children procreated of his said marriage to convey, assign, or bequeath by deed, *inter vivos*, or by testament, to take effect upon his decease, said share of my said means and estate in such proportions amongst said children as he may judge proper, and in the event of the said David Brown Anderson dying unmarried the said fourth share held for his behoof as aforesaid, or the proceeds thereof, shall in so far as the same may not have been advanced to him as aforesaid, be divided equally among his surviving nearest of kin *per stirpes*. (Sixth) I direct my said trustees to hold another of said just and equal fourth shares for behoof of my elder daughter . . . in liferent, for her liferent use allenarly, and the children of her said late or any future marriage in fee; . . . and upon the decease of my said daughter . . . my said trustees shall make payment to the child or children lawfully procreated of her body of said share . . . and that in such proportions and at such terms as my said daughter shall appoint by a writing under her hand, either testamentary or *inter vivos*. . . ." The seventh purpose contained a bequest of the remaining share to his younger daughter for her liferent use allenarly and her children in fee in terms similar to those of the sixth purpose.

The residue of the testator's estate amounted to £90,000.

David Brown Anderson was married in 1900, and, with the consent of the trustees, provided, by postnuptial contract, a jointure to his wife out of the income of the share held for him. The trustees, in virtue of the power conferred upon them, advanced to David Brown Anderson the sum of £2000.

At the date of the special case, David Brown Anderson's wife was alive, and there were no children of the marriage.

The first and second parties maintained that the first parties were bound to hold the third party's share of said residue during his survivance in terms of the testator's settlement.

David Brown Anderson, the third party, maintained that the share

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of residue held by the first parties for his behoof vested in him *a morte testatoris*, subject to defeasance in the event of his dying unmarried, which was the only case in which an ulterior right was conferred on his next of kin, and that, as that event could not now occur, the share had vested in him absolutely, and he was entitled to payment thereof.

Argued for the first and second parties;—No vested right of fee entitling to immediate payment had been conferred by the testator upon his son, David Brown Anderson.[1] *Muir's Trustees*[1] was an authority directly in point. The direction "to hold for behoof of" must be read in conjunction with the whole clause. There was here no direction to pay the capital of the share to David Brown Anderson, but merely a direction to pay the income, and there was a destination over to his nearest of kin *per stirpes* in the event of his dying unmarried. The words, "dying unmarried," meant "dying without leaving a widow." The terms of the bequest to David Brown Anderson were in striking contrast to the language used by the testator in giving an undoubted fee to his elder son, and much more nearly resembled the clauses giving a liferent to his daughters. It was admitted that where a fee had been given its enjoyment could not be restricted;[2] but a fee might be given subject to restriction in a certain event, with a direction to the trustees to hold until it was seen whether or not the event occurred.[3] Again, trustees were bound to hold, where it was necessary that they should do so, in order to carry out the purposes of the trust.[4] *Greenlees' Trustees*[5] and *Ballantyne's Trustees*[6] were cases of repugnancy, where an undoubted fee was given, and the latter case was of doubtful authority since the *dicta* in *Bowman*.[7]

Argued for the third party;—David Brown Anderson was entitled to payment of his share. A direction "to hold for behoof of" was equivalent to a gift in fee,[8] and subsequent restrictions could not stand along with a gift in fee.[9] The power to make advances pointed to a vested fee. The testator had given a liferent to his daughters in clear language, but the bequest to the third party was in very different terms. The only necessity for the trustees to hold the fund was the contingency of David Brown Anderson dying unmarried, but that contingency had been purged by his marriage with their consent. "Dying unmarried" meant dying without ever having been married.[10]

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[1] Muir's Trustees v. Muir's Trustees, March 19, 1895, 22 R. 553; Reid v. Reid's Trustees, June 21, 1899, 1 F. 969; Douglas' Trustees, Nov. 6, 1902, 5 F. 69; Peden's Trustee v. Peden, June 27, 1903, 5 F. 1014.

[2] Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301.

[3] Lindsay's Trustees v. Lindsay, Dec. 14, 1880, 8 R. 281; Dalgleish's Trustees v. Bannerman's Executors, March 6, 1889, 16 R. 559.

[4] Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301, *per* the Lord President, at p. 305; Macculloch v. M'Culloch's Trustees, Nov. 24, 1903, 6 F. (H. L.) 3.

[5] Dec. 4, 1894, 22 R. 136.

[6] Feb. 18, 1898, 25 R. 621.

[7] July 25, 1899, 1 F. (H. L.) 69.

[8] Greenlees' Trustees v. Greenlees, Dec. 4, 1894, 22 R. 136; Ballantyne's Trustees v. Kidd, Feb. 18, 1898, 25 R. 621.

[9] Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301; Yuill's Trustees v. Thomson, May 29, 1902, 4 F. 815, *approved* in Macculloch v. M'Culloch's Trustees, Nov. 24, 1903, 6 F. (H. L.) 3.

[10] Jarman on Wills (5th ed.), vol. 1, p. 487; Dalrymple v. Hall, 1881,

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It had been held that a widower was a "married man,"[1] and the words "dying without issue" had been construed as meaning "without ever having had issue."[2]

LORD ADAM.—The question in this case arises out of the trust-disposition and settlement left by the late Mr William Anderson of Hallyards. Mr Anderson left a trust-disposition and settlement, by which he appointed certain trustees. He also left two sons and two daughters. The parties to this case are, the trustees appointed by Mr Anderson, of the first part; the two daughters, of the second part; and Mr David Brown Anderson, who is the younger son of the testator, of the third part.

The question arises out of the clause by which the testator directs the disposal of the residue of his estate; and that question is whether Mr David Brown Anderson, the party of the third part, has on the proper construction of the settlement, and more especially of the fifth clause of the settlement, an absolute right to the fee of the share bequeathed to him, and if he has such a right of fee whether or not he has right to immediate payment. The first parties, the trustees, say that that is not the nature of the right given to Mr David Brown Anderson, but that what is given to him is only a liferent, and certain other advantages or powers which it is in the option of the trustees to confer upon him.

Now, in the clause dealing with residue the testator directs that the whole of the residue and remainder of his estate "shall as soon as conveniently may be after my death, be divided by my said trustees into four just and equal shares, corresponding to the number of my present surviving children, which several shares shall continue to be held by my said trustees or paid, applied, or disposed of by them, in manner hereinafter directed." That is the ruling clause as to the residue. It is to be divided by the trustees into four shares, and these shares are to be held or paid according to the manner he directs. That is to say, some are to be paid, some are to be held; and accordingly in the next clause, which deals with the share given to his eldest son, there is a direction "as soon as conveniently may be after the foresaid division, to pay, assign, or dispone one of said just and equal four shares to" his elder son, William Anderson. Now there is no question that that clause confers a fee upon William Anderson. But then we come to the fifth clause, which is the one we have materially to do with; and by it he directs his trustees "to hold another of said just and equal fourth shares of said residue for behoof of my younger son, David Brown Anderson, Writer to the Signet." The direction there is not to pay but to "hold for behoof of."

It was said by the Solicitor-General, and I do not dispute the observation, that a direction simply to hold for behoof of a particular person with no further direction or with no further limitations or qualifications, and no further disposition of the fee, would and may in certain cases amount to a gift, though it is only said to be "for behoof of." I do not dispute that at

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L. R., 16 Ch. Div. 715; *In re* Sergeant, 1884, L. R., 26 Ch. Div. 575; Blundell v. De Falbe, 1888, 57 L. J., Ch. Div. 576.

[1] Kennedy's Trustees v. Sharpe, Nov. 21, 1895, 23 R. 146.

[2] Steel's Trustees v. Steedman, Dec. 13, 1902, 5 F. 239.

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all, but I dispute altogether the mode of construction of this clause, which the learned Solicitor-General submitted, namely, that having got the leading words "to hold one-fourth of the residue for behoof of my younger son, David Brown Anderson," we have to stop there and say—without looking at the qualifications and limitations contained in the clause—that that means an absolute gift in this case, and that being an absolute gift, all the qualifications and conditions annexed to it are to be considered as mere qualifications and conditions of an absolute gift already given. I do not think that is a proper mode of construing a will. I think you must take the whole clause from first to last, and having considered the whole clause with all its conditions and qualifications, then say whether, when the testator used the words that the trustees were to hold one-fourth share for behoof of David Brown Anderson, he thereby meant them to hold it for his behoof in fee, or to hold it for his behoof as subsequently directed and pointed out in the clause. Now, if that be the proper way to consider the case, the question is, looking to the construction of this will, what was the intention of the testator? Was the intention, taking the whole clause into consideration, to confer an absolute fee on his son, David Brown Anderson, or was it to give him the life interest and other powers thereby conferred, and no more?

The testator further goes on to direct that the trustees are to take and invest his share in their names for his behoof, and then this is what they are to do,—"They shall pay over to him during his survivance the free interest, dividend, or annual profits thence arising, and his receipt therefor shall be a valid and effectual discharge to my said trustees for the payments of said interest, dividends, or profits." That is nothing but a direction to pay the interest or income of the estate. It was said that that is inconsistent with a direct right of fee being given to Mr Anderson, because, if so, he had a right to demand the whole capital, and the direction to pay the interest would be quite superfluous.

But then there is another power to the trustees. In the event of the marriage of the son to their satisfaction, "or if for any other reason they may judge it expedient and prudent to make such advances," they have power to advance to him from the capital of the share held by them for his behoof a sum not exceeding £2000 sterling to meet expenses needful and proper to be incurred upon his marriage. Now, that again is entirely inconsistent with his having a right to the whole capital. It is provided that his share is to be held for his behoof in the sense expressed here—that the trustees, if they think proper, may advance £2000.

Then there is a power given to the son to provide, with the consent of the trustees, for his widow in the event of his marriage. The same observation applies to this provision. That is not an absolute power of disposal of the estate, and is inconsistent with the fee being intended to be given. Then there is the power of apportioning his share among his own children; but that is a very different power from a power of absolute disposal to anybody he wished. It is a limited power, and again is inconsistent with the right in fee being given to him.

And then we have another clause which is, that in the event of Mr David Brown Anderson dying unmarried, the one-fourth share held for his behoof,

or the proceeds thereof, shall be divided "equally among his surviving nearest of kin *per stirpes*." Now, it is impossible to deny that on the construction of that clause in certain events there was an equal division of the fee to be given to selected beneficiaries, namely, not the heirs *in mobilibus*, which the law would settle, but his nearest of kin *per stirpes*, which is a selected class.

As to the true meaning of the word "unmarried," whether it means if he should die unmarried, or whether it means if he should never have been married, on the construction of this deed, I do not think it is at all material what meaning we give the word, because we are trying to find the intention of the testator, and it appears to me quite obvious that in certain events contemplated by the testator the fee of this estate was not given to his son, but was given to his next of kin *per stirpes*. That is a clear destination-over, and is quite inconsistent with David Brown Anderson having a right of fee *a morte testatoris*. Accordingly, on the construction of this deed, I think it is evident that the intention of the testator was not to give the fee to David Brown Anderson, but to give the trustees the duty to hold and to administer the estate in terms of the fifth clause. I am therefore of opinion that we should answer in the affirmative the first alternative of the first question, to the effect that the first parties are bound to hold during the lifetime of the third party the share of the testator's estate at present held by them for his behoof.

LORD M'LAREN.—The question relates to the construction of the fifth purpose of Mr Anderson's will under which he deals with the interest of one of his sons. I think it proper to begin by attending to the terms of the third purpose in which the testator indicates the general scheme of his settlement, which is that his whole estate is to be divided by his trustees "into four just and equal shares corresponding to the number of my present surviving children," but then he proceeds, "which four shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed." Here, I think, is a plain announcement that although his estate is to be divided into four shares, the testator does not intend that each of these four shares shall be dealt with in the same manner, but that you are to look to the special direction to see in what way the general intention in favour of each member of his family is to be carried out.

Now, with the aid of the prefatory statement in the third purpose I think no one who goes on to read the fifth purpose, in which the trustees are directed to hold a certain "share for behoof of" the testator's younger son, David Brown Anderson, could fall into the error of supposing these words stated completely the purpose of the testator in regard to his son, but would consider that these words are merely an announcement of the subject which he was going to dispose of, and would look for the precise destination of that share to the directions which are given to the trustees in regard to this share which they are to set apart for behoof of David Brown Anderson. It was contended by the third parties that these words "for behoof of my younger son" are sufficient to vest him in the capital of his share in the events which have happened; but there are at least two perfectly legitimate modes of interpreting these general words. The one would be that the son

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would get just the particular interest thereafter provided for him, and no more; and the other would be that he is to get all the particular benefit provided for him, but if there be any case unprovided for, then this general intention would take effect in his favour. Now, when we look to the language of the fifth purpose to see which of these constructions of the general language at the beginning is the true one, I can have no doubt that the testator intended to qualify the bequest, because at the very beginning the testator's first direction is to pay Mr David Brown Anderson the income of the share. That would be a very strange way of carrying out a purpose to give the legatee the capital. In so far as the argument of the third parties is founded on the cases of *Miller's Trustees*[1] and *Yuill*,[2] I think it proceeds on a misapprehension of the scope of the rule of construction there introduced, because these cases had only reference to administration, and all that was laid down was that if from the language of the deed it is clear that a fee is given, any attempt to limit the enjoyment of the fee would be futile. But then that principle is qualified in the opinion of Lord President Inglis by saying that when there are trust purposes to be served which cannot be secured except by continuing the trust administration, the rule cannot be applied, and the qualification stated in that eminent Judge's decision is confirmed by the decision of the House of Lords in *Macculloch*,[3] where, while the principle of *Miller's Trustees*[1] and *Yuill*[2] was affirmed, it was held that the principle could not be applied to the case of a son in whom the right of fee had vested, because the son was not entitled, in face of the opposition of the daughters, to insist upon an immediate division of the estate. I do not doubt that, if all parties were agreed, the estate might be divided, but even in the matter of administration any of the beneficiaries who desired that the estate should be administered by the trustees would according to the case of *Macculloch*[3] be entitled to have the trust kept up. But then the case of the third party is further put upon the ground that while a liferent is in the first place given to Mr Anderson, there are superadded such extensive interests in the fee that when combined with the liferent, they constitute the equivalent of an unqualified fee. Now, as I had occasion to point out in a case which was discussed last week,[4] although the doctrine has been laid down by the highest authorities that a liferent with an unqualified power of disposal and no ulterior destination may amount to a fee, no case has actually occurred in which all these theoretical conditions have been fulfilled, and in which by the mere force of the words themselves a qualified right has been held to be an unqualified right. It is not surprising that there should be no such case, because if a testator means to give an unqualified right it is very easy for him to say so, and if he means substantial qualification then such qualifications would receive effect through the intervention of a trust. Now, it seems to me that under this trust Mr Anderson has an absolute right to nothing more than the sum of £2000 which the trustees are empowered to advance to him, and with regard to all the rest of the capital the directions are perfectly plain that Mr Anderson is

[1] 18 R. 301. [2] 4 F. 815. [3] 6 F. (H. L.) 3, [1904], A. C. 55.
[4] See Forrest's Trustees v. Reid, Nov. 25, 1904, *supra*, p. 142.

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to receive the income for life, and that the fee is to go to his children if he marries, subject to a power of division amongst them to be exercised by will or deed.

What is to happen in case Mr Anderson should have no issue, or should die without leaving any children surviving him, is a question which I think we can hardly usefully consider at the present time. It may be that if in that case he disposed of the estate to third parties, it might be held that under the general words at the commencemeut of the fifth purpose he would have an interest in the fee sufficient to enable him to dispose of it. That has been held in other cases, chiefly cases of provisions in favour of ladies, with a power to settle; but this is a question which we are unable to determine in the absence of those who may have an adverse interest.

I am clearly of opinion with your Lordship that the testamentary directions must be carried out according to the plain meaning of the language used, and that this is not a case where any artificial or arbitrary rule of construction ought to interfere with the testator's intention, and that the question must be answered in favour of the first parties.

LORD KINNEAR.—I agree with your Lordships, for the reasons you have stated.

The LORD PRESIDENT concurred.

THE COURT answered the first alternative of the question in the affirmative.

MACKENZIE, INNES, & LOGAN, W.S.—DUNDAS & WILSON, C.S.—Agents.

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Dec. 8, 1904. Williamson v. Macpherson & Co.

JOHN WILLIAMSON, Pursuer.—*R. S. Horne.*
ALEXANDER MACPHERSON & COMPANY, Defenders.—*Salvesen, K.C.*—*MacRobert.*

*Appeal—Interim Execution pending appeal—Expenses—Modification*—48 *Geo. III. cap.* 151, *sec.* 17.—In an action of damages for breach of contract the pursuer was found entitled to damages and to expenses, "reserving consideration as to modification" until the approval of the Auditor's report. After the expenses had been taxed, but before the Auditor's report had come up for approval, the defenders appealed to the House of Lords. In a petition presented by the pursuer for interim execution pending the appeal, including interim execution for the taxed expenses, the Court *refused* the petition *quoad* the expenses, in respect that after the appeal had been presented it was incompetent to deal with the question of modification of the expenses.

(SEE *Williamson* v. *Macpherson & Co.*, June 28, 1904, 6 F. 863.) 2D DIVISION.

In this action John Williamson, shipowner, Glasgow, concluded against Alexander Macpherson & Company, contractors for ship machinery, Greenock, for £1100, as damages for breach of contract.

On 13th January 1904 the Lord Ordinary (Kincairney) granted decree in favour of the pursuer, assessing the damages at £243, 9s. 9d., with a finding as to expenses in the following terms:—"Finds the pursuer entitled to expenses, reserving consideration as to modification; allows an account of said expenses to be given in, and remits the same when lodged to the Auditor of Court to tax and to report."

The defenders reclaimed.

On 28th June 1904 the Second Division adhered to the interlocutor reclaimed against, with a finding as to expenses in the following

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terms:—"Find the pursuer entitled to additional expenses; remit to the Auditor to tax the same, and to report to the Lord Ordinary, to whom remit the cause to proceed therein, and to decern for said expenses."

The pursuer's account of expenses was thereafter taxed at £1299, 6s. 4d., but before the Auditor's report was approved the defenders on 8th November 1904 presented a petition and appeal to the House of Lords.

On 8th December the pursuer petitioned for interim execution pending appeal, praying the Court "to allow execution to proceed on the said judgments and decrees of dates 13th January 1904 and 28th June 1904 before mentioned, notwithstanding the said appeal, to the effect of enabling the petitioner to recover payment of the sums thereby found due to him, as well as the taxed expenses before mentioned and dues of extract . . . and, if necessary for that purpose, of new to remit to the Lord Ordinary to decern for the taxed expenses found due to the petitioner."

The defenders, in the Single Bills, objected to the petition being granted in so far as it related to expenses, and argued;—After an appeal had been taken to the House of Lords the process was no longer in the Court of Session, and it was consequently not possible for the Lord Ordinary to deal with the question of modification which had been reserved.[1]

Argued for the pursuer;—The proper course was to remit to the Lord Ordinary to deal with the question of modification, reserved by the Lord Ordinary's interlocutor, and that course was competent notwithstanding the appeal.[2] The cases on which the defenders founded were too remote in date to throw light on the existing practice.

LORD JUSTICE-CLERK.—I think the prayer of the petition should be granted so far as it refers to the sums found due, and refused *quoad ultra*.

LORD YOUNG concurred.

LORD TRAYNER.—I see no reason for departing from the practice established by the cases cited to us.

LORD MONCREIFF concurred.

THE COURT pronounced an interlocutor in terms of the prayer of the petition so far as it related to the sums found due to the petitioner, and *quoad ultra* refused the prayer.

WEBSTER, WILL, & Co., S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 44.

Dec. 8, 1904. Young's Trustees v. Grainger.

MRS MARY ISOBEL MURDOCH OR YOUNG AND OTHERS (Young's Trustees), Pursuers (Appellants).—*Johnston, K.C.—J. H. Millar.* JOHN GRAINGER, Defender (Respondent).—*Clyde, K.C.—R. S. Horne.*

*Police—Ruinous Buildings—Owner unknown—Sale by order of Sheriff—Title—Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *secs.* 196, 197, 200.—The Burgh Police Act, 1892, provides for the sale by auction of ruinous buildings and waste ground which have become a nuisance and the owners of which cannot be found, for the consignment of

[1] Gordon v. Hyslop & Co., July 11, 1821, 1 S. 120; Lord Medwyn v. Dickson, July 7, 1829, 7 S. 837; Hogarth v. Balmer, July 6, 1830, 8 S. 1017; Mackay's Practice, p. 582.

[2] 48 Geo. III. cap. 151, sec. 17.

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the price, and for the completion of a purchaser's title, by recording in the Register of Sasines a decree of the Sheriff declaring the purchase duly completed, and authorising immediate possession of the tenements sold.

Ruinous buildings sold under the above enactment were situate on ground let on a building lease for 999 years. After the purchaser had completed his title by recording the Sheriff's decree and had disponed the subjects, an action was raised against the disponee for payment of rent due under the long lease, the pursuer contending that the purchaser had acquired the property *tantum et tale* as it stood in the lessee. The defender founded on the recorded decree as giving him an unqualified statutory title to the land.

The Court *sustained* the defence.

*Opinions per* Lord M'Laren and Lord Kinnear that the lessor's remedy was to claim against the deposited purchase price.

1ST DIVISION.

Sheriff of Ayrshire.

IN 1903, certain ruinous buildings in Cauldshore, Girvan, of which the owner was not known, were sold by the Commissioners of the Burgh of Girvan by public roup by order of the Sheriff, and the price deposited in bank, in terms of the Burgh Police (Scotland) Act, 1892, sections 200 and 196.*

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* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), section 195, in dealing with ruinous buildings belonging to two or more owners, gives the parties interested an option of purchase or sale among themselves upon a valuation made by order of the Sheriff, and enacts:—Section 196. "If any of the said parties fail to take advantage of the said option within the time so fixed, or shall not be able to agree as to which shall be the buyer and which the seller, it shall be lawful to the said Sheriff to cause such houses, buildings, and areas to be exposed to sale by public auction, . . . and the purchaser thereof shall be then bound within ten days after the sale, or within such time as may be fixed by the Sheriff, to consign the purchase money, . . . and the money so deposited shall remain at interest for the behoof of all parties interested therein, and subject to the future orders of the Sheriff."

Section 197. "Upon such deposit being so made, the Sheriff shall pronounce his decree or warrant, declaring the purchase duly completed, and authorising immediate possession of the tenements so sold to be given to the purchaser thereof; and such warrant or decree shall, upon being registered in the proper Register of Sasines, be a valid and sufficient title to such purchaser."

Section 200. "If any houses, buildings, or areas have become waste and ruinous, or have become receptacles for filth and other nuisances, or unsafe and unfit for use and occupation, the Commissioners may, by a notice addressed to the owner if his address shall be known, or if not known by a notice affixed to a conspicuous part of such houses, buildings, or areas, require the same to be rebuilt or otherwise put into a state of repair to their satisfaction, within three months from the date of such notice; and in the event of such requisition not being complied with, the Commissioners may apply to the Sheriff for warrant to sell such houses, buildings, or areas, and it shall be lawful to the Sheriff to order the same to be valued and exposed for sale by public auction, and to sell the same, and such sale shall be made and carried out, or re-sale effected, the price deposited and applied, and the purchaser's title completed, in the way and manner hereinbefore directed with reference to waste and ruinous buildings, houses, or areas within burgh, held by two or more joint owners."

Section 4 (22). "'Owner' shall include joint owner, fiar, liferenter, feuar, or other persons in the actual possession of, or entitled to receive, the rents of lands and premises of every tenure and description, and the factor, agent, or commissioner of such person, or any of them, or any other person, who shall intromit with or draw the rents."

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The purchaser of the buildings was Robert Wotherspoon.

On 22d January 1903 the Sheriff of Ayrshire pronounced an interlocutor approving of the report of the sale to Wotherspoon at the price of £116, "and in respect that deposit of said price has been made by the said Robert Wotherspoon, declares the purchase duly completed, and authorises immediate possession of said houses or buildings so sold to be given to the said Robert Wotherspoon, the purchaser thereof."

On 16th February 1903, Wotherspoon registered an extract of the Sheriff's decree in the Division of the General Register of Sasines applicable to the county of Ayr.

On 26th November 1903, Wotherspoon disponed the buildings in question to Dr John Grainger, Glasgow, and the disposition was recorded in the Register of Sasines on the following day.

On 31st March 1904 Mrs Mary Isobel Murdoch or Young and others, the testamentary trustees of the late John George Kirkpatrick Young, of Glendoune, Girvan, brought an action in the Sheriff Court of Ayrshire at Ayr against Dr John Grainger, for payment of £1, 1s. 11½d., being the one year's rent due at Martinmas 1903 for the ground upon which the buildings conveyed to him by Wotherspoon were erected.

The pursuers averred that the ground in question formed part of a large area of ground included in a long lease granted by Thomas Francis Kennedy of Dunure, their author, in favour of John Mackenzie, manufacturer in Doune, Girvan, dated 25th December 1836, and 7th December 1839, and recorded in the Register of Sasines 12th May 1894; that the lease was for the period of 999 years from Martinmas 1832, as to some portions of the ground, and from Martinmas 1834 as regards another portion of the ground; that the portion of the *cumulo* yearly rent of £4, 7s. 9d. applicable to the subjects possessed by the defender was £1, 1s. 11½d., and that this sum was regularly paid to the pursuers by Hugh M'Ghie, a grandson of the said John Mackenzie, who had acquired right under the lease to the ground in question, up to Martinmas 1902.

The pursuers further averred (Cond. 5) that Robert Wotherspoon had acquired Hugh M'Ghie's rights to the lease in virtue of the decree of the Sheriff of Ayrshire above narrated. "The process upon which said decree followed is referred to and founded on. The pursuers were not called as defenders therein. They were not parties to it. They received no notice of the proceedings. Subsequently the said Robert Wotherspoon conveyed to the defender the said rights of the said Hugh M'Ghie, so acquired under said decree, conform to the disposition produced by the defender. The defender is now in right of the said Hugh M'Ghie's rights of said lease to the extent of the said ground . . ." (Cond. 7) "The capital value of the subject of the action exceeds £25."

The defender founded upon his disposition from Wotherspoon, and the decree of the Sheriff of Ayrshire in Wotherspoon's favour above set forth.

The pursuers pleaded, *inter alia*;—(1) The defender being in right of said lease, and in possession of the ground, to the extent condescended on, he is bound to pay the yearly rent applicable thereto to the pursuer, the ground landlord in said lease. (3) The defender having under said decree only acquired the lessee's interest in said ground, the pursuer's claim is not excluded.

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The defender pleaded, *inter alia*;—(3) The defender being absolute proprietor of the subjects in question in virtue of a statutory title, and a decree of Court, the pursuer's claim is excluded, and is incompetent, and the action should be dismissed, with expenses.

No question was raised with regard to the regularity of the procedure relating to the sale of the buildings in question to Wotherspoon.

On 14th June 1904 the Sheriff-substitute (Shairp) sustained the third plea in law for the defender, and dismissed the action.

The pursuers appealed, and argued;—It was not disputed that the ground on which the buildings were erected was part of the ground let under the long lease, which had been registered in the Register of Sasines. The nature of the legal rights created by a long lease had at first been doubted,[1] but in *Fraser* v. *His Majesty's Advocate*[2] a long lease upon which sasine and possession had followed, was held good against the granter and against the Crown, and the right had come to be assimilated to that of a feu-contract.[3] Any doubt as to the nature of the right had been removed by the Registration of Leases Act, 1857.[4] Accordingly, all the Sheriff could sell was the leasehold subjects, and his decree only gave the purchaser a title to these subjects *tantum et tale* as they stood in the previous owner. The lessor was not "the owner" of the property.[5] He received no notice, and had no right or duty to repair the buildings. He could not therefore prevent the sale, nor could he claim against the price, because it was the interest of the "owner" which was sold, and the deposited money belonged to the owner or his representatives. The result of the Sheriff's judgment was to create a new estate in land, and to wipe out the right of the ground landlord.

Argued for the defender;—The procedure leading up to the Sheriff's decree was admittedly regular, and the provisions of the Act of 1892, with regard to the effect of that decree, were perfectly clear and distinct. The Sheriff's decree gave the purchaser an absolute and unqualified title. The pursuer's remedy was to claim against the price.

LORD ADAM.—This is an appeal from the Sheriff Court at Ayr, in which the pursuers claim a right to rent as lessors under a long lease granted by Mr Kennedy, their predecessor, and which has been duly recorded. The sum which the appellants seek to recover is a small sum of £1, 1s. 11½d., being the proportion of the total rent of the original subjects effeiring to the portion in the defender's possession, but it has been pointed out that this is a continuing payment, and is of sufficient value to entitle the pursuers to appeal to the Court of Session. The defender says, in defence to the action, that he has nothing to do with the long lease, and that he is proprietor of the subjects, and is therefore not due rent. The question, therefore, is whether this defence is well founded, and whether the defen-

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[1] Jordanhill Creditors, Feb. 13, 1752, 5 Brown's Sup. 797, Elchies, No. 18, *Tack*.

[2] June 8, 1770, 2 Pat. App. 66.

[3] Maule v. Maule, March 4, 1829, 7 S. 527, and Appendix at end of 7 S.

[4] 20 and 21 Vict. cap. 26.

[5] Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 4, subsec. (22). Quoted *supra*, p. 233.

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der is, in fact, not tenant, but proprietor. The title which the defender produces is an extract decree in a petition in the Sheriff Court at Ayr, which sets forth—[His Lordship quoted the extract decree]; and that decree has been duly registered in the Register of Sasines. The appellants do not attack the decree, but they say, *esto* that the decree is good, still the effect of it is not to relieve the purchaser from the obligation to pay rent under the long lease. The decree proceeds under section 200 of the Burgh Police Act, 1902, and it is not disputed that the proceedings have been properly carried out. That section deals with ruinous and insanitary buildings, and it is not disputed that this was the condition of the buildings in question. With regard to such buildings, the section enacts that the Commissioners may, if the address of the owner is not known, by a notice affixed to the buildings, require them to be put in proper repair within three months, and may, if the requisition is not complied with, apply to the Sheriff for a warrant to sell the buildings, and thereafter carry out the sale. In this case the Commissioners did not know the owner of these derelict buildings, with the result that, after three months, no one came forward to say that he would remove the nuisance, and the buildings were sold under the warrant of the Sheriff, and the price duly consigned to await the claim of anyone having an interest in the buildings. With regard to the purchaser's title, section 197 enacts that the Sheriff's decree, declaring the purchase duly completed, shall, upon being registered in the proper Register of Sasines, be a valid and sufficient title. The section does not say that the purchaser is to be the assignee to a lease or the vassal of a superior, but that the decree shall be a valid and sufficient title to such purchaser; and I am of opinion that, on a proper construction of the Act, the purchaser here is not the tenant, but is the proprietor of the buildings. That is my short view of the case. The result may be anomalous, as the property would be held under no superior, but it is not new, *e.g.*, we have the purchase of lands by railway companies or by school boards. On the whole matter, it appears to me that the provisions of the statute have been properly carried out, and that the interlocutor of the Sheriff-substitute dismissing the action is right.

LORD M'LAREN.—I have not found this case very easy of solution, but I shall state the considerations *hinc inde* which have affected my mind. Section 200, in connection with previous sections, relates to ruinous and insanitary property. Under section 200, with which we are more directly concerned, the first proceeding is that the burgh authorities may issue an order requiring the owner to put the property in repair to their satisfaction. If the owner cannot be found, sufficient intimation may be given by a notice affixed to the building. If that order is not implemented, the burgh authority may then proceed to sell the property under a warrant to be issued by the Sheriff. The definition of "owner" in section 4 (22) does not throw much light upon the question, but it may at least be said that, if there is a hierarchy of owners in the feudal sense, the definition includes the person who draws the rent payable by the occupier, and it can hardly be disputed that the tenant under a long lease is the owner to whom notice has to be given. To my mind, the difficulty of including the superior or owner of

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the ground rent, who has the *dominium* of the lands, is that a person in that position has neither a right nor a duty to repair the buildings, because he has parted with the proceeds of the subjects in exchange for an annual payment. I cannot think that it is a sound construction of the statute to hold that the pursuers were in fault for not having obeyed an order which it was not in their power to fulfil, and the result arrived at by the Sheriff must be supported upon some other ground. Section 200 contemplates the case of a ruinous tenement in a burgh the owner of which is unknown. If it were made a condition of the sale that rights to ground rents are reserved, it might be difficult to find a purchaser, and the clause would be inadequate for its purpose. I am not satisfied that this is a good answer, or that it was intended to confiscate the rights of a superior or owner of a ground-annual. But while I feel the force of this difficulty I am not inclined to dissent; indeed, I am reconciled to the decision which your Lordship proposes for two reasons. First, because the statute makes the right to rent a preferential claim upon the price; and second, because this is the only way in which the clause can be effectively worked. The effect of these proceedings is to confer a valid and unimpeachable title upon the purchaser, and any person who can shew an interest must claim against the purchase price.

LORD KINNEAR.—I agree, and substantially on the grounds stated by your Lordships. The action is raised by a landlord for payment of rent due under a long lease, and he has brought it, very naturally, against the person whom he finds in possession of the premises. The defender puts forward as his defence that he is not a tenant holding under the lease, nor does his title proceed from anyone who was in right of the lease, but that he holds an absolute title based on a decree of the Sheriff—a title quite independent of any rights or obligations under the lease. I think, if that is made out, it is a perfectly good answer to the demand for payment of rent.

In considering the title of the defender, it is necessary to observe the object of the power under which the burgh authorities sold these premises. The object is to abate a nuisance arising from houses that have become waste and ruinous, or receptacles for filth, or unsafe and unfit for use. With regard to such property the burgh authorities may give notice, individual or public as the case may be, calling for its repair, and if this order is not complied with, they may then apply to the Sheriff for an order to sell the property. The object of the power therefore is to provide a practical method of abating a nuisance by selling derelict buildings if the owner fails to put them in repair. When the purchaser has consigned the purchase money in bank, subject to the orders of the Sheriff, the Sheriff will pronounce a decree declaring the purchase completed and authorising immediate possession, and the statute further provides that such decree upon being registered shall be "a valid and sufficient title to such purchaser." Now, that seems to me to be a perfectly clear provision that this decree is to be in itself a sufficient title, and that the purchaser is not bound to connect it with any previous title in order to make it effectual. If it had been intended that he should make up a title by transmission, it would have been perfectly easy to make that clear. If the Act had said that the

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Sheriff's decree was to be equivalent to a conveyance from the last proprietor, we might have understood that the purchaser was intended to take the property subject to all the previous burdens upon it. Failing such a provision, I cannot see that he is bound to connect with any previous owner, and I think that we must give effect to the precise words of the statute.

It is true that this provision of the statute introduces two somewhat startling anomalies into our law of conveyancing, for, in the first place, it gives a purchaser a title without connecting his holding with that of any predecessor in the subjects, and, secondly, it gives him a right to hold heritable property on a title independent of any known feudal tenure. But these anomalies are not unprecedented, for as we all know there are other cases of statutory titles which are perfectly good, independently of any feudal title whatever. But whether unprecedented or not, we must give effect to the plain words of the statute.

But another point has been urged by the appellants against the view taken by the Sheriff, namely, that it will have the effect of extinguishing rights which were in existence at the time of the sale, and that without giving notice to the owner of these rights, so as to enable him to step in and prevent the sale by himself taking steps to abate the nuisance. I think that is exactly the result which is contemplated by the provisions of the statute. But it is said that the effect will be a confiscation of the rights of the landlord. I cannot agree with that view. The only prejudicial result of these proceedings will be that they will have the effect of a compulsory conversion of heritable property into money. The terms of the clause shew that the statute contemplates that there will always be someone with such an interest in the property that he can or may put it in repair and so abate the nuisance, and if such a person can be found he is to get notice. But if no such person can be found, a requisition is to be affixed to the buildings themselves, so that anyone with an interest in them may see what is going to be done. Now, I do not think it matters to the carrying out of these provisions whether this person can be found or not, for the statute clearly provides that if he is found he is to put the premises in repair, but if not, then the nuisance is to be abated in another way, namely, by sale. There is no provision for ascertaining what are the rights and burdens affecting the property before the sale, but there is a provision that after the sale the purchase money is to be consigned in bank, and the Sheriff is then to proceed to ascertain what share in the consigned money each person interested in the property is entitled to. Now, from that it appears to me that it is not intended that these interests should be ascertained first, but that the property should be sold first, and then these people claiming rights in the property are to come before the Sheriff, who will ascertain their interests and rank them to their proper shares of the sum consigned in bank. I think therefore that the judgment of the Sheriff was right, and that we should dismiss this appeal.

The LORD PRESIDENT was absent.

THE COURT dismissed the appeal.

CARMENT, WEDDERBURN, & WATSON, W.S.—CARMICHAEL & MILLER, W.S.—Agents.

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JOHN DARNEY & SON, Pursuers (Reclaimers).—*Campbell, K.C.—Hunter.*

CALDER DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF MIDLOTHIAN AND ANOTHER, Defenders (Respondents). — *Sol.-Gen. Dundas — Macphail.*

Dec. 9, 1904. John Darney & Son v. Calder District Committee.

*Public Health—Offensive Trade—Licence—Sanction of Local Authority subject to conditions—Claim to reduce sanction quoad condition only—Ultra vires—Process—Partial Reduction and Declarator—Competency—Public Health (Scotland) Act*, 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 32.—A firm of glue manufacturers who proposed to start the business of glue making, in a district where that business had been duly declared to be an offensive business under section 32 of the Public Health (Scotland) Act, 1897, obtained the sanction of the Local Authority under that section, but subject to the condition that the products of the business should be manufactured "from hide clippings *only*." The firm thereupon brought an action, in which they maintained that the insertion of this condition in the sanction was *ultra vires* of the Local Authority, and concluded for reduction of the order granting the sanction in so far as it imposed the condition, and for declarator that the sanction should be valid and effectual to the pursuers as if the condition had not been inserted.

*Held* that, whether the insertion of the condition was or was not *ultra vires* of the Local Authority, the action was incompetent, the condition being an inseparable part of the sanction as granted by the authority which alone had power to grant it.

*Macbeth* v. *Ashley*, June 20, 1873, 11 Macph. 708, April 17, 1874, 1 R. (H. L.) 14, *distinguished.*

1ST DIVISION.

MESSRS JOHN DARNEY & COMPANY, who had previously carried on business as gluemakers at Kinghorn, Fifeshire, acquired a disused paper mill at Kinauld, Currie, in the Calder District of Midlothian, and proceeded in September 1902 to alter the mill to suit the requirements of their business.

In April 1903 the Calder District Committee of the County Council of Midlothian as Local Authority for that district under the Public Health (Scotland) Act, 1897, issued an order whereby, under section 32, subsec. (1) of that Act, they declared that the business of glue manufacturing should be "an offensive business under and within the meaning of the said Act, section, and subsection." * This order was

* The Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 32, enacts:—"(1) If any person after the commencement of this Act establishes, without the sanction of the Local Authority, the following businesses, or any of them; that is to say [certain businesses enumerated], or any other business which the Local Authority may declare, by order confirmed by the Board (*i.e.*, the Local Government Board), and published in the *Edinburgh Gazette*, to be an offensive business, he shall be liable to a fine. . . .

"(2) The Local Authority shall give their sanction by order, but, at least fourteen days before making any such order, shall make public the application for it, by advertisement . . . setting forth the time and place at which they will be willing to hear all persons objecting to the order, and they shall consider any objections made at that time and place, and shall grant or withhold their sanction as they think expedient, and where the Local Authority grants or withholds such sanction, any person aggrieved may appeal to the Board, whose decision shall be final, but in the case of a district other than a burgh, the appeal to the Board shall only arise after the County Council has given its determination on the matter, and a Local

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confirmed by the Local Government Board on 1st May 1903, and duly gazetted thereafter.

On 10th July 1903 Messrs John Darney & Son, in view of this order, made application to the District Committee for sanction to commence the manufacture of glue and gelatine in the premises at Kinauld before mentioned.

On 4th August 1903 the District Committee decided that the application might be granted, but resolved to delay issuing their sanction until bye-laws should be framed and confirmed by the Local Government Board. Bye-laws as to the manufacture of glue were adjusted by the District Committee, and submitted to the Local Government Board on 30th December 1903. These bye-laws were confirmed by the Board on 6th January 1904.

On 9th February 1904 the District Committee issued the following order:—"In terms of section 32 of the Public Health (Scotland) Act, 1897, we, the Local Authority of the Calder District of the county of Midlothian, by this our order sanction, under the condition that the products of the business are manufactured from hide clippings *only*, the establishment of the business of glue, gelatine, or size manufacturer in the premises situated at Kinauld, near Currie, as shewn on the plans submitted along with the application of Messrs John Darney & Son, glue manufacturers, Kinghorn, dated 10th July 1903."

Messrs Darney objected to the insertion of the condition as to manufacturing "from hide clippings *only*," as being *ultra vires* of the Local Authority, and asked that an order should be issued without any such condition, but only under the bye-laws as confirmed by the Local Government Board. The District Committee refused to grant such an order. Messrs Darney did not appeal to the County Council under section 32 (2) of the Public Health (Scotland) Act, 1897.

The bye-laws did not contain any provision as to the products of the business of glue making being manufactured from hide clippings *only*.

On 2d March 1904 Messrs Darney brought the present action, in which they called as defenders the Calder District Committee of the County Council of Midlothian, and the Clerk to the Committee. The pursuers concluded (1) for reduction of the order above quoted, dated 9th February 1904, sanctioning the establishment of the business of glue, gelatine, or size manufacturing by the pursuers, "which order contains a condition that the products of the pursuers' business are to be manufactured from hide clippings *only*, incompetently inserted therein by the said Calder District Committee," in so far as the order imposed "a condition not authorised by the Public Health (Scotland) Act, 1897, and not in conformity with the bye-laws for glue manufacturing" above mentioned; (2) for declarator that the order granted to the pursuers should "be valid and effectual to the pursuers in all time coming, and that as if the said condition, whereby the pursuers

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Authority may appeal to the Board against the determination of the County Council.

"(3) The Local Authority may make bye-laws for regulating the conduct of any businesses within the meaning of this section . . . which are for the time being lawfully carried on in their district, and the structure of the premises in which any such business is being carried on, in order to prevent or diminish the noxious or injurious effect thereof, and the mode in which the said application is to be made."

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are required to manufacture their products from hide clippings *only* had not been inserted in the said order"; and (3) for decree ordaining the Clerk to the District Committee "to correct the foresaid order by . . . deleting the condition complained of."

The defenders pleaded, *inter alia*;—2. The action is incompetent, and ought to be dismissed, with expenses.

On 30th June 1904 the Lord Ordinary (Low), after hearing counsel in the Procedure Roll, issued this interlocutor:—"Sustains the second plea in law for the defenders: Dismisses the action, and decerns."*

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* "OPINION.— . . . The pursuers aver that the condition attached to the order will seriously prejudice them in their business, and that it was *ultra vires* of the defenders to impose such a condition. The pursuers argued that under the Act the defenders were bound either to grant or withhold their sanction to an offensive business, and that although they were empowered to make bye-laws for regulating such businesses, they were not entitled to qualify an order sanctioning a business with a condition not appearing in the bye-laws. The defenders had in fact made bye-laws dealing, *inter alia*, with the manufacture of glue, in which there was no such condition as that appearing in the order sanctioning the pursuers' business.

"In these circumstances, the pursuers seek in this action to have the order reduced in so far as it imposes the condition, and also a decree declaring that the order 'shall be valid and effectual to the pursuers in all time coming, and that as if the said condition, whereby the pursuers are required to manufacture their products from hide clippings *only*, had not been inserted in said order.'

"What, therefore, the pursuers ask the Court to do is to convert a conditional order of the defenders into an absolute order unfettered by any condition.

"The first question is whether the Court has power to do any such thing, and that depends upon the provisions of subsection 2 of section 32 of the Act. The subsection provides that the Local Authority shall give their sanction to the establishment of a business falling within the category of 'offensive,' by order, but that, before making such order, they shall, after advertisement of the application, hear and consider any objections which may be made to the granting of the order, and shall then 'grant or withhold their sanction as they think expedient; and where the Local Authority grants or withholds such sanction, any person aggrieved may appeal to the Board, whose decision shall be final.'

"These provisions make it plain that the granting or withholding of sanction to establish an offensive business is a matter with which this Court has nothing to do, and therefore it seems to me to be quite incompetent to ask the Court to declare that a conditional sanction which was given by the Local Authority falls to be regarded and acted on as if it had been an absolute and unconditional sanction.

"The pursuers argued, however, that they could not appeal to the Local Authority against the order which had been made, because the Act only allowed an appeal 'where the Local Authority grants or withholds such sanction,' and here it could not be said that the Local Authority had done either the one or the other.

"Now, if the pursuers had simply sought to have the order set aside altogether, so as to leave it to the defenders to issue a new order, either unconditionally granting or withholding sanction to the business, there would have been something to be said in favour of that being done. What the pursuers ask, however, is only a partial reduction, and I doubt whether under the summons as framed it would be competent to pronounce a decree reducing the order *in toto*.

"Further, I am not impressed by the argument that, looking to the form

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The pursuers reclaimed, and argued;—(1) The insertion of the condition in the order was *ultra vires* of the Local Authority. They were not entitled to put restrictions upon such manufacturers by limiting their sanction, but only by bye-laws duly confirmed by the Local Government Board.* This was also a *privilegium*, which was illegal. (2) The form of the action was the same as in *Macbeth* v. *Ashley*.[1] No doubt the result of granting decree as concluded for would be that the pursuers would get an unlimited sanction instead of a sanction *sub conditione*, although the Local Authority would not have granted their sanction at all except *sub conditione*. But that was just what happened in the case of *Macbeth*.[1] The pursuers were entitled, not as matter of discretion, but *ex debito justitiæ*, to have what was a legal nullity struck out of the order. (Counsel also cited *Rossi* v. *Magistrates of Edinburgh*.[2]) (3) The pursuers could not have appealed to the County Council and Local Government Board, because the sanction of the Local Authority had been granted, not refused. If the insertion of the condition was legally within the powers of the Local Authority the pursuers could not appeal against the insertion of it.[3] The question was one of law purely which the County Council and Local Government Board could not have decided, and which for their guidance must first be determined by the Court.

Argued for the defenders and respondents;—(1) The insertion of the condition in the order was *intra vires* of the Local Authority. (2) But whether it was or was not this action was incompetent. The case of *Macbeth* v. *Ashley*[1] had no bearing. The form of certificate there was statutory. The condition was separable. The certificate could stand without the condition. Here that was not so. The condition in this case could not be taken out of the order without in effect granting the very thing which the Local Authority had refused to grant. What the pursuers asked for was that the Court should grant them a sanction to carry on an offensive trade. This the Court had no power to do. The case of *Rossi*[2] was not in point. There also the conditions objected to were separable; but further, the difficulty here did not arise, as the effect of the decree obtained by the pursuer in that case was not to give him a licence to do anything. He had

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of the order, the pursuers might not be entitled to appeal. I think that it is clear that the pursuers have right to appeal to the Local Authority against the order. The criticism upon the way in which the order is framed is very technical. The defenders were not prepared to sanction the establishment by the pursuers of a glue manufactory in which all the materials from which glue may be made might be used, but only of a manufactory in which hide clippings alone were used. If the order had sanctioned the establishment of a business of glue manufacturers from hide clippings only, it would, I think, have been unobjectionable in point of form, but the order which the defenders granted was in substance precisely to the same effect.

"I shall therefore dismiss the action as being incompetent."

* Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 32, subsecs. (1), (2), and (3), and secs. 183-188.

[1] April 17, 1874, 1 R. (H. L.) 14, and in the Court of Session, June 20, 1873, 11 Macph. 708, 45 Scot. Jur. 440.

[2] Feb. 20, 1903, 5 F. 480, reversed Nov. 21, 1904, H. L. present volume, and [1905] A. C. 21.

[3] Cameron v. Magistrates of Glasgow, Feb. 20, 1903, 5 F. 490.

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still to go to the proper authority for a licence. The proper course for the pursuers was to have appealed to the County Council.* The sanction which they asked for had been in effect withheld. If they had not availed themselves of the remedy provided by the statute the present action was also incompetent upon that ground.

LORD ADAM.—This is an action brought by a firm, who are manufacturers of glue, and propose to set up a glue manufactory in the defenders' district. On 10th July 1903 they made application to the defenders, who are the Local Authority under the Public Health Act, for their sanction to commence the manufacture of glue. That application stood over for some time because the Local Authority was preparing bye-laws as to the manufacture of glue. We are told that after considerable delay these bye-laws were adjusted, and that they were finally confirmed by the Local Government Board on 6th January 1904. The pursuers set forth two of these bye-laws, which refer to the manner in which the business of glue manufacture is to be carried on. These bye-laws having been confirmed, the Local Authority on 9th February 1904 issued this order—(His Lordship read the defenders' order of that date). That is the only order pronounced, and that is the order which we have to consider. The pursuers' application was an unlimited application for sanction to manufacture glue in any way they could. The sanction given was subject to the condition that the products of the business should be manufactured "from hide clippings *only*." That was a limited sanction granted on an application for an unlimited sanction.

That being so, this action was brought, concluding not for a total reduction of the order but only for reduction of it to a limited extent. The pursuers ask for reduction of the order in so far as it imposes a condition "that the products of the pursuers' business are to be manufactured from hide clippings *only*." Then there follows a conclusion for declarator, that the "order granted to the pursuers shall be valid and effectual to the pursuers in all time coming, and that as if the said condition whereby the pursuers are required to manufacture their products from hide clippings *only* had not been inserted in the said order."

It is perfectly clear that the effect of a decree of reduction in the terms asked would be to turn a limited order, sanctioning the manufacture of glue from hide clippings only, into an order sanctioning the manufacture of glue in any way whatever.

The ground of the pursuers'-contention in support of the conclusions of their summons is this:—The Public Health (Scotland) Act, 1897,† section 32, by subsection (1) enacts, that anyone who establishes, without the sanction of the Local Authority, any of certain businesses enumerated, or any other business which the Local Authority by order confirmed by the Local Government Board may declare to be an offensive business, shall be liable to a penalty. The business of glue manufacturing is not one of the businesses enumerated, but the defenders, by order duly confirmed, had

* Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 32 (2).

† 60 and 61 Vict. cap. 38.

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declared it to be an offensive business. By subsection (3) it is enacted, that the Local Authority, subject to confirmation by the Local Government Board (as provided by section 185 of the Act), may make bye-laws for regulating the conduct of offensive business; and the pursuers say that the defenders accordingly made application for the sanction of certain bye-laws by the Local Government Board with regard to the manufacture of glue, and that certain bye-laws were duly confirmed, and these they contend contain the only conditions with regard to the making of glue which it is legal for the Local Authority to impose on any manufacturer who wants to make glue in their district. The pursuers say that by their order the defenders have imposed a condition which is not in their bye-laws, namely, the restriction to manufacture from hide clippings only. They say this is illegal, and that being illegal they are entitled to have it struck out of the order, and to have the order left standing as an unconditional sanction to manufacture glue in any way whatever; that is to say, they want to convert a conditional sanction into an unconditional sanction, which the Local Authority never gave them.

The Lord Ordinary has dismissed the action as incompetent, and I entirely agree with the Lord Ordinary. The question is whether the pursuers had the sanction of the Local Authority to the carrying on of this business in any way, or only their sanction to carrying it on in a particular limited way. No one can doubt that the defenders' sanction was not unlimited. An unlimited sanction was what was asked for and refused. What authority has this Court to convert an order giving a limited sanction into an order giving a sanction unlimited in any way? It has none.

In the case of *Macbeth* v. *Ashley*[1] the condition was quite separable from the licence. If here the condition were separable I could understand the pursuers' contention, but that is not the case. The sanction granted is for the manufacture of glue in a particular way, and in that way only.

It may be a question whether that condition was legal or not, but whether it was legal or not it is plain that the pursuers did not get the sanction of the Local Authority to carry on the manufacture in the way they desire.

I think that is enough for the decision of this case. But I am disposed to think the defenders' order was tantamount to a refusal of the pursuers' application, and it would rather appear to me that the pursuers had a right of appeal to the County Council, and from them to the Local Government Board, and if so, this action would be incompetent on that ground, for if an appeal is given by the statute the statutory procedure must be followed. But it is not necessary to decide that question, for I think it is quite incompetent, by means of a partial reduction, to convert a conditional sanction into a sanction which is unlimited.

I therefore agree with the Lord Ordinary, and think that we should adhere to his interlocutor.

LORD KINNEAR.—I agree. I do not think that it is competent for the Court to grant decree in the terms asked for, and I do not think that the

[1] April 17, 1874, 1 R. (H. L.) 14, June 20, 1873, 11 Macph. 708.

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competency of doing so is a technical question arising out of a criticism of the terms of the summons, but is a question of substance as to the right of the pursuers to obtain the remedy they seek, and the power of the Court to grant such a remedy. I agree with your Lordship that we cannot grant it. The pursuers made application to the defenders for sanction to commence the manufacture of glue and gelatine in the premises erected and equipped by them at Kinauld, which is within the defenders' district. I understand that the application was for an absolute sanction, and that, had it been granted in the terms asked for, it would have enabled the pursuers to carry on their manufacture by any lawful methods known to the trade. It was, however, not granted in this form, but the Local Authority issued an order giving their sanction "under the condition that the products of the business are manufactured from hide clippings *only*." Now, that order starts no doubt by giving a sanction in affirmative form, but it goes on to add a condition implying a distinct negative to what the pursuers ask for, for it says, "You are to carry on this manufacture from hide clippings only," while what was asked for was leave to carry it on by every lawful method. I do not think it necessary to decide whether this condition was or was not *ultra vires* of the Local Authority, for it is not brought before us in a form in which we can decide that question, although I think that it is a perfectly proper question to be brought before the Court for consideration, if it is brought in a proper way. But here what we are asked to do is not only to determine, as a question of law, that the condition was incompetent, but to strike out of the order that portion of it which is said to be incompetent and to leave the rest standing, so that it will be transformed into an unconditional sanction to carry on the manufacture of glue by any known method. Now, I agree with your Lordship and with the Lord Ordinary that that is just asking us to grant what was refused by the Local Authority. It is said to be a question whether the Local Authority can be held to have withheld this sanction or not, and we cannot say what they would do if they were advised that they must either grant it unconditionally or refuse it. But certainly they have not granted it unconditionally as yet, and if we give decree in the terms asked for we shall just be doing what they have not yet done. We shall in fact be giving a sanction to carry on one of the offensive trades, and that I think this Court has no power to do.

I do not see that any difficulty is created by the two cases that were cited by the reclaimers. In the case of *Ashley*[1] the licence and the illegal condition were quite easily separable, and the Court held that, if the condition were struck out, the licence, which the licensing authority had intended to grant, could still stand. The difficulty which arises here was not raised by any of the Judges or by the counsel in that case. The case of *Rossi*[2] too does not apply to the present proceedings, for there what was sought was a general declarator that certain conditions could not be legally inserted in a certificate, but no certificate had as yet been granted. So in that case there was no risk that the effect of the decree would be to grant a sanction which

[1] 1 R. (H. L.) 14.
[2] 5 F. 480, and H. L. present volume, and [1905] A. C. 21.

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had been refused; the applicant would still have to go to the licensing authority for his licence, and would not be obtaining it by a decree of this Court. Here what we are asked to do must have a very different consequence. I agree with your Lordship and the Lord Ordinary that this action must be dismissed.

LORD KINCAIRNEY.—I agree with your Lordships and the Lord Ordinary.

This is an "offensive business" which cannot be established without the sanction of the Local Authority, and no one else can give that sanction. This Court cannot. The question is, have the pursuers got the sanction of the Local Authority? They have not, except under a certain condition. I do not say whether it was legal to impose that condition or not. The pursuers will not accept the sanction with that condition. But they have no other. The question is, can we, by striking out the condition said to be *ultra vires*, affirm that the Local Authority have sanctioned this manufacture? I think we cannot. The point is well expressed by the Lord Ordinary when he says:—"What, therefore, the pursuers ask the Court to do is to convert a conditional order of the defenders into an absolute order unfettered by any condition. The first question is, whether the Court has power to do any such thing." I think there is no doubt the answer must be as the Lord Ordinary has answered it, in the negative. I concur in the judgment proposed by your Lordships.

The LORD PRESIDENT and LORD M'LAREN were absent.

THE COURT adhered.

ARCH. MENZIES, S.S.C.—A. G. G. ASHER, W.S.—Agents.

No. 46.

Dec. 10, 1904. M'Phie v. Magistrates of Greenock.

WILLIAM CROSS M'PHIE, Pursuer (Respondent).—*Watt, K.C.*—*R. S. Brown.*

PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF GREENOCK, Defenders (Reclaimers).—*Campbell, K.C.*—*M'Lennan.*

*Limitation of Action—Public Authorities Protection Act*, 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1.—The Public Authorities Protection Act, 1893, sec. 1, enacts that no action shall lie against any person on account, *inter alia*, of any act done in the "execution, or intended execution," of "any public duty" unless the action is commenced within six months next after the act complained of.

The Magistrates of a burgh let the town hall, which belonged to the common good of the burgh, to A, a public entertainments manager, for the purpose of giving a public entertainment therein on 7th September 1903. On that day the Magistrates refused to allow A the use of the town hall unless he agreed to omit a wrestling competition from the entertainment, and A having refused to do this, the entertainment did not take place.

On 8th April 1904 A brought an action of damages for breach of contract against the Magistrates, who pleaded sec. 1 of the Public Authorities Protection Act, 1893.

*Held* (*aff.* judgment of Lord Low) that the Act did not apply.

2D DIVISION. Lord Low.

BY letters dated 24th and 29th July 1903, the Magistrates of Greenock agreed to let the Town Hall of Greenock to William Cross M'Phie, public entertainments manager, 375 Eglinton Street, Glasgow, for 7th, 8th, and 9th September 1903, for the purpose of giving public

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entertainments therein. On the 7th of September, the day fixed for the first entertainment, the Magistrates refused to allow M'Phie the use of the hall unless he agreed to omit a wrestling competition from the performance. This he refused to do, and accordingly the Magistrates would not allow him to use the hall, with the result that he was unable to give the proposed entertainments.

On 8th April 1904 M'Phie brought an action against the Magistrates concluding for £500 as damages for breach of contract in respect of the defenders' refusal to allow him the use of the Town Hall.

In defence the Magistrates stated,—(Ans. 2) " . . . The Greenock Town Hall belongs to the defenders in their corporate capacity. . . . The defenders let said hall in the discharge of their public duty, and the rents derived from letting it form part of the burgh revenues"; and pleaded, *inter alia*;—(1) The action is barred by section 1 of the Public Authorities Protection Act, 1893, and the defenders are entitled to absolvitor, with expenses as between agent and client.*

On 29th October 1904 the Lord Ordinary (Low) pronounced this interlocutor:—" Repels the first plea in law stated for the defenders: Allows to the pursuer a proof of his averments, and to the defenders of their answers thereto; and appoints the same to proceed on a day to be afterwards fixed." †

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* The Public Authorities Protection Act, 1893 (56 and 57 Vict. c. 61), sec. 1, enacts:—" Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect," *inter alia*, " (*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . ."

† " OPINION.— . . . The action was not brought until more than six months after the date when the use of the hall was refused to the pursuer, and the defenders plead that the action is thereby barred in terms of the provisions of the Public Authorities Protection Act, 1893.

" The question, therefore, is, whether this is a case to which that Act applies.

" The defenders are undoubtedly a public authority, but that alone is not sufficient to render the statute applicable. It must also be shewn that this action is brought 'for an act done in pursuance, or execution, or intended execution of an Act of Parliament, or of a public duty or authority, or in respect of an alleged neglect or default in the execution of any such act, duty, or authority.'

" It is not said that the defenders were acting in pursuance of any Act of Parliament, but it is contended that they were acting in the execution of a public duty. It appears that the defenders are in the habit of letting the town hall for meetings and entertainments, and the rent obtained forms part of the revenue of the burgh. The argument is that, as the defenders are a public authority, and as they were letting the hall not with a view to private gain but for the purpose of increasing the revenue of the burgh, they were acting in the execution of a public duty. I am unable to take that view. It seems to me that in letting the hall the defenders were not acting *qua* public authority, but as managers or trustees for the burgh, whose duty it was to administer the burgh property to the best advantage.

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The defenders reclaimed, and argued;—The defenders in refusing to allow the pursuer the use of the town hall for the purpose of a wrestling competition were acting in the "intended execution of a public duty" within the meaning of section 1 of the Public Authorities Protection Act, 1893; they were therefore entitled to the benefit of the Act. It was no answer that the Act was done in the way of municipal trading, out of which the corporation might make a profit.[1]

The pursuer was not called upon.

LORD JUSTICE-CLERK.—I think the Lord Ordinary is right. The cases referred to by Mr M'Lennan were in connection with acts done in pursuance of statutory duties. Here the question is whether or not the Corporation of Greenock acted in breach of a contract entered into with a private individual. They entered into a contract with the pursuer, as he alleges, whereby he was to have the use of the Town Hall of Greenock for certain entertainments, and it is said that they failed to implement their contract. They were under no obligation, statutory or otherwise, to have a town hall at all. If they had one they could use it as they pleased, and if they let it the profit went to the common good. They are just in the position of individuals who have halls to let, and if they let them for the purposes of public exhibitions, and afterwards have reason to think that the exhibitions are such that they are legally entitled to stop them, then if they are willing to run the risk of an action of damages they are quite entitled to do so. It is out of the question to say that in letting the town hall the defenders were acting in pursuance of a public duty, statutory or otherwise. I am therefore of opinion that the judgment of the Lord Ordinary should be adhered to.

LORD YOUNG.—I think that this is a very clear case. The pursuer sues for damages on account of actionable breach of contract which he says has been committed by the defenders, who are the Provost, Magistrates, and Town-Council of the burgh of Greenock. Now, I know of no principle or authority which could have influenced the Legislature to place public bodies in a favoured position in regard to liability for breach of contract, and consequently in construing this statute I decline to attribute such an intention

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I do not think that the management of the property of a burgh is a public duty within the meaning of the Act.

"The case might have been different if the position taken up by the defenders had been that they stopped the performance, not as the managers of the burgh property, but as Magistrates, and because in their judgment it was in the public interest that the proposed exhibition of wrestling should not be allowed to proceed. That view, however, was not suggested, the only argument being that to which I have already referred.

"I am therefore of opinion that the action is not barred by the statute, and I shall accordingly repel the first plea in law for the defenders, and allow a proof."

[1] Spittal v. Corporation of Glasgow, June 17, 1904, 6 F. 828; The Ydun v. Mayor of Preston, L. R. [1899], P. 236; Ambler & Sons v. the Corporation of Bradford, L. R. [1902], 2 Ch. 585; Edwards v. Vestry of St Mary, Islington, 1889, L. R., 22 Q. B. D. 338; Cree v. Vestry of St Pancras, L. R. [1899], 1 Q. B. 693.

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to the Legislature. Suppose that these defenders had contracted with a tradesman to put this hall into good order so that they might let it, is the Corporation exempt by Act of Parliament from paying the contract price if the tradesman does not render his account for six months after the completion of the work? If they do not pay, why should they not be liable in damages for the breach of their contract to pay? I am very clearly of opinion that the Lord Ordinary was right in repelling the first plea in law for the defenders, and that we should adhere to his judgment.

LORD TRAYNER.—The only question raised in this reclaiming note is whether the first plea in law for the defenders should be repelled or sustained. The Lord Ordinary has repelled it and allowed a proof, and I think he has acted rightly. The plea is that this action is barred by section 1 of the Public Authorities Act, 1893. What is here complained of is that the defenders failed to implement the contract with the pursuer by which they let to him the Town Hall of Greenock. But the defenders were under no obligation to let the hall, and if they did so they acted, not under any public authority conferred on them, or public duty laid upon them, but merely as the persons having charge of the building. They had the hall in their hands to let or not as they pleased.

LORD MONCREIFF was absent.

THE COURT adhered.

PATRICK & JAMES, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

No. 47.

Dec. 10, 1904. Bradshaw v. Kirkwood & Sons.

HENRY BRADSHAW, Appellant.—*Orr*—*Irvine*.
JAMES KIRKWOOD & SONS, Respondents.—*T. B. Morison*.

*Bankruptcy—Composition—Reasonable Offer—Spes successionis—Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 138, 139.—*Held* that an offer of composition by a sequestrated bankrupt which did not take into account a valuable interest in a succession which, although not vested in the bankrupt, would accrue to him in the event of his surviving his mother, who was eighty years of age, was not a reasonable offer in the sense of section 138 of the Bankruptcy (Scotland) Act, 1856.

1ST DIVISION. Sheriff of Lanarkshire.

HENRY BRADSHAW, stockbroker, Glasgow, whose estates had been sequestrated, at a meeting of his creditors held after his examination on 20th July 1904, made an offer of a composition of five shillings per pound on his debts at the date of the sequestration, payable within one month after his discharge. The bankrupt also offered to pay the expense of the sequestration and the remuneration of the trustee, and offered James Henry Bradshaw as his security.

The meeting unanimously agreed to entertain the offer, and directed the trustee, James R. Hodge, chartered accountant, Glasgow, to give the necessary notices for having the same decided upon at another meeting of creditors.

In the notice calling another meeting of creditors on 24th August 1904, to consider the offer of composition in accordance with the provisions of section 139* of the Bankruptcy Act, 1856, the trustee set forth a state of affairs shewing liabilities £678, 14s. 7d.; assets, £20, 18s. 6d.,

* Quoted in Lord Adam's opinion, p. 251.

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and appended the following note:—"The bankrupt's father died about three years ago leaving heritable and moveable estate valued at £11,259, 10s., but subject to liferent of his widow, and on her death to be divided equally among her children, of whom there are six, but I am advised that this does not vest in the children unless they survive their mother, and therefore I am unable to place any value on the share provided for the bankrupt under his father's will."

The bankrupt's father, Philip Bradshaw, by his will dated 9th February 1891 and recorded 26th July 1901, conveyed his estates to trustees, and directed them to pay the income of the residue to his wife in liferent for her liferent alimentary use allenarly, and on the decease of the longest liver of him and his wife to divide and pay the whole residue of his estate equally among and to his whole children, except his son James; "Declaring that if any of my said children shall die before receiving payment of their shares above provided to them, and leave lawful issue, the share or shares which would have fallen to such deceaser or deceasers shall be divided equally among and paid to such issue *per stirpes*."

At the date of the offer of composition the bankrupt's mother was eighty years of age and in infirm health.

The creditors at their meeting on 24th August 1904 resolved by a majority in number and four-fifths in value of those present to accept the composition and security offered.

On 19th September 1904 the trustee reported to the Sheriff of Lanarkshire that the composition had been accepted by the requisite majority of creditors in number and value, and produced the bond of caution granted by Henry Bradshaw as principal, and James Henry Bradshaw as cautioner, all in terms of section 138 of the Bankruptcy Act, 1856.

James Kirkwood & Sons, stockbrokers, 62 Buchanan Street, Glasgow, who were creditors of the bankrupt for £93, 16s. 6d., lodged a note of objections to the offer of composition in which they maintained, *inter alia*,—"6. The offer is not reasonable, in respect that the bankrupt has an interest in his father's estate which, if realised, would be more than sufficient to pay the creditors 20s. per £."

On 24th October 1904 the Sheriff-substitute (Balfour) pronounced this interlocutor:—"Having heard the agents for the bankrupt and for the opposing creditors James Kirkwood & Sons, and considered the objections lodged by the said opposing creditors, for the reasons contained in the annexed note, Finds that the offer of composition made by the bankrupt is not reasonable; therefore refuses his discharge, and decerns." *

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* "NOTE.—The offer in question was made at a meeting of the creditors called by the trustee, who reported that the bankrupt's father died three years ago leaving estate valued at £11,259, 10s., but subject to the liferent of his widow, and on her death to be divided equally among his children, of whom there were six, but the trustee adds, 'I am advised that this does not vest in the children unless they survive their mother, and therefore I am unable to place any value on the share provided for the bankrupt under his father's will.'

"The facts of the case are that the bankrupt is one of a family of six, and his mother is living, but she is eighty years of age and in infirm health. The bankrupt's claim on the father's estate amounts to over £2000, and the claims in the sequestration amount to £670. The offer of five shillings

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The bankrupt appealed, and argued;—The bankrupt's interest in his father's estate had not vested. A direction to pay on the death of a liferentrix coupled with a destination-over to the issue of predeceasing children, postponed vesting till the death of the liferentrix, and the Sheriff had failed to notice the recent authorities to that effect.[1] The bankrupt's interest in his father's estate was therefore only a *spes successionis*. He could not be compelled to assign it, and it did not fall under the sequestration.[2] The fact that the bankrupt had the chance of succeeding to a share of his father's estate did not make the offer of composition unreasonable.

Counsel for the respondents were not called upon.

LORD ADAM.—The interlocutor of the Sheriff of Lanarkshire which is submitted to review is in these terms:—(His Lordship read the interlocutor). The Sheriff finds that the offer was not reasonable, and that is the whole question before us. The circumstances of the case are these. The bankrupt made an offer of composition of 5s. in the pound, which was approved of at the necessary statutory meetings by the requisite majority in number and value of the creditors. By the 139th section of the Bankruptcy Act it is provided that when an offer of composition has been made, if "a majority in number and four-fifths in value of the creditors present should accept the said offer and security, a bond of caution shall be lodged, and a report made and a deliverance pronounced, all in the same manner and to the same effect as hereinbefore provided." The latter words refer to the 138th section, where it is provided "that the trustee shall thereupon subscribe and transmit a report of the resolution of the meeting, with the said

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per £ amounts to about £170. These facts were admitted by the bankrupt's agent, and the question comes to be whether the bankrupt's share in his father's estate has already vested in him or does not vest till his mother's death.

"By the father's will he conveyed his estates to trustees and directed them to pay the income of the residue to his wife in liferent, and on the decease of the longest liver of him and his wife he directed his trustees to divide and pay the whole residue of his estate equally among his whole children excepting one son, and he declared that if any of his children should die before receiving payment of their shares leaving lawful issue the shares which would have fallen to such deceasers should be divided among such issue *per stirpes*. The trustee states that he has been advised that the bankrupt's share does not vest in him unless he survives his mother, but he does not say who has given him this advice, and I am of opinion that according to the authorities the bankrupt's share has already vested in him. The leading recent cases on the subject are *Ross's Trustees*, 12 R. 378; *Hay's Trustees* v. *Hay*, 17 R. 961; and *Ross's Trustees* v. *Ross*, 25 R. 65, to which I refer. . . . If this be so, the offer of five shillings per £ is quite unreasonable, because the creditors would on the footing of the share having vested get 20s. per £ on their debts. The asset is one which, notwithstanding of the widow's survivance, could readily be disposed of for a substantial sum."

[1] Bowman v. Bowman, July 25, 1899, 1 F. (H. L.) 69; Parlane's Trustees v. Parlane, May 17, 1902, 4 F. 805; Dawson v. Smart, July 20, 1903, 5 F. (H. L.) 24; Forrest's Trustees v. Wilkie's Trustees, May 17, 1904, 6 F. 616.

[2] Reid v. Morison, March 10, 1893, 20 R. 510.

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bond, to the Bill-Chamber Clerk or Sheriff-clerk in order that the approval of the Lord Ordinary or Sheriff (whichever may be selected by the trustee) may be obtained thereto; and if the Lord Ordinary or the Sheriff, after hearing any objection by creditors, shall find that the offer, with the security, has been duly made, and is reasonable, and has been assented to by a majority in number and nine-tenths in value of all the creditors assembled at the said meeting, he shall pronounce a deliverance approving thereof, provided that he shall hear any objection by opposing creditors, and if he shall refuse to sustain the offer or reject the vote of any creditor, he shall specify the grounds of refusal or rejection." Now, this offer was assented to by the requisite majority of the creditors, but it was also objected to by one creditor on the ground that it was not reasonable, in respect that the bankrupt had an interest in his father's estate which, if realised, would be more than sufficient to pay the creditors twenty shillings in the pound. It was on this ground that the Sheriff founded his decree refusing the discharge, and the question submitted to us is, was this a reasonable offer?

The facts as to the bankrupt's interest in his father's estate are stated by the trustee in his report to the creditors as follows:—(His Lordship read the trustee's note appended to the notice calling the meeting of 24th August 1904). That was the advice given by the trustee to the creditors, but the ground on which the Sheriff proceeded is stated in his note to be,—"I am therefore of opinion that the share has vested in the bankrupt. If this be so, the offer of five shillings per £ is quite unreasonable, because the creditors would on the footing of the share having vested get 20s. per £ on their debts. The asset is one which, notwithstanding of the widow's survivance, could readily be disposed of for a substantial sum." I should not be disposed to agree with the Sheriff-substitute in his views as to vesting, for I do not think this testament gave a vested interest. The testator provides a liferent to his wife, and disposes of the residue on her death in these terms:—(His Lordship read the bequest of residue and the destination). Now, it is to be observed that no right is given to any of the children, except by the instruction to the trustees to pay to them on the death of the widow a certain proportion of the residue, and on these clauses alone it seems to me unnecessary to consider *Bowman*[1] and the cases following it. But if we are to consider the case of *Bowman*,[1] then I think it is also clear that there is here a destination-over. I am of opinion that here there was no vesting, but merely a *spes successionis*, and not a vested interest. But however that be, it makes no difference to the question of the reasonableness of this offer, for although this right was not vested in the bankrupt, and so not carried to the trustee by the vesting clause in his favour, yet here there was an expectancy of £2000 depending on the life of an old lady of eighty, and that was clearly a valuable asset, and would sell for a large sum, for much more than the £170 offered for a composition, and, indeed, I have little doubt that the bankrupt could sell this right at any time for enough to pay off the creditors in full. Now, I think that in view of that valuable asset in the possession of the bankrupt the offer of a composition

[1] 1 F. (H. L.) 69.

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of five shillings in the pound was not a reasonable offer, and on that ground I think the interlocutor of the Sheriff should be affirmed.

LORD M'LAREN.—Bankruptcy appeals, which often do not relate to sums of large amount, may be important in point of principle, because they regulate procedure for all future cases. It is therefore necessary to keep the points which have been argued to us clearly distinguished. In the case of *Reid* v. *Morison*,[1] which was a case of what may be called a compulsory winding-up, it was held by this Division along with three consulted Judges of the Second Division, that a trustee was not entitled to refuse his consent to a discharge because the bankrupt had not given up an interest which had not vested in him. But there are means even in such a case by which a bankrupt may be induced to make an interest which has not vested available to his creditors to some extent. The conditions are quite different when the estate is being wound up by the acceptance of a composition offer. In the present case an offer has been made which does not take into account an interest which will accrue to the bankrupt on the death of his mother, and the question is whether that is a reasonable offer of composition. The Sheriff has held that the offer is not reasonable, because in his opinion the bankrupt's interest has vested and falls under the sequestration. I am not of opinion that the interest in question has vested, but anything said on this subject will not have any influence on the question of vesting should it hereafter arise for decision. Assuming, however, that the interest has not vested, the fact remains that the bankrupt is possessed of an asset of considerable value, and the trustee is entitled to go through all the forms permitted by the Bankruptcy Act, and to take his chance that before the estate is wound up this asset may fall into the sequestration. A prudent trustee would say that there was no advantage in accepting an offer of five shillings in the pound with the chance of a good estate falling in, and would, so far as he had power, elect to keep up the sequestration. That is a good reason why, if the bankrupt desires to settle by way of composition, he should make a reasonable contribution out of the funds which will fall to him on the death of his mother. I therefore agree with your Lordship.

LORD KINNEAR.—I agree with your Lordships. I assume that all the proceedings have been regular, but I observe that that is merely an assumption, because Mr Morison tells us that, assuming the judgment of the Sheriff-substitute is wrong, he still has objections of a formidable nature. I agree, however, that the decision of the Sheriff-substitute is right, though I am not able to assent to the grounds in law upon which it is based. It is at best very doubtful whether the interest in question has vested, but without deciding that question, which is not before us, I agree with your Lordships that the bankrupt has a *spes successionis* which is certainly capable of being valued. The only condition upon which the bankrupt's right depends is his survivance of an aged and infirm lady, and that is an interest which is taken into account and valued by insurance companies every day. The question therefore is whether it is reasonable that the creditors should be compelled to

[1] 20 R. 510.

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accept a small composition without taking into account an interest which is capable of being turned into money, and I agree that it is not. The case of *Reid* v. *Morison*[1] decided that a bankrupt could not be compelled to assign a *spes successionis*, because it was not attachable by diligence nor carried by the vesting clause of the Bankruptcy Act. But it is a very different matter to say that it is not reasonable to take such an interest into account when the bankrupt claims to put an end to the sequestration by offering to his creditors a small composition for a full discharge. I am of opinion that this is not an offer which the majority of the creditors can compel the minority to accept.

The LORD PRESIDENT was absent.

THE COURT affirmed the interlocutor of the Sheriff-substitute, and dismissed the appeal.

W. J. LEWIS, S.S.C.—J. MULLO WEIR, S.S.C.—Agents.

No. 48.

Dec. 13, 1904. Finnie & Son v. Duncan.

ARCHIBALD FINNIE & SON, Appellants.—*Guthrie, K.C.*—*A. Moncrieff.* ROBERT DUNCAN, Respondent.—*Macmillan.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, secs.* (11) *and* (12)—*Review of Weekly Payment—Obstruction of Medical Examination.*—An injured workman, in receipt of weekly payments under the Workmen's Compensation Act, 1897, went to Australia without intimating to his employers that he was going or leaving his address.

In an application by the employers for review of the weekly payments, the Court *suspended in hoc statu* the workman's right to the weekly payments on the ground that he was obstructing medical examination in the sense of sec. (11) of the First Schedule of the Act.

1ST DIVISION. Sheriff of Ayrshire.

THIS was an appeal on a case stated by the Sheriff-substitute (Mackenzie), at Kilmarnock, in an arbitration under the Workmen's Compensation Act, 1897, between Archibald Finnie & Son, coal-masters, Kilmarnock, petitioners and appellants, and Robert Duncan, miner, 39 Kirkland Rows, Springside, by Kilmarnock, respondent.

The case set forth:—"The respondent was injured on 6th July 1903, by accident arising out of and in the course of his employment as a miner in the service of the petitioners, and in December 1903 he underwent an operation in the Western Infirmary, Glasgow, by which the semi-lunar cartilage of his right knee was removed, that cartilage having been injured by the accident which he suffered. The petitioners paid the respondent compensation regularly at the rate of 10s. 1d. per week, being the full amount to which he was entitled under the said Act, from the date of the accident to 11th April 1904. On 23d June 1904 the petitioners presented a petition craving the Court, under paragraph 12 of the First Schedule appended to said Act, to review said weekly payments in respect that respondent's incapacity for work terminated on or before 11th April 1904. After proof, I, on 27th July 1904, pronounced an interlocutor, repelling the respondent's preliminary pleas as to the incompetency of the petition, and finding that the respondent was then able for light labouring work, at which he might be capable of earning 15s. per week, and I

[1] 20 R. 510.

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accordingly diminished said weekly payments from 10s. 1d. to 5s. per week until the further orders of the Court, without expenses to either party. From this award no appeal was taken.

"On 21st October 1904 the petitioners lodged a minute in process again craving the Court, under paragraph 12 of the First Schedule appended to said Act, to review the weekly payments of 5s. per week awarded to the respondent by my said interlocutor of 27th July 1904 in respect that the respondent had left this country and gone to Australia, and that the petitioners had no opportunity of having him medically examined, or of ascertaining his bodily condition. Immediately on the lodging of this minute I ordered service of the minute on the respondent at his last known address, and at the Edictal Citation Office, and also intimation to his known agent in Kilmarnock. No proof was led, but on 9th November 1904 I heard parties' agents, when it was admitted that the respondent had left this country for Australia in the beginning of August 1904 leaving his wife at home, without intimation to the petitioners that he was going, or what his address would be. Respondent's agent stated that the respondent had gone to Australia for the benefit of his health, his passage having been paid by a relative. The petitioners' agent stated that he had no information on this subject."

On 16th November 1904 the Sheriff-substitute pronounced an interlocutor refusing *in hoc statu* the crave of the minute of 21st October 1904, in respect (1) that it was not stated in said minute that the respondent had permanently left this country, or that any steps had been taken by the petitioners to have him medically examined, and (2) that no change in the state of his incapacity was averred to have taken place since the award of 27th July 1904.

The question of law was:—"In the circumstances stated does the compensation awarded to the respondent on 27th July 1904 fall to be ended or diminished by reason of the respondent having left Scotland for Australia without notice to the appellants; and, assuming the question to be answered in the affirmative, should the compensation be ended or diminished, (*a*) from the date of his departure, or (*b*) from the date of judgment in this application?" *

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts:—First Schedule—"(11) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

"(12) Any weekly payment may be reviewed at the request of the employer or the workman, and on such review may be ended, diminished, or increased, subject to the examination above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act."

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Argued for the appellants;—The respondent had by his own act made it impossible to have the examination provided for by this Act. There was no official medical referee in Australia. The respondent was therefore obstructing examination, and his right to weekly payment should be suspended *in hoc statu*. Obstruction did not necessarily mean wilful obstruction.

Argued for the respondent;—The respondent had gone to Australia for the benefit of his health, and the appellants could instruct a medical man to examine him there. The Act should be interpreted liberally, and granting that this was a *casus improvisus* the respondent was not wilfully obstructing examination in the sense of the Act.

LORD ADAM.—The respondent, Robert Duncan, who was in the employment of the appellants, was injured, on 6th July 1903, by an accident in the course of his employment. The injury involved an operation, described in the stated case as the removal of the semi-lunar cartilage of his right knee. The appellants paid compensation under the Workmen's Compensation for some time from the date of the accident at the rate of 10s. 1d. per week. After a time it appeared to the appellants that this weekly payment should be modified, and they petitioned the Sheriff to review the weekly payment, with the result that the Sheriff on 27th July 1904 diminished the payment to 5s. per week. On 21st October 1904 the appellants applied again to the Sheriff to review the weekly payment. The Sheriff ordered the application to be served at the last known address of the respondent, and also edictally, and caused intimation to be made to his last known agent. When the case came up there was no proof led, but it was admitted that the respondent had gone to Australia for the benefit of his health, and the respondent's agent stated that he had no further information about him. In these circumstances the Sheriff pronounced this interlocutor—(His Lordship quoted the Sheriff's interlocutor).

The effect of this interlocutor, if adhered to, is that 5s. per week will be continued until further evidence of the respondent's condition is brought forward, and this cannot be done as long as Duncan remains abroad. By sec. 3 of Schedule I. an injured workman may, before compensation is fixed, be required to submit himself to examination by a medical practitioner selected by the employer, and, if he refuses or obstructs the examination, his right to compensation is suspended. After the weekly payment is fixed, it may, under sec. 12, be reviewed at the request of either party, and ended, diminished, or increased, the amount being settled by arbitration. Now, here the appellants thought that this was a case in which the payment to the respondent should be diminished or ended. The machinery provided by the Act, and the obligations of the workmen are set out in sec. 11 of Schedule I.—(His Lordship read the section). The words are, "shall . . . from time to time submit himself for examination" by a medical man employed by the employer. These words are imperative. But the respondent has by his own act made it impossible to put that machinery in force. He has left the country. The act does not contemplate in terms the workman leaving the country. But after prescribing the machinery by which the state of the workman is to be ascertained, it enacts (sec. 11): "If the workman refuses to submit himself to such examination, or in any way

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obstructs the same, his right to weekly payments shall be suspended until such examination has taken place." I do not think this is a case of the workman refusing, but I think that it amounts to a case of obstructing. It is a reasonable construction of the word "obstruct" to hold that it covers a case where a man by his own acts prevents examination, or, in other words, makes it impossible to have the examination provided for by the Act made. It prevents the operation of the machinery provided by the Act for ascertaining whether the weekly payment is to be continued.

Accordingly I think we should find that the respondent has obstructed the examination, and that his right to the weekly payment is suspended until the examination takes place.

LORD M'LAREN.—This case comes before us in the course of an application by the employers of an injured workman to have the weekly payment awarded to him reviewed, in respect that the workman has gone to Australia, and that the petitioners are unable to exercise their statutory right of having the respondent examined by a medical referee of their own selection. The question is as to the application of section 11 of the First Schedule of the Act, and that is the only point we are called upon to consider. Under section 11 there are, as I had occasion to point out in a previous case,[1] three courses open to the employer, with corresponding obligations upon the workman. (1) The employer may, with his consent, have the workman examined by a medical man selected by the employer himself; (2) the workman may decline an examination by the employer's doctor, and claim to be examined by an official referee; or (3) the workman may agree to examination by the employer's medical referee without being bound by his decision, and if dissatisfied with it he may claim to be examined by an official medical referee. Now, in this case the respondent having left the country, the two latter courses are not available, because there are no official referees outside the United Kingdom to which alone the statute applies, and it is only by putting a severe strain upon the language of the statute that the first course could be made available. I can hardly think that the section contemplates the employer sending a medical man to Australia or instructing an agent in Australia to employ a medical gentleman, of whom he knows nothing, to conduct such an examination. If there was any indication that the Act was intended for the benefit of a workman who goes abroad, it would be necessary to look for some way of working out the provisions of the section, but there is nothing in the principle of the statute nor in its scope to suggest that it was intended to apply to a case of this kind. There is no machinery in the statute appropriate to such a case, and therefore the only safe course is to assume that such a case is not within the statute. I should, if possible, not wish to say that the present case falls within the category of obstruction, though at the same time I think it is clear that "obstruction" does not necessarily mean wilful obstruction. In the absence of any arrangement between the parties it suffices for the decision of the case that the respondent has made

[1] See Niddrie & Benhar Coal Co., Limited, v. M'Kay, July 14, 1903, 5 F. 1121.

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it impossible to carry out the provisions of the statute. I therefore agree with all that your Lordship has said, and concur in the judgment proposed.

LORD KINNEAR.—I am not disposed to say that a workman cannot go abroad without forfeiting the benefits of the Act, provided he gives notice to his employer, so as to enable some reasonable arrangement to be made for a medical examination in case the employer thinks the weekly payment should be revised. I agree, however, with your Lordship in the chair, that the conduct of the workman in this case has made it impossible to carry out the machinery of the statute, which is provided in the employer's interest. The workman has gone to Australia without notice and without leaving any address, and the employer cannot obtain the medical examination which the 11th section says entitles him to require that the workman shall submit himself to. The workman has made it impossible to carry out the statutory proceedings, and in the plain meaning of the word there has been obstruction in fact. I therefore agree that the case falls within the provisions of section 11, and that in the meantime compensation must be suspended until the medical examination can take place. Whether that involves suspension until the workman comes back to this country, it is not necessary to consider, but until the examination takes place compensation must be suspended. It was not possible for the Sheriff-substitute to diminish or end the award, because he could know nothing of the condition of the workman. He was therefore right in declining to grant the motion as originally made, but I agree that the compensation should have been suspended *in hoc statu*.

The LORD PRESIDENT was absent.

THE COURT "having considered the stated case on appeal, and heard counsel for the parties, find that the respondent having left this kingdom for Australia without previous communication with the complainers has rendered it for the present impossible that he should submit himself to examination by a duly qualified practitioner, as provided by the 11th section of the 1st Schedule of the Workmen's Compensation Act, as he may be required to do by the subsection, has thereby obstructed his examination, and that in terms of the said subsection his right to further weekly payments from the complainers should be suspended: Find it unnecessary to answer the questions put in the case, and with these findings remit to the Sheriff to proceed."

SIMPSON & MARWICK, W.S.—GARDINER & MACFIE, S.S.C.—Agents.

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Dec. 14, 1904. Aird & Coghill v. Pullan & Adams.

AIRD & COGHILL, Pursuers (Respondents).—*Ure, K.C.*—*Graham Stewart.*

PULLAN & ADAMS, Defenders (Appellants).—*Wilton.*

*Sale—Warranty—Disconformity to contract—Right to reject—Timeous rejection.*—In November 1900 a firm of printers ordered from a firm of engineers a Marinoni printing machine. By the contract the sellers undertook to fit the machine in the buyers' works, and leave it in thorough good working condition. The machine was fitted in March 1901, and, by instalments in the following April and August, the price, with the exception of £1, was paid. The buyers used the machine until July 1902, when they intimated rejection of it. During the period from March 1901 to July

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1902 they had frequently intimated their dissatisfaction with the working of the machine, and requested the sellers to put it into proper working order, which the latter had unsuccessfully attempted to do. The buyers had made some unimportant alterations in the machine before rejecting it.

In an action by the buyers against the sellers, concluding for warrant to remove the machine from their premises, and for repayment of the price so far as paid by them, it was proved that the machine had failed to work properly, and that this was due to its inherent defects, and not to any negligence on the part of the buyers or their workmen.

*Held* that the sellers had failed to fulfil their contract, and that the buyers had timeously exercised their right of rejection.

2D DIVISION. Sheriff of Lanarkshire.

ON 9th November 1902 Messrs Aird & Coghill, printers, 24 Douglas Street, Glasgow, ordered from Messrs Pullan & Adams, printers' engineers, 15 Margaret Street, Glasgow, a Marinoni printing machine. The contract was concluded by the following letter from Aird & Coghill to Pullan & Adams:—"We have much pleasure in accepting your offer to supply quad royal perfecting duplex Marinoni complete, with moulds, as at present at work at Malcolmsons, Ltd., Redhill. That you alter the flyers and geared inkers, &c., up to date Wharfedale style. The machine to be erected at our works at Douglas Street, and left in thorough good working condition, for the sum of not to exceed one hundred and ninety pounds stg. (£190)."

The machine was delivered in December 1900, and fitted in Messrs Aird & Coghill's works in March 1901, and by instalments of £50 and £100 in April and August 1901, and by crediting Messrs Pullan & Adams with £39, £189 of the price (£190) was paid.

At various dates from November 1901 to July 1902 Messrs Aird & Coghill wrote complaining of the working of the machine, and requesting Messrs Pullan & Adams to put it in good working condition, which they attempted to do.

In July 1902 Messrs Aird & Coghill wrote rejecting the machine, and requesting its removal. Some correspondence followed, in the course of which Mr Pullan, as representing the firm of Pullan & Adams (which had been dissolved), wrote a letter of 7th November 1902, from which the following is an excerpt:—"We cannot do anything else but admit that the machine is not in order when it is broken down. So there is no need for any witnesses about it. Mr 'Adams' positively declines to do anything in the matter, as he is not legally bound. No more am I. Nor the firm of Pullan & Adams. Only I had a feeling when you had found that the machine would not suit your class of work that I would like either to see the machine working to your entire satisfaction or have it removed. Not that I, as before stated, am bound to do anything in the matter: but when you stated that you had discovered that the machine would not suit your purposes, and you would be glad to get rid of it, I was willing to try to comply with your request, as I was to put in the machine, and this at a considerable loss."

Messrs Pullan & Adams having ultimately refused to remove the machine, or to repay the price, in March 1903 Messrs Aird & Coghill raised the present action in the Sheriff Court of Lanarkshire against the firm of Pullan & Adams, and T. H. Pullan and Thomas Adams, the individual partners thereof.

The prayer of the petition was (1) for warrant to remove the machine from the pursuers' premises, and to sell the same by public roup; and (2) for payment of £150.

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The pursuers, after narrating the contract, made the following averments:—"The defenders, though called upon to do so, have failed to remedy the defects in said machine and to put it in good order and working condition. The machine spoiled all work to which it was applied to such an extent that the pursuers could not use it for their business. The pursuers have never accepted the machine as in fulfilment of the defenders' contract with them, and have rejected it and called on the defenders to remove it."

In their defences the defenders did not expressly deny that the machine had failed to work properly, but averred that its failure was due to the manner in which the pursuers had worked it, and to certain alterations they had made upon it.*

The defenders pleaded, *inter alia*;—(2) The pursuers having accepted and paid for said machine cannot now reject same. (3) The pursuers' pretended rejection not having been made *tempestive*, the action should be dismissed, with expenses.

Proof was allowed and led. The import of the evidence sufficiently appears from the interlocutor of the Sheriff-substitute.

On 22d February 1904 the Sheriff-substitute (Balfour) pronounced the following interlocutor:—"Finds in the action *Aird & Coghill* v. *Pullan & Adams* that by letter dated 9th November 1900 the defenders contracted to supply the pursuers with a perfecting duplex Marinoni printing machine at a price not to exceed £190, and the defenders undertook to erect the machine at the pursuers' works at Douglas Street, Glasgow, and leave it in thorough good working condition: Finds that the pursuers had inspected the said machine at the works of Malcolmson, Limited, Redhill, near London, but the machine was not then working and was dismantled, and the defenders, after the said inspection, contracted to put it in good working condition at the pursuers' works: Finds that the machine arrived at the pursuers' works in December 1900, and it was erected in March 1901, and the pursuers commenced working with the said machine, but they found it defective on account of its not giving what is called a good register, and the printing appeared slurred, and it was not found to be in good order and condition: Finds that the pursuers from time to time complained to the defenders of the defects in the machine, and the defenders attempted to remedy them, but without success, and after they had attempted to print twelve different jobs, nine of which were defective, they ultimately, in July 1902, requested the defenders to remove the machine and reimburse them for the loss sustained: Finds that while these jobs were being printed the defenders did not object to implement their contract to put the machine in good working condition, but without demur they applied themselves to the remedying of the defects and made additions to and alterations upon the machine from time to time, and in November 1902 they admitted in their letter of 7th November that the machine was not in order, and they made a proposal for repairing the machine and putting it in thorough good working order on payment of their jobbing account, but except on that footing they never offered to make any further alterations on the machine, and they have made no further alterations: Finds that on 20th April 1901 the pursuers paid £50 to account of the machine, and on 17th August 1901 they paid

* The nature and character of the alterations alleged is fully explained in the opinion of the Lord Justice-Clerk, *infra*.

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£100 to account of it, and in addition to these payments the defenders have credited the pursuers with the price of certain articles, viz., a guillotine and a hand-press amounting to £39, which three sums amount to £189, and these payments have been appropriated by the defenders to the price of the printing machine, £190, leaving only a balance of £1 due on that machine: Finds that the defenders have failed to prove that the defects in the machine which ultimately led to the machine breaking down were caused by the pursuers driving the machine at a greater rate of speed than it was capable of performing, or that the workmen employed by the pursuers were incompetent and unable to manipulate the machine in a skilful manner: Finds that the real defects in the machine have apparently been caused by the carriage and roller not working in unison, and this has led to defective register and slurring, and the defenders, notwithstanding all their attempts, have been unable to remedy the defects, and they have not implemented their contract to erect the machine in the pursuers' works and leave it in thorough good working condition: Finds therefore that the defenders are in breach of contract, and the pursuers are entitled to have the machine removed and sold as craved: Grants warrant to the pursuers to remove the said machine to the premises of Messrs J. & R. Edmiston, licensed auctioneers in Glasgow, and also grants warrant to such auctioneers to sell the same by public roup, and appoints the proceeds of sale, after deducting the expenses thereof, to be consigned with the Clerk of Court to abide the orders of Court."

On appeal the Sheriff (Guthrie) adhered.

On 15th July 1904 the printing machine was sold under the order of the Court, and the price (£60, 2s. 6d.) consigned.

On 18th August 1904 the Sheriff-substitute pronounced an interlocutor, whereby he authorised the sum consigned to be paid to the pursuers, and found the defenders, jointly and severally, liable for £66, 5s. 10d.

The defenders appealed, and argued;—The pursuers had not exercised their right of rejection timeously. Payment of the price and continued use of the article supplied were inconsistent with rejection.[1] A purchaser was bound either to accept the article and claim damages for the breach of warranty, or to reject it. He must elect between these remedies timeously, otherwise he lost both.[2] The present case was one of undue delay in rejection, and was covered by the decision in *Electric Construction Company, Limited*, v. *Hurry & Young*.[3]

The respondents argued;—The defenders had not fulfilled their obligation to erect and leave the machine in good order at the pursuers' works. The pursuers intimated to the defenders their dissatisfaction with the machine from the first, and the delay in rejection was due to the pursuers giving the defenders opportunities for putting the machine right. In these circumstances the machine had been timeously rejected.[3]

LORD JUSTICE-CLERK.—I have arrived at the conclusion that the judg-

[1] Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sections 14 and 35; Morrison & Mason v. Clarkson, Jan. 14, 1898, 25 R. 427.

[2] Sale of Goods Act, 1893, section 11, subsection 2; Electric Construction Co., Limited, v. Hurry & Young, Jan. 14, 1897, 24 R. 312.

[3] Pearce Brothers v. Irons, Feb. 25, 1869, 7 Macph. 571; Fleming & Co., Limited, v. Airdrie Iron Co., Jan. 31, 1882, 9 R. 473.

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ments of the Sheriff-substitute and the Sheriff were right. This machine was ordered for a particular work to be done, and was bought under an agreement whereby the defenders were to put it into and leave it in good order in the pursuers' premises. Now, I think the evidence is quite clear and distinct to the effect that that was never done.

It is quite true that there was a very long time occupied between the time when the machine was first put in and the time when the pursuers rejected it, but during the whole of that time the defenders through Mr Pullan were professing their ability to put matters right, and to bring the machine the pursuers had paid for into such working order that they could not reject it. Time after time efforts were made to put it into working order, and the results were always unsatisfactory; and I think we must take it to be the fact on the evidence (now hardly disputed) that at the time the pursuers gave intimation and rejected the machine, and asked for their money back, the machine, in spite of all the defenders had done, was not in a condition to work properly. It is not a case at all of defects by which the machine breaks or anything of that kind, but it is just this, that the adjustment of the machine—however good the material it is made of—cannot be effected so as to produce the only satisfactory result for which such a machine was intended.

I cannot hold that the time was too long, and that the rejection was not timeous. We were referred to a case[1] in which the time extended to a period of over more than a year, and if the defenders for a time of this length were professing that they were to be able to bring it right, I do not think it is against the pursuers that they gave, time after time, further delay in the hope that the matter might be settled to the satisfaction of both parties.

But, then, it is said that apart from timeous rejection the pursuers have lost right because they altered the machine themselves. I think there is no ground whatever for saying that. It appears that certain cups, which in one part of the evidence are called oil cups—and, I suppose, there must have been oil cups of certain sizes—were taken away, and larger ones substituted. That had nothing to do with the sufficiency of the machine; it may have had something to do with the running of the machine in giving it a better supply of oil; but as to the moving of the machine—which might be lubricated by hand lubricator or any other way—it had nothing to do with that.

Then it is said that the shaft was altered because the engine, instead of being driven by belt as at first, was to be put into connection with an electric motor for the purpose of being driven off the motor shaft direct. All that was done there was, I suppose, to add something to the shaft, so as to enable the motor to be fitted. That was a mere detail, and had nothing to do with the working of the machine. It is what must be expected of a machine when it first comes to a shop in which it was proposed to put it at a particular place—that it might be found that the shafting was slightly too short, and would require to have a piece welded on to it. That does not, in my opinion, in the least affect this question.

On the whole matter of right of the pursuers to reject the machine itself

[1] Pearce Brothers v. Irons, Feb. 25, 1869, 7 Macph. 571.

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as they did, I do not think it is of the slightest weight that they paid the price at the request of Mr Pullan, who was anxious to get the money. Rights of rejection do not depend on whether the article has been paid for or not. You may reject an article you have paid for on the spot on delivery of the goods, if it turns out that the goods are not conform to the contract.

The only remaining question is the liability of Mr Adams, and with regard to his liability I have no doubt whatever. He was a member of the firm that supplied the machine, and as long as it was a question whether that machine was to be accepted as being in fulfilment of the contract or whether it was to be rejected on the footing that it was not satisfactory, and that some question of damages might arise for the machine not being what it ought to have been, as long as these questions were open Mr Adams, of Pullan & Adams—who were the firm responsible for the final working out of that matter between the parties—was liable. Whatever the transactions the firm had entered into, the partners could not escape from liability for fulfilment of these transactions simply by dissolving the partnership; and it is quite plain that if they dissolved partnership altogether they could not escape, as no partner who leaves the firm escapes liability for those things done under his obligation as a member of the firm.

Therefore on the whole matter I agree with the decisions pronounced.

LORD YOUNG concurred.

LORD TRAYNER.—I think the Sheriffs are right. The parties here entered into a contract, which is binding on the defenders, to erect a certain machine at the pursuers' shop, and to leave that machine in thorough good working condition. Now, as a matter of fact, I think it has been established, and indeed seems to have been admitted before the Sheriff, that that contract was never fulfilled. The machine never was left in the defenders' premises in good working condition. Accordingly we start the case with this, that the defenders are guilty of a breach of contract, and that the defenders who were guilty of this breach of contract were Pullan & Adams, the then existing firm. If the contract was not fulfilled the buyer had a certain option either to reject the insufficient article that had been furnished or to keep it for what it was worth, and make a claim of damages. In this case he is not making a claim of damages but standing on his right to reject. That right is undoubtedly a buyer's right, but it must be timeously exercised or it will be lost. The defenders maintain that the right has been lost by the pursuers, and there are two particulars I think on which the defenders particularly rely in support of that view.

The first is, that there was payment of price; and the second, that there was too long retention of the machine on the part of the defenders. Now, payment of price may in some cases be an extremely strong element against the person who desires to reject the thing furnished to him as not conform to contract, and I do not know where we could get a better instance of the effect of payment than the case of *Morrison*[1] cited to us. In that case a defective pump was delivered, accepted, tested, and after testing was paid for. But the payment in that case was equivalent to saying, "You have

[1] 25 R. 427.

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fulfilled your contract, and I am now to make payment in fulfilment of my obligations under the contract of sale." Now, that could never be said of the payments made here, for these payments by the pursuers were not made under any circumstances indicating that they were satisfied that they were under an obligation to pay the price. We have it ascertained, as a matter of fact, that these payments were made by the pursuers not because they were satisfied, but on the contrary, at a time when they were complaining that the contract had not been fulfilled, and that the defenders were in breach of it. The payments were made, as matter of favour, at the urgent request of the defenders, who were needing money at the time. No inference therefore can be drawn here from payment of the price or part of the price (for only part was paid), to the effect that the parties who paid it were paying it in discharge of an obligation to pay it when they did.

The next objection was that the machine was retained too long. If the machine had been kept as accepted for the period stated, it would certainly have been too late to reject it. But why was it kept so long? From the very outset it was apparent to the pursuers that the contract of the defenders had not been fulfilled, and they called on the defenders time after time to fulfil the contract by putting that machine into thoroughly good working order. The defenders accepted liability for doing that, and they tried to do it month after month, and when the pursuers had lost their patience over these innumerable trials, which were of no avail, they intimated to the defenders that they would wait no longer for the machine. The defenders again asked, "Give us another chance, and we will see what we can do. We are certain that we can put it right." That was done. Well, the thing could not be accomplished. But the reason for the retention of that machine was not to enable the pursuers to make up their mind whether they were to keep it—for it would have been too long a time to retain merely for that purpose—but to enable the defenders to fulfil their obligation.

In these circumstances I think there is no room for saying that there was abandonment on the part of the pursuers of their objections, or any ground whatever from which the defenders could infer that they had accepted the machine as in proper fulfilment of their contract. Accordingly it seems to me that, as against the case on the merits, there is no valid defence stated in this case.

Lord Moncreiff.—We have had a full argument in this case, but I have come to the conclusion, without any difficulty, that the judgments of the Sheriffs are right.

Two questions were put to us—First, whether this machine was conform to contract; secondly, whether looking to the whole circumstances there was an unreasonable delay on the part of the pursuers in rejecting the machine. Now, both these questions must, I think, be answered in the negative.

As to the first question, I think it is clear on the evidence that the machine never at any time was conform to contract. The defenders' counsel contended only in a very half-hearted manner that it was; but on the evidence I think it is quite clear that it was not.

The next question is the only one which, to my mind, raises any kind of difficulty in the case; and that is whether there was unreasonable delay in

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rejecting the machine. I think the case is exceptional. The delay was great—a year and a half—but the reason for that delay, and the excuse for it, which I think a sufficient excuse, was that the delay was not on the part of the pursuers, but on the part of the sellers of the machine. Under the contract they undertook to erect the machine and leave it in good working order on the premises of the pursuers; and the evidence shews this, that throughout the whole of that year and a half workmen from the defenders, or the defenders themselves, endeavoured frequently to get this machine to work properly and failed to do so.

As to payment of the price, that was made at the request of the defenders, and before the delivery of the machine; and in that respect the case differs altogether from the case of *Morrison & Mason* v. *Clarkson and Others*,[1] because in that case the machine was delivered in March 1895, tried and found satisfactory, and the pursuer thereafter paid the price on 31st May, while later on he wished to reject it; and I think that very properly it was found that it was too late to do so.

On the whole matter I agree with both your Lordships and the Sheriffs that the decision of the Sheriff should be affirmed.

THE COURT pronounced the following interlocutor:—"Having heard counsel for the parties on the appeal against the interlocutor of the Sheriff-substitute of Lanark, dated . . . dismiss the appeal, and affirm the said interlocutor appealed against: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor: Of new find that the defenders Pullan & Adams are in breach of contract, and the pursuers Aird & Coghill are not liable for the price of the machine: Further find the parties Pullan & Adams and Thomas Hudson Pullan and Thomas Adams liable to the parties Aird & Coghill in the sum of £66, 5s. 10d. sterling: Of new authorise the consigned money to be paid to the parties Aird & Coghill, and decern against the said Pullan & Adams and Thomas Hudson Pullan and Thomas Adams, jointly and severally, or severally, for payment of said sum to the said Aird & Coghill, with interest thereon at the rate of 5 per cent from the date of citation till payment: Find the respondents entitled to expenses," &c.

DOVE, LOCKHART, & SMART, S.S.C.—WILLIAM DOUGLAS, S.S.C.—Agents.

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TURNBULL, SCOTT, & COMPANY, Pursuers (Respondents).—*Salvesen, K.C.—C. H. Brown.*
WILLIAM CRUICKSHANK & COMPANY, Defenders (Appellants).—*Ure, K.C.—Younger.*

*Ship—Charter-Party—Lay-Days—"Working Day of twenty-four consecutive hours."*—A charter-party provided that the ship was to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted."

*Held* that a "working day of twenty-hour consecutive hours" meant a period of twenty-four actually consecutive hours (*i.e.* including the hours of

[1] 25 R. 427.

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night), and not an artificial period made up of twenty-four working hours (*i.e.*, excluding the hours of night).

*Ship—Charter-Party—Demurrage—Exceptions—"Stoppage of trains or any cause beyond the personal control" of charterers—Delivery of cargo "as customary."*—By a charter-party the ship was bound to deliver the cargo consisting of iron ore "as customary" at the port of discharge where and as directed by the consignees. The charterers were exempt from liability for demurrage in case of delay, *inter alia*, through "stoppage of trains or any cause beyond the personal control" of the charterers. The time taken for loading and discharging having exceeded the lay-days, the shipowners brought an action for demurrage against the charterers, who pleaded the exemption clause. It was proved that the customary mode of discharging iron ore at Ardrossan, the port of discharge, when the cargo had been sold (as the cargo in question had been), was direct into railway waggons, although in special circumstances the harbour authorities might give permission for part of a cargo being discharged on the quay. It was also proved that delay in discharging the cargo had been caused by the railway company failing to supply a sufficient number of waggons per day. The charter-party took the ship bound to work at night if requested, but the charterers did not request the harbour authorities for permission to work at night.

*Held* (1) that the customary mode at Ardrossan of discharging a cargo of iron ore which had been sold was into railway waggons direct; (2) that the charterers were not liable for demurrage in respect of ordinary working hours where the delay was caused by want of railway waggons; but (3) that the absence of waggons during the hours of night did not exempt them from demurrage, as the railway company could not be expected to supply waggons at night without notice.

2D DIVISION. Sheriff of Lanarkshire.

BY charter-party, dated 16th December 1902, William Cruickshank & Company, iron ore merchants, Glasgow, chartered the s.s. "Eastgate" from Turnbull, Scott, & Company, steamship owners, London, the ship to proceed to Aquilas, Carthagena, or Almeria, as ordered by the shippers, and there load a cargo of iron ore, and being so loaded, forthwith to proceed to Glasgow or Ardrossan, and there deliver the same as customary, where and as directed by consignees, to whom notice is to be given of the vessel being ready to discharge, paying for discharge one shilling per ton. . . . The cargo to be shipped at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted; and to be discharged on same conditions. (Except in the case of strikes of miners or workmen, accidents or stoppages caused by frost at any mine or mines from which shippers may receive part or whole cargo, epidemics, riots, insurrections, quarantine, stoppage of trains, interventions of sanitary, customs, and other constituted authorities, or any cause beyond the personal control of shippers, charterers, or consignees, which may hinder the loading or discharge of the said vessel.) In these cases lay-day hours not to count and demurrage not to accrue. Days to be averaged to avoid demurrage. In case charterers can arrange to load or discharge ship on Sundays or holidays, captain to allow work to be done, half such time to count. Time not to count at port of discharge between the hours of 5 P.M. on Saturdays and 7 A.M. on Mondays, unless used. Loading time to count from 6 A.M. after ship is reported at Custom-House and ready, unless work should have commenced earlier, and for discharging when ship is in every respect ready in berth, and in free pratique, as per custom of port; written notice of such readiness being given to consignees during usual office hours. The ship to unload barges sent alongside with all possible

dispatch (should this mode of shipping be used); and captain to be responsible for any delay incurred by not doing so. Ship to work day and night, if requested to do so, and to give use of winches, with necessary steam power and hands, charterers paying all extra expenses. Ship to keep the steam winches in good working order. Demurrage (if any) at the rate of 16s. 8d. per hour."

The "Eastgate" proceeded to Aquilas, as directed by Cruickshank & Company, and there loaded a cargo of iron ore. She then proceeded to Ardrossan, where she discharged.

In June 1903, Turnbull, Scott, & Company brought an action in the Sheriff Court at Glasgow, against Cruickshank & Company, for decree for £80, 8s. 4d. as demurrage incurred in respect of the "Eastgate."

(1) The first question raised was as to the meaning of the clause in the charter-party—"The cargo to be shipped at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted, and to be discharged on same conditions."

The pursuers maintained that a "working day of twenty-four consecutive hours" meant a day of twenty-four actually consecutive hours, *i.e.*, a day in the ordinary sense, so that every hour counted (Sundays and holidays excepted) from the time that the vessel was ready to load or to discharge in terms of the charter-party until the completion of loading or discharging.

The defenders, on the other hand, maintained that "a working day of twenty-four consecutive hours" meant an artificial period of twenty-four hours in each of which the work of loading or discharging was usually performed, the hours of night being thus regarded as non-existent.

The cargo of the "Eastgate" amounted to 2241 tons of ore, and this, at "500 tons per working day of twenty-four consecutive hours," brought out eight days twenty-three hours for loading and discharging combined. According to the pursuers' method of calculation therefore, the lay-days extended to eight days twenty-three hours with the addition of Sundays and holidays. According to the defenders' method of calculation, on the other hand, the lay-days extended, roughly speaking, to twice eight days twenty-three hours in actual time.

(2) If the time taken for loading and discharging exceeded the lay-days (which on the pursuers' method of calculation admittedly it did) the question arose as to the defenders' liability for demurrage.

The defenders averred;—(Ans. 6) " . . . Explained that, in accordance with the charter-party, the vessel was to deliver the cargo at Ardrossan as customary; that the custom at Ardrossan is to discharge iron ore into trucks. Explained that the delay, if any, which occurred at Ardrossan arose from want of trucks or other cause beyond the personal control of the charterers. Explained that besides the custom above averred the charter provides"—(The defenders then quoted the clause of exceptions in the charter-party). "The causes of the delay are exceptions within the charter-party. . . . Denied that it is customary at Ardrossan to discharge iron ore on to the quay. Explained that in any case there was no quay space available on which to discharge the cargo in question, and it was never suggested to the defenders or their representatives that the cargo, or any part of it, should be discharged on to the quay. Both parties to the con-

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tract understood that the cargo was to be discharged into trucks direct, and acted accordingly."

The pursuers averred;—(Cond. 6) " . . . Explained that it is customary at Ardrossan to discharge iron ore not only into trucks, but also on to the quay, and that there were ample trucks and quay space available to have discharged the 'Eastgate' within the lay-days."

A proof was allowed and led. The evidence was to the following effect:—

The iron ore forming the cargo of the "Eastgate" was sold to James Dunlop & Company, Limited, of the Clyde Iron Works. The delay in discharging at Ardrossan was due to the Caledonian Railway Company (by whose line Dunlop & Company directed the ore to be forwarded) supplying only a restricted number of waggons per day. Where a cargo of iron ore had been sold the custom at Ardrossan was to discharge it direct into railway waggons. Where a cargo of iron ore had not been sold it might be discharged on to the quay, provided that there was room and the harbour authorities gave permission; and even in the case of a cargo that had been sold it occasionally happened that after the bulk of the cargo had been discharged into trucks, the remainder was discharged on to the quay, if there was a scarcity of waggons, in order to let the vessel away. The matter of discharging on to the quay was mentioned incidentally in the course of conversation between Captain Evans, the master of the "Eastgate," and Mr Craig, the traffic superintendent of the Harbour Company, but no request was made to discharge the cargo of the "Eastgate" on to the quay. There was a conflict of evidence between Captain Evans and Mr Craig as to whether there was room on the quay at the time for the cargo of the "Eastgate"—Mr Craig deponing that there was not, Captain Evans that there was. The customary hours of working at Ardrossan were from 6 A.M. to 6 P.M., but occasionally for special reasons ships discharged during the night. The defenders did not make any request to be allowed to discharge during the night.

On 6th April 1904 the Sheriff-substitute (Mackenzie) pronounced the following interlocutor:—"Finds in fact (1) that the defenders chartered the steamship 'Eastgate' from the pursuers, as per charter-party, No. 25 of process, to proceed to Aquilas, there load a cargo of iron ore, and, being so loaded, to proceed to Ardrossan, and there deliver the same as customary; (2) that the charter-party provided, *inter alia*, as follows"—(The material clauses of the charter-party were then set forth); "(3) that the said ship duly proceeded to Aquilas in terms of the charter-party, and there loaded a cargo of 2241 tons of iron ore, and that the time occupied in loading was six working days of twenty-four consecutive hours each; (4) that the ship reached Ardrossan on Thursday, 22d January 1903, and was ready to discharge cargo on Friday, 23d, at 10 A.M., and that the discharge of cargo was finished at 10.30 A.M. on Saturday 31st January; (5) that the total time occupied in discharging the cargo was six working days of twenty-four consecutive hours each and ten and a half hours, and that the total time occupied in loading and discharging was eighty-three and a half hours in excess of the time stipulated in the charter-party; and (6) that the detention of the 'Eastgate' beyond the lay-days specified in the charter-party is not proved to have been due to any of the causes enumerated in the charter-party as exceptions to the charterers' liability to pay demurrage: Finds in law that

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the defenders are liable to the pursuers in demurrage at the rate of 16s. 8d. per hour for the said period of eighty-three and a half hours, amounting to £69, 11s. 6d.: Therefore decerns against the defenders for payment to the pursuers of the sum of £69, 11s. 6d., with interest at the rate of five per cent per annum from 3d June 1903: Finds the pursuers entitled to expenses," &c.*

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* "NOTE.—This is an action by shipowners against charterers for payment of demurrage, and the first point in dispute between the parties is as to the meaning of the provision in the charter-party,—'The cargo to be shipped at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted, and to be discharged on same conditions.' The pursuers submit that the words 'consecutive hours' are used in their ordinary sense, and that, excepting Sundays and holidays, each period of twenty-four consecutive hours elapsing after loading or discharging should have begun must be reckoned as a working day in terms of the clause. The defenders, on the other hand, maintain that the meaning of 'working day of twenty-four consecutive hours' is working day of twenty-four consecutive working hours, and that non-working hours of working days—that is, hours during which, in accordance with the custom of the ports of loading or discharging, work did not proceed—were not to be counted as part of the 'twenty-four consecutive hours,' which go to make up each 'working day.' I am of opinion that the construction put upon the clause by the pursuers is the right one. It appears to me that the defenders' construction denies all proper effect to the word 'consecutive.' I cannot read 'consecutive hours' as equivalent to consecutive working hours, or as meaning anything else than hours following one another immediately and without interval of time. This construction is entirely consistent with the other provisions of the charter-party as to the time to be allowed for loading and discharging, and, it may be added, with the interpretation which the defenders themselves put upon the charter-party while the contract was being carried out, as is shewn by the letters from the defenders to John Craig, Captain Evans of the 'Eastgate,' and the pursuers' agents, Robert Mackill & Company, dated respectively January 24th, January 27th, and February 13th, 1903.

"In support of their contention the defenders founded on the case of *Rhymney s.s. Company* v. *Iberian Ore Company*, 79 L. T. 240, affirmed *sub nomine The Forrest s.s. Company* v. *Iberian Ore Company*, 16 T. L. R. 59, but there is a material difference between the terms of the charter-party in that case and this. In the first place, the words which had there to be construed were 'working day of twenty-four hours,' and not as here 'working day of twenty-four consecutive hours.' In the second, the charter-party in that case, after providing that the ship was to work at night if required, provided further that such time was not to count unless used, which in effect limited the 'working day' in the ordinary case to the hours usually worked, whereas here the charter-party, while providing that the ship is to work at night if requested, does not contain the further provision that the time is not to count unless used, except in regard to the period between 5 P.M. on Saturday and 7 A.M. on Monday, and the fair inference is that hours not worked on working days were intended to count whether used or not. . . .

"The next point to be ascertained is what time was occupied in loading and discharging the ship. It is admitted that six lay-days—that is, six working days of twenty-four consecutive hours—were occupied in loading, and it is not matter of controversy that the ship was ready to discharge cargo on Friday, 23d January, at 10 A.M., and that the discharge was completed on Saturday, 31st January, at 10.30 A.M. The time therefore occupied in unloading, omitting the time which, in terms of the charter-party, was not to count, namely, from 5 P.M. on Saturday, 24th January, to 7 A.M.

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The defenders appealed, and argued;—(1) The lay-days had not been exceeded; consequently demurrage had not been incurred. A "working day of twenty-four consecutive hours" meant a conventional day made up by piecing together twenty-four hours, during each of which there had been or ought to have been work, *i.e.*, the hours of night were not counted. That was the interpretation put upon a substantially similar clause in the *Forrest s.s. Company*[1] by the Court of Appeal in England, and by the House of Lords. It was said that that construction gave no effect to the word "consecutive." But "consecutive" merely meant that no proper working hours were to be omitted; it could not mean that there were not to be any breaks once the lay-days had begun to run either at the port of loading or at the port of discharge, for there were in the first place the breaks caused by Sundays and holidays; and in the second place there were possible breaks caused by the exception clause coming into operation.

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on Monday, 26th January, was six days ten and a half hours, and the total time occupied for loading and discharging twelve days ten and a half hours, being eighty-three and a half hours in excess of the time allowed by the charter-party.

"The only remaining question is whether the detention of the ship beyond the stipulated time was due to any of the causes specified in the charter-party as exceptions to the defenders' obligation to pay demurrage. The defenders submit that it was, and it is for them to establish this. They contend that, by the terms of the charter-party, the cargo was to be delivered 'as customary'; that this provision is to be read into the clause of exceptions; and, therefore, that they are exempt from liability, if by reason of any of the excepted clauses they were prevented from discharging the cargo in the customary manner within the stipulated time. They allege that, by the custom of the port of Ardrossan, iron ore is discharged into railway trucks, which was the mode of discharge they adopted, and that the detention of the ship was due to the insufficiency of the supply of waggons given by the Caledonian Railway Company. This, they say, was within the meaning of the clause of exceptions a 'stoppage of trains,' or, at anyrate, 'a cause beyond the personal control of the charterers' hindering the discharge of the ship.

"In considering this argument, I assume that the defenders would, as they contend, not be liable for the detention of the ship beyond the time stipulated, if, owing to any of the excepted causes, its discharge 'as customary' within that time was rendered impossible. But, even making this assumption, I am of opinion that it is not enough for the defenders to shew that the mode of discharge which they adopted, namely, into trucks, was the most usual method of discharging iron ore at Ardrossan. They must, I think, shew further that it was the only mode of discharging ore recognised by the practice of the port, which it was within their power to adopt. They bound themselves to load and discharge the vessel at a certain rate per day, and the clause of exceptions only frees them from liability for failure to fulfil their engagement if the impediment arising from the excepted cause be one hindering the discharge of the ship, and I do not think the insufficiency of the waggon supply could be regarded as such an impediment, if they could have resorted to another method of discharge recognised by the custom of the port, although not so commonly used or so convenient as that which they adopted.—*Granite Steamship Company* v. *Ireland & Son*, 19 R. 24.

"It is necessary, therefore, to inquire whether there was any other mode

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[1] Forrest s.s. Co. v. Iberian Ore Co., 1898, 79 L. T. 240, 3 Com. Cas. 316, aff. 16 T. L. R. 59, 5 Com. Cas. 83.

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The hours of night were also an implied exception. The clause "ship to work day and night if requested" shewed that night work was abnormal. The pursuers' construction gave no meaning to the word "working." They read the clause just as if it had been "day of twenty-four consecutive hours." The clause "days to be averaged to avoid demurrage" meant that all the working hours were to be added together, and the total divided by twenty-four. (2) If the pursuers' construction of "working day of twenty-four consecutive hours" was adopted, the defenders did not dispute that the lay-days had been exhausted before the ship was unloaded at Ardrossan. The defenders, nevertheless, were not liable in demurrage, for they were within the exception clause in the charter-party. The delay was due to a "cause beyond the personal control of the charterers," namely, to scarcity of railway waggons.[1] The defenders did not dispute that the

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of discharging ore than into trucks recognised by the custom of the port of Ardrossan, and on this point the result of the evidence is clear, and I do not think it necessary to examine it in detail. On the one hand, it is clearly proved that much the most usual method of discharging ore at that port is into trucks, but on the other, it is proved just as clearly that, if quay space is available, the Harbour Company are glad to allow it to be put on the quay, and that this is a recognised method of discharging ore at the port when necessity arises, although it is not generally adopted except where a cargo arrives which has not been sold, or in the case of a sold cargo, where there is a special desire to get the ship away, and its departure can be accelerated by discharging part of its cargo in this manner. It is true that only a small proportion of the total iron ore brought to Ardrossan is discharged on to the quay, and that most of the witnesses who speak to the point deny that it is the customary method of discharge, but all, I think, admit that it is a known method permitted by the harbour authorities, which can be resorted to in cases of emergency, and in this state of the evidence I am unable to hold that the method in question is not in accordance with the custom of the port. It is quite possible that there should be more than one customary method of discharging cargo at a port, and where the charterer's obligation is to discharge 'as customary,' his engagement will not, in my opinion, be fulfilled unless he use all the usual methods of dispatch.

"The defenders further argued that in the case of the 'Eastgate' the cargo could not have been put on the quay, because there was no quay space available at the time, but I do not think they succeeded in proving this. The only witnesses to the point are Captain Evans of the 'Eastgate,' and Mr Craig, who took charge of the unloading of the ship. Captain Evans states that there was ample room on the quay alongside the ship to accommodate the cargo. Mr Craig's recollection is to the contrary, but it is certain that no application was ever made by the charterers to have the cargo put there, and that being so, I cannot regard Mr Craig's evidence, founded as it is upon his recollection of the condition of the quay at a time more than a year past, and contradicted, as it is, by that of Captain Evans, as proving that there was no room on the quay for the 'Eastgate's' cargo.

"I was referred by the defenders to the cases of *Wyllie & Co.* v. *Harrison & Co.*, 13 R. 92, and *Letricheux & David* v. *Dunlop & Co.*, 19 R. 209, in which charterers were held not liable for detention arising from an insufficient supply of railway trucks, but I do not think these cases are applicable as authorities in the present case, as in neither was there any method of discharge available except that which was adopted, viz., into trucks. . . ."

[1] J. & A. Wyllie v. Harrison & Co., Oct. 29, 1885, 13 R. 92; Letricheux & David v. Dunlop & Co., Dec. 1, 1891, 19 R. 209; Mein v. Ottmann, Dec. 11, 1903, 6 F. 276.

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general clause of exception just quoted included only causes of delay *ejusdem generis* with those specifically mentioned; but scarcity of waggons was *ejusdem generis* with "stoppage of trains." The discharge was to be "as customary." It was proved that delivery into trucks was the only customary method of discharge at Ardrossan, and was therefore the only method that the defenders were bound to adopt.[1] Even if discharge on to the quay was a customary method of discharge at Ardrossan it could not have been adopted in the present instance, since there was no room on the quay. The defenders were entitled to deduct all the hours of night as well as of day, during which the work of discharging was impossible owing to the want of waggons, and these hours being deducted no demurrage was due.

Argued for the pursuers;—(1) "Working day of twenty-four consecutive hours" meant a day in the ordinary sense. The defenders' construction gave no meaning or effect to the word "consecutive." The presumption was that days in a charter-party meant running days, *i.e.*, days in the ordinary sense. The evidence shewed that it was usual to work at Ardrossan at night, or at least outside the ordinary working hours (from 6 A.M. to 6 P.M.). Work at night was treated as normal in the charter-party since no special rate of remuneration was provided. "Days to be averaged to avoid demurrage" meant that the time occupied in loading the cargo was to be added to the time occupied in unloading cargo, and the resulting number of hours divided by twenty-four, *i.e.*, that broken days were not to be treated as whole days. (2) The exceptions clause did not apply. Want of waggons was not *ejusdem generis* with stoppage of trains, which included only stoppage *en route*. The delay was caused by the failure of the defenders to discharge on to the quay in the absence of railway waggons.[2] "As customary" referred to the mode of loading and unloading, *e.g.*, whether by crane or into lighters, and not to the mode of removing.[3] The proof shewed that discharge on the quay was a customary mode of discharging at Ardrossan. In any view, the defenders were not entitled to deduct the hours of night. They had not made any demand for waggons at night.

There was also argument (and evidence) on the question whether the scarcity of waggons must be held to have been due to the fault of the defenders in respect that the Caledonian Railway Company had refused a full supply of waggons to James Dunlop & Company, Limited, on account of the overcrowded state of Dunlop & Company's works; or otherwise, in respect that the defenders ought to have obtained waggons from another railway company.

At advising,—

LORD TRAYNER.—The parties to this case are practically agreed, or nearly agreed, on all the facts which are material. They differ in regard to the construction to be put on the clauses of the charter-party, which provide (1) for the lay-days allowed the charterers for loading and discharging

[1] Ardan Steamship Co., Limited, v. Weir & Co., Jan. 19, 1904, 6 F. 294.

[2] Krause v. Drynan & Co., July 9, 1891, 18 R. 1110; Granite Steamship Co., Limited, v. Ireland & Son, Nov. 20, 1891, 19 R. 124.

[3] Gardiner v. Macfarlane, M'Crindell, & Co., Feb. 24, 1893, 20 R. 414; The Actieselskabet "Primate" v. Macleod & Co., Nov. 14, 1903, 11 S. L. T. 440.

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cargo, and (2) for the exceptional circumstances which absolve the charterers from liability for demurrage.

1. The charter-party provides that the cargo is to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours, weather permitting. Sundays and holidays always excepted." The Sheriff-substitute has stated in the note to his interlocutor appealed against the interpretation which the parties respectively put upon this clause, and has done so with such clearness and precision that it is quite unnecessary for me to repeat what he has so well said. He is of opinion that the view contended for by the pursuers is the right one, and I agree with him. It was argued by the defenders that the judgment of the Sheriff-substitute was in conflict with the decision pronounced in the case of the *Forrest s.s. Company*,[1] a decision they maintained which was favourable to them, and pronounced in a case not distinguishable from the present. But I think, with the Sheriff-substitute, that that case is distinguishable. In it the provision was that the cargo should be loaded and discharged at a certain rate "per working day of twenty-four hours," and that was interpreted to mean not twenty-four consecutive hours but twenty-four working hours. That decision was not arrived at without hesitation (and was dissented from by one Judge), but of course I take it as a just construction of the instrument then under consideration. But the very difficulty which in that case stood in the way of the pursuer's success has been removed in the present case by the unambiguous language of the contract. The working day is said to be a day of twenty-four consecutive hours, and in each of such days 500 tons of cargo was to be loaded or discharged. In the clause before us there is the exception that hours when the weather did not permit of loading or discharging were not to be reckoned against the charterers, nor were holidays nor Sundays. But in every twenty-four consecutive hours from the commencement of the loading or discharging, 500 tons were to be loaded or discharged if the weather did not hinder it or a holiday or Sunday intervene. And in my opinion the words "working day" in the clause before us are used only in antithesis to the days which were Sundays or holidays.

2. On the second question I differ from the Sheriff-substitute. The charterers are taken bound to discharge the cargo at the port of destination "as customary," and are not to be liable for demurrage where delay in the discharge is occasioned by, *inter alia*, "stoppage of trains . . . or any cause beyond the personal control" of the charterers. I take it as proved that the customary mode of discharging ore (such as the cargo in question) at Ardrossan is to discharge it into railway trucks or waggons brought alongside or nearly alongside of the ship. To discharge such a cargo on the quay is not customary, although sometimes comparatively small quantities of ore are under special circumstances allowed by the harbour authorities to be so discharged. If it were necessary to the decision of the question before us I should hold it established—and this I think is the only fact regarding which the parties are at variance—by the best evidence (that, namely, of Mr Craig, the superintendent of Ardrossan harbour) that, to use

[1] 79 L. T. 240, aff. 16 T. L. R. 59.

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his own words, "There was no room to put any of the 'Eastgate' cargo on the quay." The Sheriff-substitute scarcely does justice to this evidence, which he says is not corroborated, overlooking the fact that the captain of the "Eastgate" admits that Mr Craig told him practically the same thing as stated by him in evidence. But I do not think it necessary to say whether there was room for the cargo of the "Eastgate" on the quay or not. It was to be discharged "as customary," and that I think the evidence clearly shows was into railway trucks. That being so, the question arises, what was it that delayed the discharge, and the answer to that question is given by the captain of the "Eastgate"—"My evidence comes to this, that after the first day the delay was caused through want of trucks so far as I know." This is also proved by other witnesses. The pursuers maintain that "want of trucks" is not within the excepted causes of delay, and this leads me to notice the terms of the clause of exception. If I read that clause in its broadest and most literal sense I should hold that it exempted the charterers from liability for demurrage if the delay in discharging the cargo arose from any cause whatever over which they had not "personal control." It might fairly be read as excluding liability in any and every case except where the delay arose from the neglect or fault of the charterers. But I am willing to read the clause in a more restricted sense, and to hold that the general words of exemption with which the clause concludes must be limited to causes not under the charterers' control which are *ejusdem generis* with those causes specified. Even then I think the clause must be read as the defenders contend it should. One of the specified causes is "stoppage of trains," and it appears to me that want of railway trucks is *ejusdem generis* with that. Stoppage of trains just means the want of railway accommodation for taking and carrying the ore to the consignee; the want of trucks is practically the same thing. If there were no trucks to receive the cargo, then the train of which they would have made a part if not the whole was stopped. The conveyance of the ore by trains was necessarily stopped if there were no trucks to make the train. In my opinion, therefore, the defenders are not liable for demurrage for the delay occasioned by the want of trucks, and to this extent I think the present appeal should be sustained. The hours, however, which are not to be charged against the charterers do not, in my opinion, include more than the hours of the ordinary working day during which trucks were usually supplied, but when, in point of fact, they were not supplied. The defenders say that the hours of night when no trucks were available should also be deducted. I think not. If the charterers had asked for trucks at an unusual hour (wishing to work night and day), and had been refused them, there would have been something to say for their contention. But this is not the case. The hours of the night, therefore, are not to be deducted from the pursuers' claim. The parties applying these views to the facts of the case will be able to fix the amount for which the pursuers are entitled to decree.

Lord Moncreiff.—At the close of the debate it appeared to me that the Sheriff was right upon the first point and wrong upon the second. On the first point, that is, as to the proper mode of ascertaining the time to be

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allowed for loading and unloading under the charter-party, I agree with and adopt the reasons given by the Sheriff.

On the second question, however, I cannot agree with him. I think it is proved—(1) that the customary mode of discharging a sold cargo at Ardrossan was to discharge it into waggons. (2) That it was only in an emergency that any part of a cargo of ore was allowed to be put and remain on the quay, and that in order to get this done the ship had to arrange with the charterer and also with the harbour authorities. (3) That through no personal fault of the charterers there were not sufficient trucks forward to receive the cargo. And lastly, that the balance of the evidence is in favour of the view that on the occasion in question there was no room on the quay for the cargo. John Craig, the traffic superintendent of the Ardrossan Harbour Company, says this distinctly; and although Evans, the master of the "Eastgate," says that there was room on the quay for the cargo, he admits that, in his conversation with Craig, Craig said that there was too much on the quay already, and he does not say that he suggested to Craig that the cargo should be landed on the quay.

In regard to the insufficiency of trucks, it is sufficient to refer to the cases of *Letricheux* v. *Dunlop*,[1] and the recent case in this Division "*The Lady Palmer*."[2]

I understand that with findings to the above effect the parties will have no difficulty in ascertaining how the accounts stand between the ship and the charterers.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

THE COURT pronounced this interlocutor:—"Recall the interlocutor dated 6th April 1904 appealed against: Find in fact in terms of the 1st, 2d, 3d, and 4th findings in fact set forth in said interlocutor: Find further in fact (1) that the lay-days allowed by the charter-party for loading and discharging the cargo in question amounted to eight days and twenty-three hours; (2) that the loading and discharging of said cargo occupied twelve days and ten and a half hours, being three days and eleven and a half hours in excess of the said lay-days; (3) that of that excess one day and one and a quarter hours was caused by the want of trucks into which the said cargo had to be delivered: Find in law—(1) that on a sound construction of said charter-party the defenders are not liable for demurrage for any delay to the discharge of said cargo occasioned during the currency of the lay-days by the want of trucks; (2) that the defenders are liable to the pursuers for demurrage at the stipulated rate of 16s. 5d. per hour for a period of two days and ten and a quarter hours, which amounts to the sum of £48, 10s. 10d. sterling: Therefore decern against the defenders for payment to the pursuers of said sum of £48, 10s. 10d. with interest as concluded for: Find the pursuers entitled to expenses in the Sheriff Court and in this Court, but as regards the latter only to two-thirds of the same as taxed," &c.

F. J. MARTIN, W.S.—J. B. DOUGLAS & MITCHELL, W.S.—Agents.

[1] 19 R. 209. [2] 6 F. 276.

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Maxtone v. Magistrates of Dunoon.

DAVID MURRAY MAXTONE, Pursuer (Reclaimer).—*Campbell, K.C.—Graham Stewart.*

PROVOST, MAGISTRATES, AND COUNCILLORS OF DUNOON, Defenders (Respondents).—*Smith, K.C.—Adamson.*

*Burgh—Municipal Register of Voters—Public Official—Remuneration—County Assessor—Statute—Construction—"Expense of making up register"—Town-Councils (Scotland) Act*, 1900 (63 *and* 64 *Vict. cap.* 49), *secs.* 26, 27, *and* 67.—By secs. 26 and 27 of the Town-Councils (Scotland) Act, 1900, the duty of preparing the municipal register of voters, in the case of burghs not returning or contributing to return a member to Parliament, is laid upon the assessor of the county in which the burgh is situated.

By sec. 67 it is enacted that the "whole expense of making up and printing the municipal register" shall be defrayed by the burgh."

*Held* (*aff.* judgment of Lord Low, *dub.* Lord Trayner) that under sec. 67 a burgh was liable only for the actual outlay of the assessor in preparing the municipal register of voters, and not for anything by way of remuneration to the assessor for his personal services.

2D DIVISION. Lord Low.

ON 21st January 1904 David Murray Maxtone, assessor for the county of Argyll, brought an action against the Provost, Magistrates, and Councillors of the burgh of Dunoon for payment of £57, 7s. 4d.

Dunoon was a police burgh, in the county of Argyll, which did not return or contribute to return a member to Parliament, and consequently under the Town-Councils (Scotland) Act, 1900, secs. 26 and 27,* the duty of preparing the municipal register of voters for the burgh fell on the pursuer as assessor for the county.

The sum sued for comprised (1) remuneration for work done by the pursuer in making up the municipal register of voters for the burgh for the years 1902-1903 and 1903-1904; and (2) outlay incurred by him in connection with this work.

The pursuer pleaded;—The pursuer having performed the services and made the outlays referred to, and the defenders being due and

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* The Town-Councils (Scotland) Act, 1900 (63 and 64 Vict. cap. 49), enacts:—

Sec. 26. "In every burgh not returning or contributing to return a member or members to Parliament, the assessor for the county or counties or districts thereof within which the burgh is situated shall on or before the 15th day of September in each year prepare an excerpt from the list of voters for parliamentary purposes for such county, containing the names of all persons appearing thereon in respect of premises within the municipal boundary, and the municipal register shall consist of (1) the said excerpt; (2) the supplementary list."

Sec. 27. "On or before the 15th day of September in each year the assessor for any burgh and for any portion of a county included within the municipal boundary of any burgh shall prepare a separate list of" peers and females entitled under sec. 23 to vote at municipal elections, "which list shall form the supplementary list."

Sec. 67. "The whole expense of making up and printing the municipal register and in connection with the election of councillors and magistrates shall be defrayed either from the common good of the burgh, the assessment imposed or levied in the burgh under the provisions of the Registration Acts, or any assessment levied under the Burgh Police (Scotland) Act, 1892, or any local Act, all as the council may determine, and the said expenses may be divided and apportioned among the said common good and assessments as the council think proper."

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indebted to him in the amount of the reasonable charges for said services and the amount of said outlays, decree as concluded for ought to be pronounced.

The defenders pleaded, *inter alia*;—(4) The pursuer being bound, under the said Town-Councils Act, to perform the duties for which he claims payment, and his services being covered by his salary as county assessor, and there being no obligation imposed on police burghs to pay him any special fee therefor, the defenders should be assoilzied. (5) The pursuer not having a contract with the defenders, and not being entitled to demand remuneration or recover outlays from them, the defenders should be assoilzied, with expenses.

On 2d August 1904 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the defenders are not bound to remunerate the pursuer for his services in making up the municipal register of the burgh of Dunoon, but that they are bound to repay to him the necessary and proper expenses which he has incurred in making up the said register: With these findings appoints the cause to be enrolled for further procedure, reserves the question of expenses, and grants leave to reclaim."*

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* "OPINION.—By the Town-Councils (Scotland) Act, 1900, certain duties are laid upon the assessor for the county in which a burgh not returning a member to Parliament is situated, in regard to making up a municipal register of voters. By the 67th section of the Act it is provided that 'the whole expense of making up and printing the municipal register, and in connection with the election of councillors and magistrates,' shall be defrayed out of the common good, or out of certain assessments, or shall be apportioned between them. There is nothing said in the Act as to the remuneration of the assessor for his labour and trouble in making up the register.

"The pursuer is assessor for the county of Argyll, and the defenders are the Town-Council of the burgh of Dunoon, which is a police burgh situated in that county. The pursuer has, as assessor for the county, performed the duties in the way of making up the municipal register of Dunoon imposed upon him by the Act, and he now sues the defenders for remuneration for his services and for payment of certain outlays incurred by him.

"In regard to the outlays, assuming that they have been properly and necessarily incurred, I do not think that there can be any doubt that they fall in terms of the 67th section to be paid out of the common good or the assessments referred to in the section, and as the defenders have the administration and control of the common good and the assessments, I think that the pursuer is entitled to sue them for payment of outlays which he has made on their behalf in the performance of his statutory duty.

"The question of remuneration, however, is in a different position. The pursuer did the work because it was imposed upon him by statute, and not because he was employed by the defenders to do it. The pursuer therefore cannot claim remuneration from the defenders on the ground of contract. Nor, in my opinion, is there any statutory obligation laid upon the defenders to remunerate the pursuer for his services. The statute imposes the duty of making up the municipal register upon the county assessor, but says nothing whatever about his remuneration, and I think that it is impossible to read into the Act by implication a provision that he shall be remunerated for his labour in making up the register by the Magistrates of the burgh.

"The pursuer founds upon the 67th section, but I do not think that its provisions aid him. What the section deals with is the 'expense' of making up the register, and I do not see how remuneration to the assessor can possibly be included in the expression 'expense' unless some one is under a

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The pursuer reclaimed, and argued;—The pursuer was entitled not only to his outlays, but also to a reasonable sum as remuneration for his services. Section 67 of the Town-Councils Act, 1900, imposed on the burgh not only the "whole expense" of printing but also of "making up" the municipal register, and the words "making up" would be almost, if not entirely, meaningless if they did not include the remuneration of the assessor, for that was practically the only item of expense in making up as distinguished from printing the register. The county assessor, who was removable at pleasure,[1] might, under section 40 of the Burgh Voters Act, 1856,[2] be compelled by the burgh to perform his statutory duty of making up the burgh register; he was therefore *quoad* that roll the servant of the burgh, and entitled to remuneration out of the burgh funds. The fact that "expense" was not in terms declared to include the assessor's remuneration was not adverse to the pursuer's claim; there were cases in which such remuneration was held to be included, although it was only by implication,[3] and the fact that "expense" was expressly declared to include the assessor's remuneration in the Registration of Voters Act, 1856,[2] sec. 43, and in the County Voters Act, 1861,[4] sec. 41, really told in favour of the pursuer, as shewing how the Legislature defined "expense" in matters of this description. Besides, these sections of the Acts of 1856 and 1861 were incorporated in the Town-Councils Act, 1900.[5] This was not the case of an official of a public body, *e.g.*, a town-clerk[6] with a fixed salary, having extra work imposed on him by statute, for the public body under whom he acted, without anything being said in the statute as to

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legal obligation to pay such remuneration. But the defenders (with whom alone this case is concerned) are, as I have shewn, under no obligation, either statutory or contractual, to remunerate the pursuer.

"I may add that I am confirmed in the view which I have expressed by comparing the Act of 1900 with other Acts whereby similar duties have been laid on assessors. Thus, by the Registration of Voters (Scotland) Act of 1856 the assessors in burghs are directed to make up registers, and it is provided (section 43) that after the completion of each annual register the magistrates shall fix the amount of the costs and expenses thereof, 'including therein any remuneration to assessors which they may deem proper.' Similar provisions are contained in the County Voters (Scotland) Act, 1861. I think that those Acts shew that when the Legislature intended assessors to be remunerated for such work express provision was made to that effect, and that when in the Act of 1900 no provision was made for remuneration it was because it was not intended that the assessor should receive any additional remuneration beyond his salary as county assessor.

"I may also refer to the English cases of *Jones* v. *Carmarthen (Mayor)*, 8 M. and W. 605, and *Queen* v. *Governors of the Poor of Hull*, 2 Ellis and Blackburn, 182."

[1] Lands Valuation (Scotland) Act, 1854 (17 and 18 Vict. cap. 91), sec 3; Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 83, subsec. 6.

[2] Burgh Voters Registration (Scotland) Act, 1856 (19 and 20 Vict. cap. 58).

[3] Lands Valuation (Scotland) Act, 1854, sec. 18; Local Government (Scotland) Act, 1889, sec. 28, subsec. (5); County Council of Lanark v. Lord Advocate, March 15, 1892, 19 R. 617.

[4] County Voters Registration (Scotland) Act, 1861 (24 and 25 Vict. cap. 83).

[5] Town-Councils (Scotland) Act, 1900, sec. 29.

[6] Town-Councils (Scotland) Act, 1900, sec. 78, subsec. (4).

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remuneration; it was the case of the official of one public body—the County Council—doing work for another public body—the burgh, with which he was otherwise entirely unconnected. It would be *ultra vires* of the County Council to remunerate the pursuer for this work.[1] The English cases to which the Lord Ordinary referred were decided upon other statutes.

*Smith, K.C.*, for the defenders, stated that they acquiesced in the Lord Ordinary's judgment as regarded liability for outlays.

The argument for the defenders on the question of liability for remuneration to the pursuer sufficiently appears from the opinions of the Lord Ordinary and the Court.[2]

At advising,—

LORD JUSTICE-CLERK.—The question in this case arises under the Town-Councils (Scotland) Act of 1900. By that Act the making up of the register of municipal voters in the smaller burghs, which are not separately represented in Parliament as burghs, is ordered to be performed by the assessor for the county in which any such burgh is situated. The County Assessor of Argyllshire, having been required to make up the roll of Dunoon, maintains in this action that he is entitled to payment from the burgh for his work in doing so. The claim he divides into two parts—the necessary outlays incurred by him in having the work done, and remuneration to himself for the work done by him. As regards the first I think that the Lord Ordinary has rightly held that the pursuer's outlays must be paid, and against this finding the defenders do not reclaim. But he has held that there is no ground in law for subjecting the burgh funds in payment of the pursuer's services. My opinion is that he has rightly so held. The pursuer has done the duties for which he now asks payment by appointment of the statute, which has laid this work upon him. He is ordained to do it, and the burgh has no choice in the matter, but must allow this public duty to be done by him and by no one else. He can certainly therefore have no claim against the burgh as upon a contract of service. It is therefore only by appeal to the statute that the pursuer can establish any claim to receive remuneration for work in obedience to statutory requirement. Now, I do not find any authority in the statute for compelling the burgh to make such payment. I agree with the Lord Ordinary that section 67 cannot be read as conferring any right upon a county assessor fulfilling this statutory duty to demand payment for the work. "Expenses" incurred is one thing, payment for work is another.

It is certainly consistent with if not directly confirmatory of this view that in other statutes where new duties have been imposed upon those holding official appointments, and where it was thought right that there should be additional remuneration in respect of them, this was expressly

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[1] Local Government (Scotland) Act, 1889, sec. 83, subsec. (3).

[2] *Cited by the Defenders:*—Jones v. Mayor of Carmarthen, 1841, 8 M. and W. 605; Queen v. Governors of the Poor of Kingston-upon-Hull, 1853, 2 E. and B. 182; Queen v. Allday, 1857, 7 E. and B. 799; County Council of Lanark v. Hart, March 10, 1904, 6 F. (H. L.) 31; Addison on Contracts (10th edit.), p. 807.

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dealt with by statutory enactment. The decision in the case of *The Queen* v. *Allday*[1] seems also most apposite.

My opinion is that the Lord Ordinary has rightly disposed of the case, and that his interlocutor should be affirmed.

LORD YOUNG concurred.

LORD TRAYNER.—I cannot say that the interpretation put by the pursuer on the clauses of the Act on which he bases his claim is unreasonable. On the contrary, that clause seems to me quite capable of being read as including within "the expense of making up" the municipal register a fair remuneration to the officer who makes it up. But the considerations against that view stated by the Lord Ordinary are at least as strong against the pursuer's contention as anything which occurs to me in favour of it. I cannot therefore say that I think the Lord Ordinary's interlocutor wrong, but I assent to the judgment now proposed with some hesitation.

LORD MONCREIFF.—Although this may be rather a hard case for the pursuer, I am not prepared to differ from the Lord Ordinary. The pursuer's claim depends entirely upon whether the words in the 67th section of the Town-Councils (Scotland) Act, 1900, "the whole expense of making up and printing the municipal register," &c., include remuneration to the pursuer, the Assessor for the County of Argyll, for his personal services in making up the municipal register as well as the necessary and proper expenses connected with the making up and printing the register, which admittedly must be defrayed by the burgh of Dunoon.

If this question had arisen for the first time, and we had no guidance from decision or from analogous provisions in other Acts of Parliament, I should have been disposed to hold that the expense of making up the register included suitable remuneration to the person upon whom the duty of making it up was laid by the statute. But the view which the Lord Ordinary has taken, that "expense" does not include remuneration to the pursuer, is confirmed by the decision to which he refers—*The Queen* v. *Governors of Poor of Hull.*[2] It is also confirmed by the provisions of other Acts of Parliament—in particular, the Registration of Voters Act of 1856, sec. 43, which expressly provides for remuneration to assessors and town-clerks respectively connected with the completion of the annual registration, and the corresponding provision in the County Voters (Scotland) Act of 1861, sec. 41.

The case therefore stands thus—the Town-Councils Act of 1900, sec. 26, has laid upon the county assessor the duty of making up the municipal register, and the statute does not provide for any additional remuneration, as distinguished from the outlays, being paid to him for the performance of that duty. The duty thus laid upon the county assessor does not appear to be very onerous, and many instances could be given in which officials have had extra work laid upon them by statute of a much more onerous description in respect of which no additional remuneration is given.

I am far from saying that the imposition of this extra work upon the

[1] 7 E. and B. 799.
[2] 2 E. and B. 182.

county assessor may not furnish him with a good reason for asking the County Council to increase his salary; but that is a matter for arrangement between the County Council and the assessor.

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THE COURT adhered.

M'NEILL & SYME, S.S.C.—W. & J. L. OFFICER, W.S.—Agents.

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Dobell, Beckett, & Co. v. Neilson.

DOBELL, BECKETT, & COMPANY, Pursuers (Respondents).—*Salvesen, K.C.—C. N. Johnston, K.C.—Horne.*
JOHN BIRKMYRE NEILSON, Defender (Reclaimer).—*Ure, K.C.—Younger.*
ROBERT REID (M'Dowall & Neilson's Trustee), Defender (Reclaimer).—*Campbell, K.C.—MacRobert.*

*Bankruptcy — Right in Security — Illegal Preference — New security granted in substitution for prior invalid security — Custody of security subject — Constructive Delivery—Stoppage in transitu — Transference of document of title for valuable consideration and in good faith—Act* 1696, *c.* 5—*Sale of Goods Act*, 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 47.—In June 1903, Neilson lent £3000 to M'Dowall & Company, and in security took from M'Dowall & Company delivery-orders for timber belonging to them stored in Connal & Company's timber-yard. The orders were in favour of Neilson, and were addressed to Haggart & Company, licensed timber-measurers, employed by M'Dowall & Company to measure and store the timber. The orders were intimated by Neilson to Haggart & Company, who replied acknowledging that they held the goods to his order. The duties of Haggart & Company in regard to storing timber were to measure it, to stack it in the yard selected by their employers, by whom they were paid, and to arrange for its removal when sold. The yard belonged to Connal & Company, by whose servants it was watched, and by whom books were kept in which were noted the quantities of the timber stored and the names of the owners, who paid rent for storage. According to the practice of the timber trade in Glasgow, the measurers were allowed by the proprietors of the yard to have practically complete control over timber stored by them. They could remove the timber as and when they chose, and delivery-orders for the removal of timber were addressed to them.

On 23d September 1903, Neilson at the request of M'Dowall & Company granted delivery-orders signed by him and addressed to Haggart & Company in favour of M'Dowall & Company for the timber in exchange for the bills of lading of a cargo of timber purchased by M'Dowall & Company from Dobell, Beckett, & Company, then on its way to Glasgow. On the arrival of the cargo at Glasgow four days later, it was stopped *in transitu* by Dobell, Beckett, & Company. On 1st October M'Dowall & Company were sequestrated.

In a question between Dobell, Beckett, & Company, and Neilson, *held* (1) that the delivery-order addressed to Haggart & Company by M'Dowall & Company, and duly intimated to them by Neilson, did not operate as constructive delivery of the timber to Neilson, Haggart & Company being the servants of the granters of the order and not independent custodiers of the timber; (2) that Neilson therefore had not a valid security at the date when the bills of lading were transferred to him, and that the transfer was struck at by the Act 1696, c. 5.

*Held* further, that the undertaking by Haggart & Company to hold to Neilson's order, surrendered by him when he received the bills of lading, not being an obligation granted by them personally, but only as the servants of M'Dowall & Company, was of no value, and was not "valuable consideration" in the sense of the Sale of Goods Act, 1894, sec. 47, and that the stoppage *in transitu* was not affected by the transference of the bills of lading to Neilson.

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2D DIVISION. Lord Low.

ON 11th June 1903, John Birkmyre Neilson, warehouseman, Glasgow, lent to M'Dowall & Neilson, timber-brokers, the sum of £3000, and in security took delivery-orders for certain lots of timber belonging to M'Dowall & Neilson, lying in the timber-yards owned by Connal & Company, and by the Clyde Navigation Trustees. The delivery-orders were in favour of John Neilson, and were addressed to Haggart & Company, timber-measurers, Glasgow, who had been employed by M'Dowall & Neilson to measure and store the timber and to superintend its removal. The orders were sent by John Neilson to Haggart & Company, who acknowledged them by a letter dated 19th June 1903, bearing:—"We have your letter of yesterday enclosing delivery-order in your favour from Messrs M'Dowall & Neilson for the following wood goods, viz. . . . which we now hold to your order."

On 22d September 1903, M'Dowall & Neilson asked John Neilson to release the timber for which he held said delivery-orders, in exchange for the bills of lading of a cargo of timber which had been purchased by them from Dobell, Beckett, & Company, timber-merchants, Quebec, and was on its way to Glasgow. John Neilson agreed to do so, and signed delivery-orders in favour of M'Dowall & Neilson, addressed to Haggart & Company, and the bills of lading, were accordingly indorsed to him on 23d September.*

At the date of this transaction, M'Dowall & Neilson were in fact insolvent. On 25th September they closed their office, and on 1st October their estates were sequestrated. Robert Reid, C.A., Glasgow, was appointed trustee.

The ship containing the cargo of timber arrived in Glasgow on 27th September, and, immediately on its arrival, the agents of Dobell, Beckett, & Company having learnt of M'Dowall & Neilson's insolvency, served upon the master of the ship a notice that they stopped the goods *in transitu*, and required him to deliver the timber to them as unpaid sellers, which he did.

Questions having arisen regarding the cargo of timber, which was claimed by Dobell, Beckett, & Company as unpaid sellers, by John Neilson in security of his loan, and by Robert Reid as trustee on the sequestrated estates of the purchasers, the present action was raised by Dobell, Beckett, & Company, against John Neilson and Robert Reid. The summons concluded, *inter alia*, for declarator (1) that the pursuers were entitled to stop, and did validly and effectually stop, *in transitu* the cargo of timber sold by them to M'Dowall & Neilson; (2) that the pursuers, as at the date of the stoppage *in transitu*, had a valid lien on the timber for the sum of £2592, 5s., being the price at which they sold the same to M'Dowall & Neilson, and that neither of the defenders had any right or title to demand delivery or to claim possession of said goods or the proceeds thereof except upon payment

* M'Dowall & Neilson's letter of 23d September to John Neilson was in the following terms:—"Dear Sir—In consideration of (first) your handing to us delivery-orders addressed to Messrs Haggart & Company, timber measurers and contractors, Glasgow, for the following timber, viz.:— . . . for all of which we gave you delivery-orders addressed to Messrs Haggart & Company in security of a loan of £3000 which you gave us on 11th June 1903; and (second) of your continuing the said loan to us of £3000 on getting other security in place of the timber for which you have now given us delivery-orders, we now send you herewith"—four bills of lading.

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of said price; (5) that M'Dowall & Neilson were at the time when the bills of lading were indorsed and transferred by them to the defender John Neilson, or at least within sixty days of the date of said indorsation or transfer, insolvent and notour bankrupt in terms of the Statute 1696, c. 5; (6) that the indorsation of the bills of lading by M'Dowall & Neilson, and the transfer thereof by them to the defender John Neilson, were null and void, and of no effect or validity. There was also a conclusion for reduction of the transference of the bills of lading to John Neilson.

The pursuers pleaded, *inter alia*;—(1) The pursuers being unpaid sellers of goods to buyers who became insolvent, were entitled to stop said goods *in transitu*, and having validly stopped them *in transitu*, decree of declarator ought to be pronounced in terms of the first and second conclusions of the summons. (3) The transfer of said bills of lading executed by M'Dowall & Neilson having been granted during insolvency and without valuable consideration, or otherwise for the purpose and to the effect of creating an illegal preference in favour of the defender John Birkmyre Neilson, is void, *aut separatim* ought to be reduced in terms of the conclusion for reduction. (6) The defender John Birkmyre Neilson is not entitled to found upon the indorsations of said bills of lading in respect that they are contrary to the Act 1696, c. 5, and are void and null, or alternatively ought to be reduced.

John Neilson pleaded, *inter alia*;—(6) The said bills of lading having been lawfully transferred by the pursuers to M'Dowall & Neilson as buyers, and transferred by them to this defender, who took the same in good faith and for valuable consideration, any right of lien or stoppage *in transitu* available to said sellers can only be exercised subject to this defender's rights.*

On 24th May 1904 the Lord Ordinary (Low) allowed a proof, which was led on 28th June. The result of the evidence sufficiently appears from the opinion of the Lord Ordinary, *infra*.

On 20th July the Lord Ordinary pronounced the following interlocutor:—"Finds, decerns, and declares in terms of the first, second, fifth, and sixth declaratory conclusions of the summons: Finds, reduces, decerns, and declares in terms of the reductive conclusions thereof: Finds that it is unnecessary to dispose of the conclusions of the summons *quoad ultra*: Dismisses the same, and decerns," &c.†

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* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 47, enacts:—"Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

"Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee."

† "OPINION.—I shall first consider the question which is raised in this case between the pursuers and the defender John Birkmyre Neilson.

"The circumstances are as follows:—John Neilson is a brother of Arthur

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The defenders reclaimed.

Argued for the defender John Neilson;—The bills of lading were acquired by the defender in good faith and for valuable consideration, and the pursuers' rights of stoppage *in transitu* could only be exercised subject to the rights of the defender as transferee.* The transference of the bills of lading to the defender by M'Dowall & Neilson was not a transaction struck at by the Act 1696, c. 5, the documents in question having been acquired in substitution for a prior equivalent security, namely, the delivery-orders addressed to Haggart & Company.[1] These orders constituted a good and complete security, or at least—which had the same effect in a question under the Act of 1696[2]—one which could have been completed by the defender without the intervention of M'Dowall & Neilson. The transference of the delivery-orders to the defender operated constructive delivery in his favour, and thereafter the timber was held by Haggart & Company on his account, and not on that of M'Dowall & Neilson. Ac-

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Neilson, who was the only member of the firm of M'Dowall & Neilson, timber-brokers, Glasgow. In June 1903 Arthur Neilson asked John Neilson to lend him £3000. Arthur Neilson had been speculating largely and unsuccessfully upon the Stock Exchange, and was at the time insolvent, although he managed to carry on business until the 25th of September following. He did not disclose his financial condition to John Neilson, although he told him that he required the loan on account of losses upon the Stock Exchange. Arthur Neilson said that he would give timber security for the loan. John Neilson had not so large a sum available at the time, so he applied to Mr Woodrow—a brother-in-law of Arthur Neilson—who agreed to find the money, and handed £3000 in cash to John Neilson, who in turn paid it to Arthur Neilson on the 11th of June. There seems to have been an arrangement between John Neilson and Mr Woodrow that they would divide any loss which there might be between them; but that is a matter which is not of any importance in this case. After he received the money Arthur Neilson sent delivery-orders in favour of John Neilson to Haggart & Company, timber-measurers in Glasgow, for certain lots of timber which were lying in the timber-yards of Connal & Company and of the Clyde Navigation Trustees. I shall explain presently why these delivery-orders were sent to Haggart & Company and not to the owners of the timber-yards. The face value of the timber included in the delivery-orders was £3343. From time to time, between 11th June and 23d September, Arthur Neilson wished to dispose of portions of the timber for which he had given delivery-orders to John Neilson, and upon these occasions he got a delivery-order for the parcel of which he wished to dispose, and in lieu thereof gave to John Neilson a delivery-order for another parcel of approximately equal value. All the delivery-orders were addressed to Haggart & Company.

"On 22d September Arthur Neilson through his salesman, Fraser, asked John Neilson to release timber to the face value of £2802 in exchange for the bills of lading of the cargo of wood which is in question in this case, and the value of which was stated to be £2599. After consulting Mr Woodrow and his law-agent, John Neilson agreed to exchange his delivery-orders for the wood in the timber-yards for the bills of lading. John Neilson admits that Fraser told him that his brother was in financial difficulties, and the latter paid off his employees and shut his office on the 25th Sep-

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* Sale of Goods Act, 1893, sec. 47.

[1] Roy's Trustee v. Colville & Drysdale, March 20, 1903, 5 F. 769.

[2] Goudy on Bankruptcy (3d ed.), p. 104; Scottish Provident Institution v. Cohen & Co., Nov. 20, 1888, 16 R. 112.

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cording to the custom of trade in Glasgow, Haggart & Company were independent custodiers of the goods, and the case was distinguishable on the facts from that of *Anderson*,[1] referred to by the pursuers, where the goods remained in the possession of the debtor and in the custody of his paid servants. The owners of the yards were the custodiers if Haggart & Company were not, and the latter, in superintending and controlling the removal of the timber, were acting as their agents. In any event, the personal obligation of Haggart & Company, expressed in their acknowledgment to the defender that "we now hold the goods to your order," constituted a separate security, which was surrendered by the defender in exchange for the bills of lading, and was "valuable consideration" in return for which the bills of lading were acquired. If Haggart & Company, while holding the timber to the order of the defender, had parted with it without his permission, he would have had recourse against them personally. There

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tember, his estates and those of his firm being sequestrated under the Bankruptcy Acts on the 1st of October.

"The bills of lading were therefore indorsed to John Neilson within sixty days of the bankruptcy of Arthur Neilson and his firm, and the pursuers, as creditors of M'Dowall & Neilson, seek to have the transaction set aside on the ground that security for a prior debt was thereby voluntarily given.

"Whether the pursuers are entitled to succeed or not seems to me to depend upon whether John Neilson had a good security over the timber for which he held delivery-orders, because if the security was good, there was no illegality in his exchanging it for another security.—*Roy's Trustee* v. *Colville & Drysdale*, 5 F. 769.

"The delivery-orders, as I have said, were addressed to Haggart & Company, timber-measurers. That arose in this way. If the consignee of timber arriving in the Clyde desires to store it, he employs a measurer, whose duty is to measure the timber and see it properly stacked in the yard selected by his employer. The yards are enclosed, and the gates are kept and the yard watched by the servants of the proprietors of the yard. The stacking of the timber appears to be done by the men employed by the measurer, but the part of the yard in which the stack is to be placed is pointed out by the superintendent. An entry is made in the books of the yardkeeper of the number of stacks, the cubic feet in each stack, and the name of the timber-merchant for whom the timber is stored. A note also appears to be taken of timber removed from time to time, but as the rent is regulated, not by the size of the stack, but by the ground which it covers, the important removal, from the yardkeeper's point of view, is the last when the ground is left vacant, and that is the only removal to which he pays much attention.

"The rent is paid by the merchant on whose behalf the timber is stored by the measurer, and if a change of ownership of the timber is intimated to the yardkeeper, he charges the rent thereafter against the new owner. The fees and charges of the measurers are paid by the merchants by whom they are employed.

"After the timber is stored, the measurer—who must hold a licence from the Clyde Trustees—has, so far as the storekeeper is concerned, practically complete control over it, and he is allowed to remove timber which he has stored and when he chooses. A practice accordingly appears to have sprung up of addressing a delivery-order to the measurer in the event of timber which is stored being sold, and the measurer either takes the timber out of the yard and delivers to the purchaser, or if the latter desires it to continue in

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[1] Anderson v. M'Call, June 1, 1866, 4 Macph. 765, 38 Scot. Jur. 405.

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was no evidence that the defender had acquired the bills of lading in bad faith.

Argued for the pursuers;—The pursuers' rights of stoppage and lien were not affected by the transference of the bills of lading to John Neilson, as that transaction was null and void under the Act of 1696. The delivery-orders given by him in exchange for the bills of lading were no security at all. No such security could exist until the goods were delivered, either actually or constructively, to him. They were not actually delivered, and constructive delivery could only take place when they were in the custody of some person (other than the owner) to whom the delivery-order could be addressed.[1] In the present case the goods *de facto* remained in the custody of the proprietors of the timber yards, and M'Dowall & Neilson could at any time have resumed possession.[2] Haggart & Company were not independent custodiers, but merely the agents for M'Dowall & Neilson, and the transference to John Neilson of the delivery-orders addressed to Haggart & Company did not operate constructive delivery to him.[3] He could not

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store, the measurer intimates to the yardkeeper the name of the purchaser, who is thereafter liable for the rent.

"Although a delivery-order addressed to the measurer may be a very convenient course to follow in the case of timber in store being sold, it does not follow that it is a competent method of constituting a security. That depends upon whether the measurer is an independent custodier of the goods not identified with the owner who is granting the security.

"It was argued for John Neilson that the measurer was practically custodier of the goods, as he had full control over them, and that in receiving delivery-orders and removing and distributing the timber, he was truly acting as agent for the yardkeeper, who would otherwise require to employ a servant for that purpose.

"I do not think that the measurers, Haggart & Company, were the custodiers of the timber. The timber had been put in the keeping of the Clyde Trustees and Connal & Company for M'Dowall & Neilson and by their instructions, and Haggart & Company were allowed complete control of the timber in the way of moving it from the yard, not because they were custodiers, but because they represented and had the authority of M'Dowall & Neilson.

"But even if Haggart & Company were in a sense the custodiers of the timber, I am of opinion that a delivery-order addressed to them was ineffectual to operate constructive delivery of the timber, because they were the servants of M'Dowall & Neilson.

"It was M'Dowall & Neilson who instructed them to measure the timber and to store it on their behalf; it was M'Dowall & Neilson who paid the measurers or to whom they looked for payment; and the measurers were allowed control over the timber in the yard, not because they were the custodiers or the servants of the custodiers, but because they were the accredited agents of M'Dowall & Neilson. Further, I think that it is plain that if M'Dowall & Neilson had dispensed with the services of Haggart & Company and employed another measurer to look after the timber in store, the yardkeeper would, upon receiving intimation of such change, have been bound to see that Haggart & Company did not thereafter interfere with the timber.

"Now, it is well settled that in order to operate constructive delivery of goods by a delivery-order, the custodier to whom the delivery-order is

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[1] Pochin & Co. v. Robinows & Majoribanks, March 11, 1869, 7 Macph. 622, *per* Lord President at p. 628, 41 Scot. Jur. 334; Gunn v. Bolckow, Vaughan, & Co., 1875, L. R., 10 Ch. App. 491.

[2] Young v. Aktiebolaget Ofverums Bruk, Nov. 27, 1890, 18 R. 163.

[3] Anderson v. M'Call, 4 Macph. 765.

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have completed his security within sixty days of M'Dowall & Neilson's bankruptcy by obtaining possession of the goods through the delivery-orders, as delivery in such circumstances would have been struck at by the Act of 1696.[1] In any event the defender could not take advantage of the proviso in section 47 of the Sale of Goods Act, as he did not acquire the bills of lading either for valuable consideration or in good faith. The undertaking by Haggart & Company to hold the timber to his order was of no more value than an undertaking by M'Dowall & Neilson themselves, Haggart & Company, as agents for disclosed principals, not being personally responsible for their actings. Further, in taking the bills of lading without inquiry at a moment when any inquiry would have informed the defender of M'Dowall & Neilson's financial position, he had not acted in "good faith" as defined by the Sale of Goods Act.*[2]

At advising,—

LORD TRAYNER.—I concur with the Lord Ordinary, and have nothing to add to the opinion he has expressed. There were, however, two points raised in the debate before us regarding which the Lord Ordinary has expressed no opinion, and on them I desire to say a few words. The first of these points was maintained by the defenders (the reclaimers), and was to this effect: That assuming no effectual security had been constituted by the delivery-orders intimated to Haggart & Company, and that therefore the right conferred by the indorsed bills of lading within sixty days of bankruptcy was not the substitution of one good security for another previously existing, yet the defender gave a valuable consideration for the bills of lading, and so brought himself within the terms of the 47th section of the Sale of Goods Act. The valuable consideration on which the defender here relies was, according to the argument, this—the personal obligation by Haggart & Company to hold the goods referred to in the delivery-orders for behoof of the defender, which obligation the defender discharged or surrendered by taking the bills of lading in exchange for those goods. It

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addressed must be independent of the granter of the order, and if, although he is custodier of the goods, he is also in the employment of the granter, there will be no delivery.—*Anderson* v. *M'Call*, 4 Macph. 765.

"I am therefore of opinion that delivery-orders addressed to Haggart & Company did not operate constructive delivery to John Neilson. If, however, that view is sound, then John Neilson never had a security over the timber—he had at most his brother's obligation to grant a security. Therefore when the bills of lading were indorsed to John Neilson, the only tangible consideration for the transfer was the prior debt, and the transaction was accordingly, in my judgment, one which was struck at by the Act 1696, cap. 5. I am therefore of opinion that the pursuers, being creditors of the bankrupts, are entitled to have the transaction set aside." (His Lordship then proceeded to consider the questions raised between the pursuers and the defender Reid, which, in substance, were identical with those raised in the case reported *ante*, p. 35.)

[1] Rhind's Trustee v. Robertson & Baxter, March 4, 1891, 18 R. 623.

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 62 (2), enacts:—"A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not."

[2] Jones v. Gordon, 1877, L. R., 2 A. C. 616, *per* Lord Blackburn, p. 628; Cuming v. Brown, 1808, 9 East, 505; Benjamin on Sale, 4th ed., p. 897.

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is no doubt true that when the delivery-orders were intimated to Haggart & Company they, in acknowledging receipt, stated that they held the goods "to your order"—that is, the order of the defender. But the judgment of the Lord Ordinary holding that the intimation of the delivery-orders to Haggart & Company was ineffectual to transfer, by constructive delivery, the goods to the defender, proceeds upon the ground (as I think rightly) that Haggart & Company were not independent custodiers of the goods, but only the servants, agents, or representatives of M'Dowall & Neilson as the owners. If, therefore, in receiving the delivery-orders Haggart & Company were only acting as the agents or representatives of M'Dowall & Neilson, their acknowledgment of the same and their obligation to hold to the order of the defender must have been granted in the same character. They had no other. Their obligation as agents (for known principals) bound their principals and not themselves. It follows that the obligation which the defender says he surrendered was the obligation of his debtors M'Dowall & Neilson, which was not a valuable consideration for the bills of lading in the circumstances which existed. Accordingly, in my opinion, this contention on the part of the defender cannot be given any effect to.

The other point was one maintained by the pursuers. They said that the defender was excluded from the benefit of any privilege conferred by the section of the Act I have referred to, in respect that he was not *in bona fide* when he took the bills of lading, knowing as he did (or might have known) that M'Dowall & Neilson were then insolvent. I am not prepared to sustain this view or to affirm that the defender was not acting in good faith. When he went to consult his law-agents with regard to the subject of exchanging what he then regarded as his valid security over the goods in the Clyde Trustees' yard, for the indorsed bills of lading, I am disposed to think he was desirous of being advised as to the character and extent of the right which an indorsed bill of lading conferred. He explains in his evidence that he had never previously had any transactions based upon an indorsed bill of lading, and he desired information, as I have said, as to the value of such a thing as a security. His law-agent said something about what "if anything happened within sixty days." Now, I quite believe the defender when he says that he did not understand what this allusion to the Act of 1696 meant or imported. That being so, I cannot hold bad faith in any way imputable to the defender, and I have thought it right, so far as my opinion goes, to clear him of any such imputation. The result, however, of my opinion is that the Lord Ordinary's judgment should be affirmed.

Lord Moncreiff.—I agree with the Lord Ordinary. The pursuers, who are timber-merchants in Quebec and London, in February and August 1903, sold certain quantities of timber to M'Dowall & Neilson, and in part execution of their contracts in September 1903 shipped at Quebec and Montreal four lots of timber mentioned in the summons, the price of the lots amounting to £2592, 5s. On 18th and 22d September the pursuers' agents in Glasgow sent to M'Dowall & Neilson one set of bills of lading for the said timber, accompanied by two incomplete bills of exchange for the acceptance of M'Dowall & Neilson, and on 24th September the bills of exchange were returned accepted but unstamped.

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On 23d September M'Dowall & Neilson handed to John Birkmyre Neilson the four indorsed bills of lading and immediately afterwards became bankrupt, their estates being sequestrated on 1st October 1903.

The pursuers, having ascertained that M'Dowall & Neilson were insolvent, refused to deliver the cargo to John B. Neilson on its arrival at Glasgow, on the ground that they were unpaid sellers, and that they were entitled to stop it *in transitu* and hold it in security of the price.

1. The bills of lading having been delivered indorsed to John B. Neilson on the eve of the bankruptcy of M'Dowall & Neilson, the indorsation is reducible at the instance of the pursuers unless John B. Neilson can shew that in exchange for the bills of lading he gave up to the bankrupts' firm a security of equal value which he had obtained more than sixty days before their bankruptcy. That question depends upon whether John B. Neilson had at the date of the indorsation of the bills of lading a completed right in security over certain timber belonging to M'Dowall & Neilson which was then standing in the keeping of the Clyde Trustees and Connall & Company; and that again depends upon whether intimation to Haggart & Company operated constructive delivery of the timber to John B. Neilson. I am of opinion, with the Lord Ordinary, that it did not, because Haggart & Company were not independent custodiers of the goods, but were in the employment of M'Dowall & Neilson. The only difference between the present case and *Anderson* v. *M'Call* [1] is that while in the latter case the store belonged to the granters of the transfer note, although not at the place where they carried on business, in the present case the store or yard in which the timber was placed did not belong to M'Dowall & Neilson, but to the Clyde Trustees and Connall & Company. This difference, however, I think is immaterial, because both in the case of *Anderson* [1] and in the present case the delivery-order was sent to a storekeeper in the employment of the granters, and not to an independent custodier.

I am therefore of opinion that when John B. Neilson received the indorsed bills of lading on 23d September 1903, he held no valid security over the said timber which he could give in exchange for the bills of lading; consequently he received the bills of lading without value, and simply in further security of his advances to M'Dowall & Neilson.

Again, if Haggart & Company were simply servants of M'Dowall & Neilson, they cannot be held by their acknowledgment of receipt of the delivery-order to have given any personal obligation to John B. Neilson.

If these views are correct, it is not necessary to consider whether John B. Neilson took the bills of lading *in mala fide*. I think it clear that on 23d September he knew that M'Dowall & Neilson were on the brink of bankruptcy; but it is fair to assume that he thought that he was giving up a valid equivalent security.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

THE COURT adhered.

WEBSTER, WILL, & Co., S.S.C.—J. W. & J. MACKENZIE, W.S.—DRUMMOND & REID, W.S.—Agents.

[1] 4 Macph. 765.

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Rosewell Gas Coal Co. v. M'Vicar.

THE ROSEWELL GAS COAL COMPANY, LIMITED, Complainers (Reclaimers).—*Hunter*—*W. Thomson.*
DANIEL M'VICAR, Respondent.—*Wilton.*

*Master and Servant*—*Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, sec.* 14—*Compensation*—*Setting off expenses against weekly payment.*—The Workmen's Compensation Act, 1897, enacts (Schedule 1, sec. 14),—"A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same."

*Held* that an employer, who had been found liable in a weekly payment under the Act to a workman, could not set off against that payment a sum awarded to him as expenses against the workman in an application for the diminution of the weekly payment.

2D DIVISION. Lord Kincairney.

THIS was a suspension by the Rosewell Gas Coal Company, Limited, of a charge against them at the instance of Daniel M'Vicar, miner, Kelty. The following narrative of the facts in the case is taken from the opinion of the Lord Ordinary (Kincairney):—

"M'Vicar suffered injury on 12th April 1902 and on claiming compensation before the Sheriff the parties agreed on a weekly sum of 15s. 8d.; and a memorandum of the agreement was registered under the Workmen's Compensation Act on 7th January 1903. Proceedings were taken by the Rosewell Company under the provisions of the Act for diminution of the weekly rate of compensation. These proceedings were at first unsuccessful, and on 30th May 1903 the application of the Rosewell Company was dismissed, and the Company was found liable in expenses, which were taxed at £5, 15s. 6d. But on a second application by the Rosewell Company the Sheriff-substitute pronounced an interlocutor dated 10th October 1903, by which the weekly compensation was reduced to 10s. 8d. from 3d July 1903. By this interlocutor, which is printed on the record, the Rosewell Company were found entitled to one-half of their expenses, which half amounted, as taxed, to £13, 4s. 1d. There was thus a balance of expenses due to the Rosewell Company of £7, 8s. 7d.

"The complainers have paid the compensation of 15s. 8d. until 3d July 1903, and have since paid the reduced compensation to 30th October 1903.

"They then intimated to M'Vicar that they would withhold payment of the compensation until the balance of expenses due to them had been paid, and payment has not been made since that date. A sum of 10s. 8d. a week from 30th October 1903 to 31st March 1904 would amount to £11, 13s. 2d., and that sum has been consigned with the Accountant of Court. At that date M'Vicar charged the Rosewell Company for payment of £11, 13s. 2d., and the Rosewell Company presented this note of suspension."

The complainers pleaded;—(1) The said charge should be suspended, in respect . . . (*b*) that the complainers are not due to the respondent the sum charged for; and (*c*) that the respondent is barred *personali exceptione* from insisting in his claim until he has paid the said expenses incurred to the complainers in connection therewith.

On 26th July 1904 the Lord Ordinary pronounced the following interlocutor:—"Finds, in respect of the 14th article of Schedule 1 of the Workmen's Compensation Act, 1897, that the complainers'

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claim for expenses cannot be set off against the weekly payment found due by them to the respondent: Therefore repels the complainers' objections to the charge by the respondent: Refuses the prayer of the note, and decerns." *

The complainers reclaimed, and argued that expenses awarded in the course of the proceedings were in an exceptional position, and that a plea of set off based upon them was not barred by section 14 of Schedule 1.[1]

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK.—I am very clearly of opinion that the judgment reclaimed against is right.

The object of the Act is to secure that an injured workman shall have for his subsistence the sum awarded to him, and that it is not to be trenched upon in any way. This is made perfectly clear by section 14 of the First Schedule.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

THE COURT adhered.

W. & J. BURNESS, W.S.—P. R. M'LAREN, Solicitor—Agents.

No. 54.

Dec. 16, 1904. Houldsworth v. School Board of Cambusnethan.

JAMES HAMILTON HOULDSWORTH AND OTHERS, Pursuers (Respondents).—*Lees, K.C.—Berry.*

THE SCHOOL BOARD OF CAMBUSNETHAN AND OTHERS, Defenders (Reclaimers).—*Ure, K.C.—Wilson, K.C.—Chree.*

*School—Trust—Title to Sue—Statutory Irritancy—Failure of trust purposes—Title of School Board and Inhabitants to resist declarator of irritancy—School Sites Act*, 1841 (4 *and* 5 *Vict. cap.* 38).—The School Sites Act, 1841, provides facilities for the gift of sites, not exceeding one acre in extent, to be used for the purpose of erecting a school, with a proviso that in the event of the land ceasing to be used for the purposes mentioned in the Act, it should "immediately revert to and become a portion of the said estate."

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* "OPINION.—(After stating the facts *ut supra*, and dealing with an objection to the regularity of the charge)—The other point is of more consequence and of general application. It raises this question under the Workmen's Compensation Act—whether, when a workman has obtained an award, an action to recover the amount awarded can be met by a decree against him held by his employers when it is a decree for expenses awarded in the course of the proceedings for compensation.

"I think this point is determined by the 14th article of the First Schedule of the Act, which provides expressly that 'a weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.'

"I think that the last words of this article cannot be got over. They seem unambiguous, and to meet the case precisely. I do not say whether the Sheriff-substitute could or could not have framed his allowance of expenses in such a way as to make them a deduction from the compensation. I do not see that he could. At all events he has not done so, although I am informed he was asked to do so. The reasons of suspension must therefore be dismissed."

[1] Quoted in rubric.

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In 1858, by disposition bearing to be granted under the authority of the School Sites Act, H., a fee-simple proprietor, conveyed to certain persons as trustees four acres of land "to be applied as a site for a school for the district of . . . for children of the labouring, manufacturing, and other poorer classes . . . and for a residence for the teacher or teachers, and for no other purposes whatever." A school was erected. In 1903 the trustees closed the school, and intimated that they were no longer able to maintain it. The heir of H. brought an action against them, concluding for declarator that the site had reverted to him.

The trustees did not defend the action, but (1) the local School Board, and (2) certain residents in the locality, parents of children of the class for which the school was intended, were allowed to lodge defences, and they maintained that the school should be conveyed to the School Board.

*Held* (*aff.* judgment of Lord Kyllachy, Ordinary) (1) that the provisions of the School Sites Act were incorporated in the trust, although the site granted exceeded one acre, and (2) that the pursuer was entitled to decree (*per* Lord Trayner and Lord Moncreiff, the Lord Justice-Clerk concurring) on the ground that the irritancy provided by the Act had been incurred—*per* Lord Young on the ground that, apart from the Act, the property of the trust reverted to the donor because the trust purposes had failed, and no legitimate scheme for the use of the property for analogous purposes had been suggested.

*Opinions* that the School Board had no title to intervene in the action.

*Opinions* that the individual residents had a title to intervene, but no interest to oppose the decree, in respect that their only interest in the matter was to secure free education for their children, and that such education was provided by statute. *Opinion* (*per* Lord Young) that they had no title to intervene.

2D DIVISION. Ld. Kyllachy.

BY feu-charter, dated the 11th day of September 1858, Henry Houldsworth, at that time heritable proprietor of the estate of Coltness, on the narrative that the Coltness Iron Company were then in the course of erecting a school for the district of Newmains, in the parish of Cambusnethan, for children of the labouring, manufacturing, and other poorer classes therein, and a residence for the teacher thereof, and that they had applied to him to grant a piece of ground as a site therefor, gave, granted, and disponed to and in favour of James Hunter, one of the partners of the said Company, and his heirs and successors whomsoever, a piece of ground extending to about four acres, which it was further declared was to be "possessed and applied as a site for the foresaid school and residence, and for no other purposes whatever."

On 13th September 1858 Mr Hunter, by disposition bearing:—"I, James Hunter, . . . freely and voluntarily do hereby, under authority of an Act,* passed in the fifth year of the reign of Her

* The School Sites Act, 1841 (4 and 5 Vict. cap. 38), enacts (section 2), "Any person in Scotland being the proprietor in fee-simple or under entail, and in possession for the time being, may grant, convey, or enfranchise by way of gift, sale, or exchange, in fee-simple, or for a term of years, any quantity not exceeding one acre of such land, as a site for a school, for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purpose of the education of such poor persons in religious and useful knowledge; provided that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee-simple or otherwise, as fully to all intents and purposes as if this Act had not been passed, anything

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Majesty Queen Victoria, entituled an Act to afford further facilities for the conveyance and endowment of sites for schools, and of all other Acts enabling me herein, sell, alienate, and dispone from me, my heirs and successors, to and in favour of . . . and . . . being four of the resident inhabitants of the parish of Cambusnethan in which the said school is situated, and being heads of families, and to such other person or persons as may be hereafter assumed to act along with them and me, in virtue of the powers hereinafter inserted as trustees for the said Act, All and Whole . . . to be applied as a site for a school for the district of Newmains in the said parish for children of the labouring, manufacturing, and other poorer classes, of and in the said parish or the vicinity thereof, and for a residence for the teacher or teachers in the said school, and for no other purposes whatever." The disposition was recorded in the New General Register of Sasines on 17th September 1858 in terms of the School Sites Act, 1841, sec. 10.

The trustees acting under the disposition above mentioned built a school on the site conveyed, which was carried on until June 1903. when, after intimation to the School Board of the parish of Cambusnethan, it was closed. It had been maintained partly by fees, partly by Government grant, and partly by contributions from the Coltness Iron Co.

The present action was raised by James Hamilton Houldsworth, proprietor of the estate of Coltness, grandson and heir-at-law of the late Henry Houldsworth, and by the representatives of the said James Hunter, against the trustees under the Newmains School Trust. The conclusion of the action was, *inter alia*, for declarator that the whole right, title, and interest in the said piece of land conveyed in 1858 had reverted to the first named pursuer, and now belonged to him. There were also conclusions for adjudication of the said piece of land to him.

The trustees did not defend the action, but minutes were lodged for the School Board of Cambusnethan and David Brownlie and others, residents in the district of Newmains. On 12th May 1904 the Lord Ordinary pronounced an interlocutor, by which, under reservation of all questions as to the minuters' title and interest, he allowed them to lodge defences to the action.

The pursuers, after narrating the deeds above mentioned, made the following averments with regard to the history and existing state of the school:—(Cond. 7) "The school was closed for summer holidays on 26th June 1903, and the trustees were unable to re-open it. On 7th July 1903, they had received intimation from the Coltness Company that their contributions would terminate on 1st August 1903, and intimation thereof was made on 9th July to the School Board. The trustees have all along provided the means for the carrying on of

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herein contained to the contrary notwithstanding." Section 10 declares that a conveyance of any site for a school, under the Act, in a form therein given, or as near thereto as circumstances will admit, being executed with a testing-clause, and being recorded within sixty days of the date thereof in the General Register of Sasines or Particular Register for the county in which the lands or heritages lie, shall, without actual seisin, be valid and effectual in law to all intents and purposes, and shall be a complete bar to all other rights, titles, trusts, interests, and incumbrances, to, in, or upon the lands or heritages so conveyed.

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the school, for which the fees and the Government capitation grant were found insufficient, out of the funds provided for this purpose by the Coltness Company. Accordingly, they have now become merely holders of the site without having the necessary funds with which to carry out the purposes in trust for which the site is vested in them."

The defenders averred that the disposition by Mr Hunter, dated 13th September 1858, was not in the form prescribed by section 10 of the School Sites Act, 1841. They also averred that the School Board of Cambusnethan were willing, and had offered, to carry on the school in terms of the disposition by Mr Hunter.

The pursuers pleaded;—1. The pursuers are entitled to decree as concluded for—(1) In respect that the subjects in question were and are held by the defenders under the feu-charter and disposition mentioned in the condescendence solely for the purpose of being used and applied for the foresaid school and residence, and for no other purposes whatever; and they have now ceased to be so used and applied; (2) in respect that the said provision in the defenders' title with regard to the use of the said subjects is a material and essential condition of, and real burden on, the same; (3) in respect that under the provisions of the School Sites Act of 1841, which is incorporated in the defenders' title, the subjects in question, on ceasing to be used for the said purposes, revert in property to the pursuer the said James Hamilton Houldsworth. 2. The minuters, the School Board of the parish of Cambusnethan and others, have no title or interest to appear to oppose the conclusions of the summons. 3. *Separatim*, the defences lodged for the minuters, the School Board of the parish of Cambusnethan and others, are not relevant.

The defenders pleaded, *inter alia*;—3. The pursuers' averments are irrelevant, and insufficient to support the conclusions of the summons. 4. The purpose for which the ground was conveyed not having failed, the defenders are entitled to absolvitor. 5. The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to absolvitor. 6. In any event, the provisions of the School Sites Act are inapplicable, in respect that the ground greatly exceeds one acre in extent.

On 12th July 1904 the Lord Ordinary pronounced an interlocutor, whereby he declared and adjudged in terms of the conclusions of the action.*

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* "OPINION.—The pursuers in this case are (1) Mr J. H. Houldsworth, who is proprietor of the estate of Coltness and heir of the late proprietor, Mr Henry Houldsworth; and (2) the testamentary trustees and heir-at-law of the late Mr Hunter of Auldhouseburn, who was a partner with the late Mr Houldsworth in the Coltness Iron Company.

"The object of the action is to have it declared that a certain piece of ground, forming the site of a school and schoolmaster's house, erected in 1858 by the Coltness Iron Company, has ceased to be used and applied for the purpose for which it was granted by the pursuers' authors, and has thereby reverted, in terms of the title, to the pursuers, and in particular to the pursuer Mr Houldsworth. The title consists of (1) a feu-charter by the late Mr Henry Houldsworth to his partner, the late Mr Hunter; and (2) a disposition substantially of even date bearing to be granted by Mr Hunter, in terms of the School Sites Act of 1841, in favour of certain trustees who, so far as surviving, are called as defenders to the action. These trustees it appears consider that they have no good defence to the action, and accordingly they have not entered appearance. But a minute of compearance,

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The defenders reclaimed, and argued;—(1) The compearing defenders were entitled to appear and defend. The individual defenders were the beneficiaries under the trust, and were entitled to intervene to prevent what they held to be a breach of the trust.[1] The School Board had also a title to appear, just as they were entitled to appear in a scheme for the alteration of an educational trust.[2] (2) The School Sites Act, 1841, did not apply to the case, and therefore the pursuers could not take advantage of the irritancy therein contained. The Act was excluded because (*a*) the disposition was not in the statutory form, (*b*) it applied only to sites not exceeding one acre, (*c*) the original conveyance by Mr Houldsworth, whose heir now proposed to enforce the irritancy, did not bear to be granted under the Act. If so, the pursuers had no case at common law. Even if the

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having been lodged by the School Board of the parish, and certain concurring parishioners, I—perhaps not quite regularly—allowed these compearers to lodge defences, and (without deciding anything as to their title) allowed a record to be made up. Upon that record I had the other day a general argument in the Procedure-roll. The immediate question is whether the compearers have made out a title to intervene. But in considering that question it is difficult to avoid trenching on the merits.

"The position of the compearing defenders seems to be this: They say that this is an educational trust; that the trustees who are called as defenders are committing a breach of trust in not defending the action; and that they, the compearers, having an interest in the educational arrangements of the parish, and being therefore, as they say, beneficiaries under the trust, have a title to interpose and maintain certain defences which the trustees, as they (the compearers) contend, wrongfully, refuse to maintain.

"In the view which I take of the case it may (for shortness) be as well to assume that the defenders have a sufficient title to raise and argue this question of breach of trust; and perhaps on that assumption the best course may be to take the case as if the trustees were maintaining the defences which it is said they ought to maintain, and to see whether and how far these defences are well founded.

"The suggested defences are (1) that under the title there is no effective provision for the reversion of the site to the donor, even on the assumption that the school has been discontinued; and (2) that assuming the contrary, the school has not in fact been discontinued,—at all events discontinued in circumstances on which the pursuers can found.

"It does not appear to me that either of those defences could have been maintained by the trustees with any hope of success.

"As to the terms of the title, it is quite true that in the original feu-charter there is no express clause of irritancy; and it may be, that without such express clause, no forfeiture of the feu is possible for breach, even of the most express conditions affecting its use. But the case is different with respect to the disposition by Mr Hunter, which constituted the trust, and conveyed the subjects to the trustees. That disposition bears to be and is a statutory disposition under the Act of 1841, and of course incorporates by reference all the conditions and provisions expressed in that Act, with respect to the duration and other incidents of titles granted under it. And, that being so, it is not disputed that the second section of the Act

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[1] Merchant Company of Edinburgh v. Governors of Heriot's Hospital, Aug. 9, 1765, M. 5750; Christie v. Magistrates of Stirling, July 6, 1774, M. 5755; Bow v. Patrons of Cowan's Hospital, Dec. 6, 1825, 4 S. 276; Ross v. Governors of Heriot's Hospital, Feb. 14, 1843, 5 D. 589; Lord Advocate v. Lord Blantyre, June 19, 1879, 6 R. (H. L.) 72.

[2] Largs Kirk-Session v. Largs School Board, June 10, 1899, 1 F. 915.

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purpose of a charitable trust failed, the property would not revert to the heir of the donor, but would be settled by the Court on a *cy-près* scheme.[1] (3) Even on the assumption that the irritancy contained in the School Sites Act applied, it had not been incurred. It could only be incurred if the trustees could not carry on the school; not if they closed it in violation of their duty. In the present case the trustees could carry on the purposes of the trust by conveying the school to the School Board. They were entitled to do this, because the school was a subscription, and not an endowed, school.[2]

Argued for the respondents;—(1) The School Board had no title to defend the action. It was a body established by statute, and its rights and duties depended on statute, which did not confer any right or duty to intervene in an action like the present. Without challenging the title of the individual defenders, they had no interest to oppose

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makes the following provision, 'Provided that upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate held in fee-simple or otherwise, as fully to all intents and purposes as if this Act had not been passed, anything herein contained to the contrary notwithstanding.'

"Now, what is the supposed objection to the application in the present case of this statutory irritancy? It seemed to be something of this sort: (1) It was said that the site here extended to four acres, while the statute (which, *inter alia*, it has to be noted, empowers heirs of entail, and other disabled persons, to make conveyances for the purposes of this Act), confines the powers which it confers to sites not exceeding one acre. I fail, however, to see how the trustees, who accepted without objection the larger area, could be heard now to complain of the excess, or to claim that because the donor, being an owner in fee-simple, chose to exceed the limit expressed (plainly, I think, only for disabled persons), the title must therefore be read not as an invalid title, but (contrary to what it bears) as being a common law title, having no incidents beyond what the common law would imply. It appears to me that for the trustees this argument—supposing it sound—would be wholly *jus tertii*. It is in any case not an argument which, in my opinion, any Court would hold a body of trustees *bound* to take up and urge at the bidding of anybody.

"The next point was that the 14th section of the Act of 1841 provided (subject to certain safeguards), for excambions and sales of sites by the trustees or managers. But, of course, this power only applied while no irritancy had been incurred; and although no doubt its existence made, in possible circumstances, the donor's remedies somewhat imperfect, that imperfection could not, in my opinion, at all derogate from the effectiveness of the irritancy, while the power remained unexercised.

"The third point was, I think, even more extreme. It was rested on a somewhat loose expression at the close of the clause to the effect that the site should revert to the estate from which it had been given off. The suggestion was that Mr Hunter, whose position I have explained, had himself no estate adjacent to the site in question, and that the ground, although truly given off from the estate of Coltness, could not revert to any estate

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[1] Grant v. Macqueen, May 23, 1877, 4 R. 734; Macdougall, Petitioner, June 29, 1878, 5 R. 1014; Young's Trustees v. Deacons of Perth, June 9, 1893, 20 R. 778.

[2] Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), sec. 38; Johnston v. Magistrates of Canongate, May 30, 1804, M. 15,112; M'Culloch v. Kirk-Session of Dalry, July 20, 1876, 3 R. 1182; Gateside School Managers v. School Board of Beith, Feb. 3, 1903, 5 F. 424.

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the decree. Their only legitimate interest in the matter was to secure free education for their children, and that was provided by the State. (2) The provisions of the School Sites Act, 1841, were incorporated in the trust. The two dispositions, by Mr Houldsworth and Mr Hunter, were practically one deed, and expressly bore to be granted under the authority of the Act. The limitation to one acre applied only to entailed lands. The disposition, though not exactly in the statutory form, was an adaptation of that form to Scottish conveyancing. Apart from the Act, the trustees had no title to the land, because the disposition contained no precept of sasine or warrant for registration, and was recorded before the Titles to Land (Scotland) Act, 1858, came into operation. Prior to that Act, apart from the School Sites Act, 1841, there was no authority for making up a title without expeding and recording an instrument of sasine. (3) The

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except to some estate held by Mr Hunter. I confess it seems to me that the meaning of the clause simply is, that the ground shall revert to the donor. But supposing it necessary that the donor should still possess the adjacent ground, the true donor in this case was, quite obviously, not Mr Hunter, but Mr Henry Houldsworth, whose grandson is now, as I have said, the proprietor of Coltness estate, and the leading pursuer.

"It remains, however, to consider whether the school has been in terms of the title discontinued. And here there is no doubt of one thing, that it has been discontinued in point of fact. It has been closed for at least a year, and (so far as the circumstance is of importance) after eighteen months' notice of the intention to close it. What is suggested, however, is that in closing the school, the trustees acted unlawfully and in breach of their trust—unlawfully, because they had, it is said, the power to secure the continuance of the school, by handing it over to the School Board, who were willing to take it over.

"Now, although I had an ingenious argument upon this, as upon the other points in the case, I am in the first place unable to understand what the pursuers have to do with the trustees' rights and duties in a question with third parties; or how the school having been, in fact, closed for a year, they (the pursuers) have any concern as to whether the trustees in so closing it acted rightly or wrongly. The pursuers may, I think, well ask why if the School Board desired to enforce against the trustees their alleged duty either to continue the school, or to hand it over to them (the School Board), they did not bring an action to try that question during the eighteen months before the school was in fact closed.

"But, in the next place, if I am to deal with the matter on its merits, I must state it as my opinion (1) that it is not at all clear that this was a school erected or maintained by contributions or donations in the sense of the 38th section of the Act of 1872, and therefore a school which the trustees could, even if they desired to do so, hand over to the School Board; (2) that it is, on the other hand, quite clear that the trustees are at least under no duty to do so, either under their trust-deed, or on any general doctrine of trust law. I rather think that, although the School Board make some general averments the other way, this was really a school founded by the Coltness Company, or its partners, under trusts which were to some extent of a special character. But even if that were otherwise, the 38th section of the Act is at best only permissive, and applies only where the managers or trustees of the school are of opinion, and resolve, that it is proper to hand it over to the management of the School Board.

"The result, on the whole, is that the defences lodged by the compearing defenders fall to be repelled, and the pursuers fall to have decree in terms of the conclusions of the summons—with expenses against the compearing defenders."

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irritancy provided by the School Sites Act had been incurred. The school was in fact no longer carried on, and the site therefore reverted to the heir of the donor. The doctrine of *cy-près* had no application to the case of a statutory irritancy. Even assuming that it had, no *cy-près* scheme was suggested, except to hand the school over to the School Board. That the trustees had no power to do. It was an endowed school, and therefore could not be gratuitously transferred to the School Board.[1] Nor had trustees any right to delegate their duties to a public body.[2] Again, the proposal to transfer the school to the School Board was in effect a scheme to divert an educational endowment to the relief of the rates, which the Court would never sanction.[3] Therefore, as the trustees had no funds to carry on the school, and no power to adopt the only *cy-près* scheme suggested, the irritancy provided by the statute had necessarily been incurred. (4) Apart from the School Sites Act the pursuers were entitled to decree at common law. The trust purposes, as above explained, could not be carried out, and no *cy-près* scheme was possible. In such cases, where the trust was for one specific purpose which cannot be effected, the trust property reverted to the donor.[4] Moreover, the maintenance of a school of the class contemplated by the donor was a real condition of the title given. If the condition was not fulfilled the donor or his heir was entitled to recover the land given by an action of declarator and adjudication, even if there were no express irritancy.

LORD YOUNG.—The terms of the trust here are clear enough, the purposes of the trust being to erect a school and to conduct the school, the conduct of the school being under the control and management of the trustees who are to appoint a teacher who is always to be subject to dismissal by them, and to make any rules they think proper for the admission of scholars. These are the purposes of the trust. The school was erected and it was carried on on behalf of the trustees for a number of years by teachers appointed by them, all management of the school being in their hands. In short, the trustees were the governing body. Two or three years ago, circumstances having changed very much owing to the success of the School Board system providing satisfactory and gratuitous education to all those requiring it within the district of each School Board—the circumstances so changed that the attendance at the school was not sufficient to satisfy the trustees that it could be carried on with any advantage to the public, or that they had the means of carrying it on. Previous to the stoppage, the means were supplied gratuitously and charitably by the truster and the Coltness Iron Company, who had between them provided the land and

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[1] M'Culloch v. Kirk-Session of Dalry, July 20, 1876, 3 R. 1182; Gateside School Managers v. School Board of Beith, Feb. 3, 1903, 5 F. 424.

[2] Governors of Philp's Trust, Petitioners, June 27, 1893, 20 R. 900; M'Lean, Petitioner, Nov. 4, 1898, 1 F. 48.

[3] Kirk-Session of Prestonpans v. School Board of Prestonpans, Nov. 28, 1891, 19 R. 193; Governors of Jonathan Anderson Trust, March 12, 1896, 23 R. 592.

[4] Whyte's Factor v. Whyte, Jan. 10, 1891, 18 R. 376; Young's Trustees v. Deacons of Perth, June 9, 1893, 20 R. 778; Clerk v. Taylor, 1853, 1 Drewry Ch. Rep. 642.

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everything that was necessary for carrying out the trust. They ceased to make these contributions, and the donation of £842, or any donation at all by the Government out of parliamentary funds, was not repeated. The Coltness Iron Company having intimated to the trustees that they did not intend to continue to support the school, in view of the requirements recently made by the Education Board, the trustees, having no funds to carry on the school, intimated to the School Board that after eighteen months the school would be closed. In these circumstances, the trustees had to consider, as all trustees for educational or charitable purposes have to do, whether if that could not be done they could suggest any scheme whereby something similar to carrying on that school could be suggested; and they came to the conclusion that they could suggest nothing that was *cy-près* to the intentions of the truster, and accordingly that the trust could not be carried on. Now, I suppose they were advised that the law in these circumstances was that the trust-estate must return to the donor, and I am of opinion that if they were so advised, they were well advised, for when a trust such as this cannot be continued and no other scheme can be suggested by the trustees, or ought to be suggested by the trustees, I am of opinion that the law is that the property must return to the truster, the owner, who gave it, who instituted the trust, that it requires no ultimate destination to the heirs to attain that result, but that the result follows on the impossibility of carrying on a trust in the way specified in the trust-deed, or by any substitute which could be suggested for that.

The trustees have not entered appearance at all, being of the opinion that they could not resist an action at the instance of the truster or those representing him, the donor of the trust-estate. Certain other parties have, however, appeared, among them the School Board, and also the parents of some children who are in the position of school children such as would have attended that school if it had been carried on under the trust. These parents have the same agent and counsel as the School Board, and we have to consider, or it is at least legitimate to consider, the *cy-près* scheme which they suggest, though I am of opinion, for the reason which I shall state immediately, that neither of them is a party or are parties who can legitimately appear as parties in this action. The *cy-près* scheme suggested by the School Board is that the land should be handed over to them that they may erect a school upon it. That is their *cy-près*, and the only *cy-près* which they suggest, but counsel suggested, as representing the parents of some of the school children, that the school should be carried on and supported by the trustees for them (with what money they do not say), or should be handed over to the School Board in order that they should erect a school there more economically for the ratepayers. These are the *cy-près*. Well, I think the suggestion confirms the opinion which one would form to begin with, that the trustees having considered the matter arrived at a right conclusion,—that there was no reasonable scheme to which they could append their names and suggest to the Court. I therefore come to the conclusion that neither can the trust be carried on as it was constituted, nor is there any suggestion of a *cy-près* scheme to come in place of it. The testamentary trustees would have violated their trust, I think, obviously and manifestly, and could have been restrained by the trusters from so

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acting had they proposed to convey the land or any part of it to the School Board, or to sell the lands and contribute the price to the School Board, that they might have more money than they receive by rates or from contributions from the money voted by Parliament.

Now, I do not think it is necessary to go further than that. The trust cannot be carried on as constituted, no reasonable suggestion of any scheme within the scope and meaning, but different in its particulars, has been suggested by the proper parties to suggest it, or has been suggested by either the School Board or these parents. I am of opinion, however, that neither the School Board nor these parents are proper parties here. School Boards are statutory bodies, having statutory, and only statutory, duties to perform, and having statutory, and only statutory, funds in order to carry them on, these consisting of the rates and of contributions made by Parliament, assigned from time to time and provided by Parliament—by the proper authority in London, the Education Department. These are the funds that they have assigned to them for the purpose, as a statutory body, of discharging their statutory duties, and it was no statutory duty of theirs as a governing body—the governing body of the Board schools, and the governing body of no other school—it was no part of their duty or within their competence to appear in this Court to suggest to the Court a *cy-près* scheme, or to maintain that the trustees of a particular trust should have suggested a *cy-près* scheme. I think that is manifestly outside their duty. It is not their duty as a statutory body, and the suggestion that they are the beneficiaries under this trust is to my mind altogether extravagant.

Then, as to the parents of these children. Had they the power they might no doubt come forward and say,—"The trustees were appointed to carry on the trust, and keep this school in order that our children might attend it." But my opinion began with the view which I have stated distinctly, that the trustees cannot carry on the trust. Then what is their interest? Their interest is to get free education, and the free education which they suggest is education in schools under the control and management of the School Board. Well, they have that at present. It would be more convenient to have a school at this place. Well, that again can be acquired by the Local Board if it is necessary, and reasonably within the scope of their duty to acquire it under their statutory powers. They can acquire any land which they properly deem to be necessary which is approved of for the erection of a board school at a convenient place, and they can acquire that, if it is reasonably necessary, under their statutory powers.

I am therefore of opinion that the parents of school children having manifestly on their own statement no interest in the matter at all should not have been allowed to appear here, and therefore however desirable it might be that the conclusions of this action should be declared by the Court—that is to say, that the pursuers should be successful—not in an undefended case, but as in a case with proper defenders entitled to appear as defenders, and be received by the Court as defenders, that view cannot be taken. I think we have no defenders here account of whom we can judicially take. I think the pursuers acted very properly by calling neither of them as defenders, and that there is no objection to their action because

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competent and proper defenders have not been called. I reject the view, so far as my opinion goes, that we have any conceivable defender here at all, and I give an expression of my opinion that the Lord Ordinary's view is right; that the pursuers are entitled to declarator on that ground, as there is no defence.

LORD TRAYNER.—This is an action of declarator and adjudication brought at the instance of Mr Houldsworth to have it declared that certain subjects described in the conclusions of the summons belong to him, and should be adjudged to him. In this action he very properly called as defenders the persons in whom the subjects were vested feudally, there being at the time the action was raised no other defender whom he could call. Since then the School Board, and certain persons claiming to be beneficiaries under the trust, to be afterwards referred to, have compeared and been sisted as defenders. I dissent from the view, first, that the compearers are not entitled to be heard, and, secondly, that it was irregular to proceed with the case with them as defenders.

I do not doubt that any beneficiary under a trust is entitled to interfere and call the trustees to account for their administration of the trust. If the trustees propose to do something contrary to the trust a beneficiary is entitled to come forward in the action in which they seek to do it and oppose the proceedings. If the trustees neglect to do something which is incumbent on them under the trust, the beneficiaries under the trust have an undoubted title to come forward and insist that they shall do what the truster directed. I think there is no question that the persons represented here as beneficiaries are beneficiaries under this trust, and that it was not only their right to come forward and state their objections to the pursuer's action, but that the Lord Ordinary would have been distinctly wrong if he had refused to hear them.

But having got defenders who are competent and proper contradictors to the pursuer's claim, the question is whether the pursuer is to get decree. Now, the pursuer's action is based chiefly on the terms of the section quoted in condescendence 8 from the School Sites Act of 1841. The defenders have maintained that that clause cannot be imported into the trust nor pleaded upon by the pursuer. On that matter I think the defenders are quite wrong. I think the Lord Ordinary was right in giving effect to that section of the School Sites Act of 1841, and I shall state in a word or two the grounds on which I think so.

Mr Houldsworth on 11th September 1858, being the heritable proprietor of the land in question conveyed it to Mr Hunter, and conveyed it to him as expressed in his conveyance, "to be possessed and applied" as a site for a school and schoolmaster's house. Why Mr Houldsworth conveyed to Mr Hunter under this restricted and limited condition for this restricted and limited purpose I do not know. He might have proceeded at once to convey it to trustees. However, there was some reason, I assume, for what he did; but the result is exactly the same as if he had done so, because when Mr Hunter was feudally vested in the subjects he conveyed them by disposition in favour of certain trustees in December 1858. That disposition sets out with the narrative that he freely, voluntarily, and under authority of

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this Act (the School Sites Act), and for the purpose which it describes, conveys the lands to be applied as a site for a school for the district of Newmains for children of the labouring, manufacturing, and other poorer classes in the parish or vicinity thereof, and for a residence for the teacher of the school. I put it thus generally, because it is not necessary to quote the exact words of the trust-conveyance. It is said for the defenders that this was not a trust constituted under the Act of 1841. I think that is a mistake. It is said in the first place that the trust-deed is not in the terms of the form given by the statute. Well, I have compared it with the terms of the statute, and I find in its dispositive clause that it is practically the same if you take into account that this is a Scottish conveyance of Scottish heritage, and that the statute of 1841 is in its language more applicable to the constitution of a heritable right in England than in Scotland. But there is practically no difference between the disposition granted by Mr Hunter in trust and the disposition which, according to the statute of 1841, was to be granted under the authority of that statute. But Mr Hunter connects himself and his trust-deed absolutely with the statute of 1841 by the introductory words of his conveyance. He says that he does it under authority of the Act, and these are the words so far of the statutory conveyance. That he needed no authority to execute the trust-deed is certain, because he was fee-simple proprietor and could do what he liked with his own. But the words "under authority of these Acts" must be read as equivalent to "in pursuance of the Act of 1841." Now, the Act of 1841 as incorporated into the constitution of this trust provides at once an answer to the defenders' objection, because it provides in section 2 that where a trust has been constituted of this character, upon the lands so granted, or any part thereof, ceasing to be used for the purposes of the Act, the same shall thereupon immediately revert to and become a portion of the estate of which they had formed part as fully to all intents and purposes as if this Act had not been passed.

Now, it is matter of fact here that the purpose for which this deed was granted has come to an end. It is the fact that for eighteen months this school has been closed, and has been closed by the trustees for the very satisfactory reason that they had no means whatever for carrying it on. It was not a capricious act on their part; the necessity of the circumstances in which they were placed compelled them, and accordingly we are now within the very words of this statute, that the land granted has ceased to be used for the purpose for which it was conveyed to the trustees. In these circumstances the statute distinctly provides that the lands so granted shall revert to the estate from which they were taken. Now, the estate from which they were taken was the estate of Mr Houldsworth of Coltness. The pursuer, as representative and heir of Mr Houldsworth of Coltness (out of which this trust property came), is now therefore the person to whom it reverts, as it is no longer used for the purposes mentioned in the trust.

I would add another word, and it is this, I think it is an advantage to the pursuer in this case that the Lord Ordinary allowed the defenders to appear and state their objections, because in my opinion they were proper contradictors, and in that event Mr Houldsworth is now getting a decree of

declarator *in foro*, instead of a decree in absence, against the trustees whom he called originally. No. 54.

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I hold with your Lordship that the School Board has no title or interest to appear here, but with regard to the beneficiaries, while I admit their title to appear and be heard, I think their defences or objections must be repelled, because they have failed to shew any interest to maintain them. The only interest they have is to obtain free education for their children, and that the Government now supplies, and accordingly, they have no interest to maintain the trust.

On these grounds I think the interlocutor of the Lord Ordinary ought to be affirmed.

LORD MONCREIFF.—I agree. In regard to the first compearers I think that the School Board has no title to oppose the conclusion of this summons. I am inclined to think that the other compearers, the parents of children living in the neighbourhood and parish, have a title to appear, but I think they have failed to state any tangible interest to oppose the conclusions of the summons.

The feu-charter granted by Mr Houldsworth in favour of Mr James Hunter, proceeds on the narrative that he has been requested by the Coltness Iron Company, which was in course of erecting a school for the district of Newmains, in the parish of Cambusnethan, for children of the labouring, manufacturing, and other poorer classes therein, to grant them a piece of ground upon which to build a school and a residence for the teacher. That is the purpose for which the ground was required, and Mr Houldsworth accordingly did grant them by charter a site of four acres for that purpose. I think it is clear that Mr James Hunter, in whose favour that feu-charter was granted, was really the hand of Mr Houldsworth, and the question is practically the same as if Mr Houldsworth was the person who executed the trust-deed in favour of the defenders who were called as trustees for the school of Newmains. Now, that trust-deed by Mr Houldsworth professes to proceed upon the authority of the Act of 1841. The Act of 1841 applies in terms to such bequests, because it applies not only to entailed properties, but to properties held in fee-simple. But I do not think it matters in the least whether strictly speaking it applies to land held in fee-simple in Scotland where the proprietor can do as he likes with his ground, and attach such conditions as he chooses to a conveyance of it, because, under this disposition it is plain that the granter adopted the terms of the Act of 1841 as the basis of his grant. Now, the second section of the School Sites Act, 1841, empowers a proprietor holding land either in fee-simple or entail to grant by way of gift one acre of his land as a site for a school for the education of poor persons, or for the residence of the schoolmaster or schoolmistress, or otherwise for the purpose of the education of such poorer persons in religious and useful knowledge.

I pass by the question about the one acre limit, because I think it is immaterial to the question we have to decide. But then there is a provision that "upon the said lands so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate

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held in fee-simple or otherwise." That is the estate of the person, the proprietor who has made the grant for the erection of a school, or of a schoolmaster's house. That is the condition of the grant. Now, what happened in this case was simply this: Many years ago the Coltness Company under this deed, which is dated in 1858, erected a school at considerable expense, the greater part of which was defrayed partly by the Coltness Iron Company and partly by grant from Government which is not now redemanded; and they carried on or tried to carry on this school until about two years ago. At that point the Coltness Iron Company, who were the principal subscribers to the school, and practically at whose expense the school was being carried on, intimated that they could no longer continue their subscription. The school was not serving the purpose for which the disposition was made, and they intimated that they would no longer subscribe. Thereupon, the trustees intimated to the School Board their intention to close the school in eighteen months, and they did close the school. They found they could not fulfil the purpose of the trust by carrying it on.

Now, the question is whether there is anything to prevent the ground being claimed by the proprietor who made the original grant. The persons who were originally called as the defenders in this action were simply the trustees under this trust. They entered no appearance, and I am not surprised at it, because they must have felt that they had no defence to the action. But appearance has been made for other parties to whom reference has already been made; and the question is whether either of them, either the School Board or the parents of children in the parish, had any title or interest to do what the trustees felt they could not do—oppose the demands of Mr Houldsworth. Now, as I have already said, I think the School Board has no title to appear here. As to the others I assume they have a title to appear, but they have failed to shew that the trustees have committed any breach of trust, or that they themselves have any interest to insist either on the trustees carrying on the school themselves—which is impossible in the present state of matters—or presenting a petition on the footing of *cy-près* for authority for the School Board to carry on the school for purposes other than those mentioned in this trust-deed.

On the whole matter I agree with both your Lordships that the interlocutor of the Lord Ordinary should be affirmed.

LORD JUSTICE-CLERK.—I agree with the majority of your Lordships.

THE COURT adhered.

HAGART & BURN MURDOCH, W.S.—PATRICK & JAMES, S.S.C.—Agents.

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Dec. 17, 1904. Hunter v. William Baird & Co., Limited.

WILLIAM HUNTER, Appellant.—*Campbell, K.C.—J. A. Christie.*
WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—*Salvesen, K.C.—Hunter.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *First Schedule, section* 1 (*b*)—*Average weekly earnings—Continuity of employment—Miner employed by contractors passing into employment of Mine Owners.*—A miner employed by a contractor in a coal-mine was dismissed from his employment on 7th October. On Friday 9th

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October he got employment from the coalmaster in the same mine. On Monday 12th October he was injured in the course of his employment.

In a claim for compensation under the Workmen's Compensation Act, against his employer, *held* (*diss.* Lord Young), that in estimating his average weekly earnings, his earnings under the contractor could not be taken into account.

2D DIVISION.
Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897,* between William Hunter, miner, Kilsyth, and William Baird & Company, Limited, coalmasters, Glasgow, in which Hunter claimed compensation at the rate of 16s. 3d. per week for injuries sustained in the course of his employment, the Sheriff-substitute (Mark Davidson) awarded compensation at the rate of 2s. 10½d. per week, and, at the instance of Hunter, stated a case for appeal.

The case set forth the following facts as admitted or proved:—"1. That the appellant was employed as a miner in respondents' Dumbreck Pit, Kilsyth, under four different contractors, between 12th October 1902 and 7th October 1903. 2. That the said contractors were employed by the respondents at a contract price per ton for the amount of coal brought by them to the pit-head. 2. The said contractors employed workmen to assist them at a daily wage. 4. A fixed weekly sum was deducted from their wages for the general medical fund at the pit. 5. That on the last-mentioned date the appellant was discharged by Reid, one of said contractors, in whose immediate employment he then was. 6. That he was out of employment on 8th October 1903. 7. That on 9th October 1903 he entered respondents' employment as a miner, his earnings being dependent upon his output of coal. 8. That 10th October 1903 was a Saturday, being the conclusion of the trade week in the works of the respondents; that the appellant worked again on 12th October; that on that date, while in the course of his employment, a stone fell upon his right leg, whereby he was injured; and that in consequence of said accident he has been unable to earn wages since. 9. That his total earnings during the period from 9th to 12th October 1903 were 11s. 6d., and that respondents offered appellant compensation at the rate of 2s. 10½d. per week."

On these facts the Sheriff-substitute held—"1. That the appellant received injury by accident arising out of and in the course of his employment in a mine of which the respondents were undertakers within the meaning of the Workmen's Compensation Act, 1897. 2. That the average weekly earnings of the appellant while in the employment of the respondents were 5s. 9d."

He accordingly found the appellant entitled to compensation at the rate of 2s. 10½d. per week.

The following questions of law were stated:—"(1) Whether the appellant was in the employment of the respondents prior to 7th October 1903? (2) Whether, in assessing the compensation to which

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts (First Schedule, section 1),—"The amount of compensation under this Act shall be . . . (*b*) Where total or partial incapacity for work results from the injury a weekly payment during the incapacity, after the second week, not exceeding fifty per cent of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

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the appellant is entitled, any portion of his earnings prior to 7th October 1903 fall to be considered?"

Argued for the appellant;—There was here a case of continuous employment under the same employer within the meaning of section 1, subsection 3, of the Act. The word "employer" must not be construed too strictly; it would be absurd to hold that whenever any change took place in a firm of mine owners all their workmen entered into a new course of employment for the purposes of the Act. Here it was not really necessary to give a wide meaning to the word "employer"; employment in a mine by contractors was employment by the mine owners.[1]

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK.—In this case the statement of facts is to this effect, that this man was employed, for a certain period named in the case, by a series of contractors. Then the statement proceeds to say that he came to be out of employment on 8th October 1903, and that on 9th October of that year he entered the respondents' employment as a miner, his wages being dependent upon his output of coal. Now, the respondents' contention is that the period of employment by them was that beginning on 9th October, and that therefore the Court ought to find that he is only entitled to compensation on his earnings subsequent to that date. In my opinion that contention is sound, and the decision of the Sheriff to that effect is right.

LORD YOUNG.—The statement of facts is a peculiar one certainly—that the appellant was employed as a miner in the respondents' pit under four different contractors between 12th October 1902 and 7th October 1903; that these contractors were employed by the respondents at a contract price per ton for the amount of coal brought by them to the pit-head; that on the 7th October the appellant was discharged by one of the contractors in whose immediate employment he then was; and then that he was out of employment on 8th October, and on 9th October 1903 entered the respondents' employment as a miner to do their work in their pit, his earnings being dependent upon his output of coal.

The question is whether that was or was not continuous employment under the same employer. I should have thought that it was, and that if the man had been in the employment, say, of a father who died in the course of his employment, and the business was taken up by his son, and he kept on the father's workmen, and the miner went on working at the same wages under the son as he had had under the father—I should have regarded that as the same employer. That is the only good sense of the thing, and therefore the meaning of the statute; and when a mine owner has the work done for him by contractors who employ workmen, I should have thought that the employment of anybody by these contractors, to do the work in the mine owner's pit, was employment under the same employer, and that the real injury which the man suffered was deprivation of the work which he had continuously been employed to do for a whole year or approaching a whole year. To arrive at the other conclusion may be con-

[1] Morrison v. Baird & Co., Dec. 2, 1882, 10 R. 271.

forming to the literal interpretation of the statute, but is against the obvious meaning of the Act, and the obvious justice of the thing to the sufferer in the very matter which the Act contemplates and provides that he shall have recompense for.

LORD TRAYNER.—I think the Sheriff is right, and I cannot see how, on a sound construction of the statute (taking the Sheriff's statements of the facts), he could arrive at any other conclusion. The facts are that this man was employed not by the respondents, but by an independent contractor or four independent contractors in the same pit for a period of about twelve months. But the Sheriff's statement excludes the idea that the twelve months could be employment in the service of the respondents. He says that this appellant was out of employment on the 8th of October, and that he "entered" the respondents' employment—that is, he commenced to be the respondents' servant—on 9th October. If he had entered the service of the respondents on the 9th October, it is quite obvious that he was not continuously in their employment prior to that date. The one statement excludes the other. But I think it is worth noticing that the terms of the employment under the contractors and the terms of the employment under the respondents were different in material respects, because the work done by the appellant under a contractor was remunerated by payment of a daily wage, whereas under his employment with the respondents his earnings depended upon his output of coal. So that the two contracts—namely, the contract of service with the contractor and that with the respondents—were not only between different parties, but were also different in their conditions. I do not think there is much difficulty about the construction of the statute. Schedule I., section 1, subsection (*b*), provides that when total or partial incapacity arises from an accident such as we have here described, the workman shall be entitled to compensation not exceeding 50 per cent of his average weekly earnings during the period of twelve months if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer. You cannot take into account employment for twelve months anterior to the accident, or for any period whatever, unless it has been employment under the same employer, and, in my opinion, that means the employer in whose employment the injury has been received for which compensation is claimed. Now, in this case the Sheriff has negatived the suggestion that the employment of the appellant was under the respondents for more than the two or three days he has enumerated. I think this a very hard case for the appellant, but, though hard, I think the necessary outcome is that the Sheriff had no alternative but to reach the conclusion to which he gave effect.

LORD MONCREIFF.—On the questions put to us by the Sheriff, and on the facts found by him, I agree with the majority of your Lordships. The appellant's claim is not made against the respondents as undertakers under the statute. The one question is whether the appellant was throughout in the employment of the respondents prior to 7th October 1903. Now, the Sheriff states as a matter of fact that he was not—that prior to 7th October 1903 he was in the service of various contractors, no doubt in the defenders'

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pit, but in the service of the contractors, and that then a change of employment took place, and that he entered the employment of the defenders for the first time on 9th October 1903. On these facts I think we can only look at the period subsequent to 9th October 1903. Unfortunately this accident occurred on 12th October, after he had only worked two days—but two days in different weeks; and on these facts, and on these questions of law, I do not think we have any alternative but to find that the Sheriff has decided the case rightly.

THIS interlocutor was pronounced:—"Answer the second question in the case in the negative: Therefore affirm the award of the arbitrator, and decern."

ST CLAIR SWANSON & MANSON, W.S.—W. & J. BURNESS, W.S.—Agents.

No. 56.

Dec. 21, 1904. Magistrates of Musselburgh v. Musselburgh Real Estate Co., Limited.

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF MUSSELBURGH, Pursuers (Respondents).—*Guthrie, K.C.—Cullen—D. Anderson.*

THE MUSSELBURGH REAL ESTATE COMPANY, LIMITED, AND ANOTHER, Defenders (Reclaimers).—*Lord-Adv. Dickson—Younger—Armit.*

*Property—Superior and Vassal—Feu-Contract—Title—Boundaries—Sea—"Sea-beach"—Foreshore.*—The burgh of Musselburgh, which was a burgh of barony and regality, held the commonty of the burgh under a charter from the lord superior, which gave the burgh right to the foreshore *ex adverso* on the north. In 1826 the burgh feued a portion of the commonty by a feu-contract, which described the subjects feued as bounded "on the north by the sea-beach."

In a question between the burgh and the singular successors of the original feuars, raised in 1902, as to the ownership of the foreshore *ex adverso* of the ground feued, *held*, on a construction of the feu-contract and in the circumstances of the case, that the foreshore was not conveyed to the feuars by the feu-contract, but remained the property of the burgh.

*Opinions* (*per* the Lord Justice-Clerk and Lord Trayner) that a boundary by the "sea-beach" is not *per se* equivalent to a boundary by the "sea," and gives no right of property in the foreshore. *Opinions contra, per* Lord Young, Lord Moncreiff, and Lord Low, Ordinary.

*Writ—Blank in feu-charter.—Question* as to the competency of filling in by inference from the context a blank in the description of the subjects disponed under a feu-charter.

2D DIVISION. Lord Low.

(SEE *Meiklejohn* v. *Commissioners of Harbour of Fisherrow*, Feb. 19, 1902, 4 F. (J. C.) 41, and *Fisherrow Harbour Commissioners* v. *Musselburgh Real Estate Co., Limited*, Jan. 31, 1903, 5 F. 387.)

The lands or commonty of the burgh of Musselburgh, which was a burgh of barony and regality, were held under a charter of novodamus, dated 25th August 1670, granted by John, Earl of Lauderdale, Lord of the Lordship and Regality of Musselburgh, and Lord Superior of the burgh, and holding the same as vassal under the Crown, in favour of the bailies, councillors, and community of Musselburgh, by which charter there was, *inter alia*, given, granted, and confirmed to the aforesaid bailies, councillors, and community of the said burgh, and to their successors, "communiam dicti burgi infra limites et bondas subtasmentionatas viz. Terras de Duddinstoun et Whythill ex occidentali terras de Whythill, Stanehill, Monktounhall, Inneresk et Pinkie ex australi et terras de Prestoungrange ex orientali prout eadem communia metita et limitata sit et fluctus et affluctus maris

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'lie ebbing and flowing of the sea' ex boreali partibus secundum eorum priorem possessionem et prout dicta communia per incolas dicti burgi possessa fuit." The charter contained a grant of various port and harbour rights in favour of the burgh.

In November 1902 the Provost, Magistrates, and Councillors of Musselburgh raised an action against the Musselburgh Real Estate Company, Limited, and John Downie, contractor, Musselburgh, concluding for declarator "that the pursuers have the sole and exclusive right, title to, and property in (*a*) the foreshore *ex adverso* of that piece of waste ground or sea-green shewn, . . . lying to the north or seawards of the piece of enclosed ground belonging to the defenders, the Musselburgh Real Estate Company, known as Mackinlay's Park, lying within the burgh of Musselburgh." The summons also contained a similar conclusion with reference to an adjacent property also belonging to the defenders called Rosehall, but the questions raised in regard to that property are outside the scope of the present report. There were further conclusions as to the digging and taking away of sand, &c., from the foreshore, which it is unnecessary here to set forth.

The ground known as Mackinlay's Park was situated at the corner of Fisherrow Links formed by the river Esk on the east and the sea on the north, and was held by the defenders, the Musselburgh Real Estate Company, Limited, hereinafter called "the defenders" as vassals of the burgh, being part of the commonty of the burgh under the above-mentioned charter from the Earl of Lauderdale. The foreshore on the north of Mackinlay's Park extended to about 70 acres, and contained valuable deposits of sand and gravel.

The main question raised in the present action, in so far as now reported, was as to whether the description "bounded on the north by the sea-beach" in the defenders' title included this foreshore.

The defenders' title was based on a feu-contract, dated 18th and 19th April 1826, by which the burgh disponed to William and James Aitchison (of whom the defenders were the singular successors) the piece of ground afterwards known as Mackinlay's Park. By this feu-contract "the said Magistrates, Treasurer, and Council having by Act of Council, dated the 7th day of April in the year 1825, granted to the said Messieurs William and James Aitchison, a feu of that piece of ground lying at the east end and situated to the north of the park called Chalmers' Park, and forming part of the Links of Fisherrow, proceeding upon an application from the said William and James Aitchison, the said Magistrates and Council, by said Act of Council, feued to them a part and portion of said ground, to be then afterwards staked off, at the sum of £6 sterling per acre of yearly feu-duty . . . therefore the said Magistrates . . . dispone to and in favour of the said William Aitchison junior, and James Aitchison, and their heirs and disponees whomsoever, heritably and irredeemably, All and Whole the said piece of ground lying at the east end of the Links of Fisherrow, situated to the north of the park called Chalmers' Park, measuring seven acres four falls and three-fourths of a fall x x x* of ground or thereby, and bounded as follows, viz.: —on the east by the [*Blank in Charter*] River Esk, separating the ground hereby disponed from the said river, which bank shall remain open and unfeued not only along the river, but also along by the sea,

* These crosses were in the charter.

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excepting to William and James Aitchison or their foresaids; on the west by the town of Musselburgh's common ground still unfeued; on the south by a stone dike enclosing the ground called Chalmers' Park, and partly by the town's common ground, and on the north by the sea-beach; and it is hereby expressly agreed and stipulated, that if at any time hereafter, either by the receding of the sea or river, or otherwise, the said William and James Aitchison shall take possession of the ground so left, then, and in that case, the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rate of £6 sterling per acre, with free ish and entry thereto from the east and north, and partly on the south by the intended road aftermentioned, together with all right, title, and interest which the said Magistrates and Treasurer, for themselves and in name and behalf foresaid, or their predecessors or successors in office, had, have, or can claim, or pretend to the said piece of ground in all time coming, with priviledge and liberty to the said William and James Aitchison, and their foresaids, of conducting any quantity of water from any part of the said river by open cuts or otherwise, and also liberty to take water from the mill dam or lead below the Sea Mill, by a pipe not exceeding 9 inches in the bore, for any purpose whatever, so as not to be prejudicial to the said Sea Mill or any other waterfall that may be erected or extended on the said mill dam or lead, upon condition always of their conveying the surplus water again into the river within the boundary of their own property, and without stagnation, as the said piece of ground was measured by authority of the said Magistrates and Council by James Hay, land-surveyor,* lying in the parish of Inveresk, regality of Musselburgh, and sheriffdom of Edinburgh, with the teinds, both parsonage and vicarage, of the said piece of ground, and free ish and entry thereto from the bank of the River Esk on the east, and by an intended road running along the west wall of the said park, and which road is not of less breadth than 30 feet: . . . Declaring always, as it is hereby provided and declared, that the said William and James Aitchison shall be bound and obliged, as they hereby bind and oblige themselves and their foresaids, to make payment to the town of Musselburgh, or to their collectors or tacksman, of the shore dues levied or that may be leviable at the harbour of Fisherrow, and of the usual and accustomed shore dues, harbour and tonnage dues upon all vessels carrying grain or other merchant goods that shall be landed or exported from the said ground or the building erected or to be erected on the ground hereby feued if exported from within the

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* "MEASUREMENT of a FEU on Fisherrow Links from the Honble. the Magistrates of Musselburgh to William Aitchison, Esqr., Drumore, bounded on the south by Mr Thomson's Park, on the west and north by a line made by a cut in the turf along the beach, and on the east by a straight line between the north-east angle of Mr Thomson's Park to a stake driven in at the mouth of the River Esk.

| *Scotch.* | | | *Imperial.* | | |
|---|---|---|---|---|---|
| A. | R. | P. | A. | R. | P. |
| 7 | „ | 4¾ | 8 | 3 | 17½ |

"JAMES HAY, Land Surveyor.

"*Musselburgh, 18th April*, 1826."

Upon the back of the above there was a calculation of the feu-duty, which was brought out at £42, 3s. 6¾d., the amount inserted in the feu-contract.

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jurisdiction of the town of Musselburgh . . . to be holden of the said Magistrates, Treasurer, and Council, as representing the community of the said burgh, and their successors in office, in feu-farm, fee, and heritage for ever, for the yearly payment of the sum of forty-two pounds three shillings and sixpence three farthings sterling, in name of feu-duty. . . ."

The pursuers averred that they had from time immemorial, and since the date of the defenders' title, continuously and uninterruptedly possessed and administered the foreshore (in various ways which they specified), as part of the burgh property, and had all along been recognised as proprietors thereof. They further averred that the defenders and their predecessors in title had never possessed the foreshore in any manner of way.

The pursuers pleaded, *inter alia*;—(1) In virtue of the pursuers' title, and the possession had by them under their infeftments, the pursuers had the sole and exclusive right and title to the foreshore mentioned in the summons, and are entitled to declarator to that effect as concluded for.

The defenders denied the pursuers' averments as to possession, and averred acts of proprietorship on their own part over the foreshore.

The defenders pleaded, *inter alia*;—(1) The pursuers' statements are irrelevant. (3) The pursuers' statements so far as material, and in particular their averment regarding possession, being unfounded in fact, the defenders should be assoilzied. (4) The defenders, the Musselburgh Estate Company, being proprietors of the foreshore mentioned in the summons, they are entitled to absolvitor.

On 24th November 1903 the Lord Ordinary (Low) after a discussion in the Procedure-roll, allowed a proof before answer, and on 18th May 1904 proof was led.

The result of the evidence as to the possession of the foreshore is sufficiently set forth in the opinion of the Lord Ordinary.

A question was also raised as to the words to be read into the blank in the description of the eastern boundary in the feu-contract, the facts regarding which are fully stated by the Lord Ordinary.

On 2d August 1904 the Lord Ordinary pronounced decree in terms of the declaratory conclusion of the summons, in so far as regarded the foreshore *ex adverso* of Mackinlay's Park.*

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* "OPINION.—The burgh lands of Musselburgh extend along the seashore for a long distance, and include the foreshore. The original charter conveying the lands to the burgh appears to have been granted by the Earl of Lauderdale in 1670, and what is disponed as the common of the burgh is described as bounded on the north 'by the ebbing and flowing of the sea.' I understand that that grant was subsequently confirmed by royal charter.

"The defenders are proprietors of two properties held in feu from the Magistrates, and adjacent to the seashore, and the question raised in this case is whether the foreshore *ex adverso* of these properties belongs to the pursuers or the defenders? The properties are named respectively Mackinlay Park and Rosehall, and I shall deal with them in that order.

"The original title to Mackinlay Park was a feu-contract, granted by the Magistrates in 1826 to William and James Aitchison. The boundary on the north is described in the feu-contract as being 'the sea-beach,' and when the case was first heard in the Procedure-roll the defenders argued that it was settled that a boundary by the 'sea-beach' was equivalent to a boundary by the 'sea,' and that therefore the foreshore belonged to them.

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The defenders reclaimed, and argued;—The foreshore belonged to the defenders, having been conveyed to them in 1826, and never having been re-acquired by the pursuers. A boundary by the "sea-beach" was equivalent to a boundary by the "sea," and in every case included a grant of the foreshore.[1] The northern boundary was distinctly stated in the deed to be the sea-beach, and it was not competent to explain or modify it by reference either to other boundaries, or to measurements, or to possession. In any event, the eastern boundary was the River Esk, and not its bank, it being wholly incompetent to read into the deed deleted words from a draft.[2] In any case, a "bank" only meant the line separating land and water, and a boundary by the bank of a river was the same as a boundary by the river itself.[3] In a question between subject proprietors the presumption was that the property in the foreshore—like the property in the banks of a river[4]—belonged to the owners of the conterminous

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I was by no means satisfied, in view of the terms of the feu-contract, that in this case a boundary by the 'sea-beach' was the same thing as a boundary by the sea, and further, there were averments of exclusive possession of the foreshore by the pursuers which seemed to me to necessitate inquiry. I accordingly allowed a proof, and I have now to determine the question at issue upon the large body of evidence which has been adduced.

"I shall in the first place again examine the terms of the feu-contract of 1826, which I think I am in a better position to construe now than I was formerly, because I now know the precise situation of the feu and the local conditions.

"The feu is situated at the corner of the Fisherrow Links, which is formed by the River Esk and the seashore,—a fact which, as I shall afterwards shew, appears to me to be of some importance.

"The feu-contract commences by narrating that the Magistrates had, by an act of Council, granted a feu to the Messrs Aitchison, at the rate of £6 per acre of feu-duty, of a portion of the Links of Fisherrow to be 'afterwards staked off.' Then, in implement of the act of Council, the Magistrates disponed to the Aitchisons 'All and Whole the said piece of ground lying at the east end of the Links of Fisherrow, situated to the north of the park called Chalmers' Park, measuring 7 acres 4 falls and ¾ of a fall of ground or thereby, and bounded as follows, viz.:—On the east by the River Esk, separating the ground hereby disponed from the said river, which bank shall remain open and unfeued not only along the river but also along by the sea, excepting to William and James Aitchison or their foresaids; on the west by the town of Musselburgh's common ground still unfeued; on the south by a stone dyke enclosing the ground called Chalmers' Park, and partly by the town's common ground; and on

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[1] Magistrates of Culross v. Dundonald, 1769, M. 12,810; Magistrates of Culross v. Geddes, 1809, Hume's Dec. 554; Leven v. Magistrates of Burntisland, 1812, Hume's Dec. 555; Campbell v. Brown, Nov. 18, 1813, F. C.; Boucher v. Crawford, Nov. 30, 1814, F. C.; Berry v. Holden, Dec. 10, 1840, 3 D. 205, *per* Lord Medwyn, at p. 212; Hunter v. Lord Advocate, June 25, 1869, 7 Macph. 899, *per* Lord Kinloch, at p. 912, 41 Scot. Jur. 513; Lockhart v. Magistrates of North Berwick, Nov. 20, 1902, 5 F. 136; Blyth's Trustees v. Shaw Stewart, Nov. 13, 1883, 11 R. 99; Kerr v. Dickson, Nov. 28, 1840, 3 D. 154, aff. July 18, 1842, 1 Bell's App. 499; Cameron and Gunn v. Ainslie, Jan. 21, 1848, 10 D. 446, 20 Scot. Jur. 139.

[2] Inglis v. Buttery & Co., March 12, 1878, 5 R. (H. L.) 87.

[3] Morris v. Bicket, May 20, 1864, 2 Macph. 1082, 36 Scot. Jur. 529.

[4] Ersk. Inst. ii. 1, 5.

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lands as an accessory.[1] The reference in the feu-contract to landing and exporting goods from the ground disponed supported the view that the grant extended to low-water mark. The acts of possession averred by the pursuers were not proved, or only took place by the consent of the defenders and under reservation of their rights.

Argued for the pursuers;—(1) The town of Musselburgh never parted with the property of the foreshore, or (2) if it had, it had re-acquired it by possession for the prescriptive period. (1) It was not included in the feu-contract. A boundary by the sea-beach was not the same as a boundary by the "sea," and did not convey the foreshore.[2] At least, there was no more than a presumption that the boundaries were equivalent, and in the present case this presumption was displaced by the other terms of the deed, which shewed that the foreshore was excluded from the grant. The measurements (which were taxative, and to which it was competent to refer, the boundaries being

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the north by the sea-beach; and it is hereby expressly agreed and stipulated that if at any time hereafter, either by the receding of the sea or river, or otherwise, the said William and James Aitchison shall take possession of the ground so left, then and in that case the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rate of £6 sterling per acre, with free ish and entry thereto from the east and north.'

"Power is then given to the feuars to convey any quantity of water from the river 'by open cuts or otherwise . . . upon condition always of their conveying the surplus water again into the river within the boundaries of their own property and without stagnation, as the said piece of ground was measured by authority of the said Magistrates by James Hay, land-surveyor . . . with the teinds, both parsonage and vicarage, of the said piece of ground, and free ish and entry thereto by the bank of the River Esk on the east.'

"The measurement given in by Mr Hay has been recovered, and runs thus:—'Measurement of feu on Fisherrow Links from the Honourable the Magistrates of Musselburgh to William Aitchison, Esquire, Drumore, bounded on the south by Mr Thomson's park, on the west and north by a line made by a cut in the turf along the beach, and on the east by a straight line between the north-east angle of Mr Thomson's park to a stake driven in at the mouth of the River Esk.'

"Then the area is given as 7 acres 0 roods 4¾ falls Scotch, or 8 acres 3 roods 17¼ perches imperial, and upon the back there is a calculation of the feu-duty, which is brought out at £42, 3s. 6¾d., the amount which was inserted in the feu-contract.

"I think that the first question is, what was the boundary of the feu riverward, because that has an important bearing upon the boundary seaward. The Esk, I should explain, is at this point a tidal river. The defenders maintain that the property is bounded by the river on the east, just as it is bounded by the sea on the north. That a question in regard to the boundary on the east is possible arises from the fact that in the description of the boundaries there is a blank space left before the words 'River Esk,' and the question is whether any words, and if so, what, are to be read into that space?

"I do not think that anyone could read the context without coming to

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[1] Innes v. Downie, 1807, Hume's Dec. 552; Macalister v. Campbell, Feb. 7, 1837, 15 S. 490; Rankine on Land-Ownership, 3d ed., p. 231.

[2] Smart v. Magistrates of Dundee, Nov. 22, 1797, 3 Pat. App. 606; Todd v. Dunlop, June 8, 1841, 2 Rob. App. 333; Berry v. Holden, 3 D. 205; Smith v. Officers of State, July 13, 1849, 6 Bell's App. 487.

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ambiguous)[1] were in favour of the pursuers' contention, the extent of the foreshore claimed being far greater than the acreage stated in the deed. There was no grant of parts and pertinents. The references to "free ish and entry from the north,"[2] to the bank "along by the sea," which was to remain unfeued, to the land "to be staked off," and to the increased feu-duty to be paid for land left by the receding of the sea, were all unintelligible if the defenders' view were accepted. The pursuers' argument was consistent with the evidence of their uninterrupted possession of the foreshore, and was strengthened by reference to the eastern boundary, which was "the bank of the River Esk" (the words "bank of the" requiring to be read into the blank in the charter in order to make it intelligible). If the feu did not extend down to the river on the east, there was a strong presumption that it did not extend down to the sea on the north. (2) Even if the foreshore had been conveyed by the feu-contract of 1826, it had been

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the conclusion that words 'bank of the' must be read into the blank space, because if these words are read in the important clause which immediately follows is quite intelligible, which is not the case if the blank is not so filled up.

"The draft of the feu-contract has been produced, and both parties referred to it. I confess that I have doubts as to the competency of referring to the draft at all, but, however that may be, it does not seem to me to throw much light on the matter. The draft as originally written ran 'on the east by the bank of the River Esk'; then there had been interlined the words 'a road along,' making the clause run 'on the east by a road along the bank of the River Esk.' Then someone had run a pen through both the original words 'the bank of,' and the interlined words, 'a road along.' Therefore, according to the draft (giving effect to the deletions) the boundary on the east was the River Esk, and the defenders very legitimately found upon that fact. But then the question arises, why was the blank space left in engrossing the deed? It is plain that whoever engrossed the deed did not understand that the river was the boundary. And that is not surprising seeing that the clause which follows is inconsistent with the river being the boundary. That clause is in these terms—'which bank shall remain open and unfeued not only along the river but also along by the sea, excepting to William and James Aitchison or their foresaids.' That is obviously an important clause, because if the boundary was not the river but the river bank, it secured to the Aitchisons what would have been one of the chief advantages of having a river boundary, namely, that no one else could be interjected between them and the river. On the other hand, if the river was intended to be the boundary, the clause was altogether unnecessary and inofficious; and further, it is unintelligible without reading in words which are not there, because there is no previous mention of any bank. Therefore a blank space having been left presumably for words which were intended but were omitted to be filled in, and the context clearly suggesting that the words which were intended to be written in were 'the bank of the,' because these words make the deed intelligible and consistent, I think that the rules of construction require that these words should be read in.

"The defenders pointed out that when the feu-contract was engrossed other blank spaces were left for the area of the feu, and for the feu-duty. These blanks could not be filled in until Mr Hay had made his measure-

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[1] Cooper's Trustees v. Stark's Trustees, July 14, 1898, 25 R. 1160; Stewart v. Greenock Harbour Trustees, Jan. 12, 1866, 4 Macph. 283, 38 Scot. Jur. 148.

[2] Logie v. Reid's Trustees, May 30, 1903, 5 F. 859.

re-acquired by the pursuers by exclusive possession for more than the prescriptive period. The evidence as to possession was all in favour of the pursuers, and was practically uncontradicted.

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At advising,—

LORD JUSTICE-CLERK.—In this case there are two separate properties, the extent of which is in dispute, the question being whether the feuars under their titles have right to the shore *ex adverso* of their feus extending to low-water mark. The first subject to be dealt with is that called Mackinlay Park. In the title the north boundary, being the boundary towards the sea, is described as the "sea-beach." This the defenders maintain is equivalent to a boundary by the "sea," which would carry the right of the defenders over the shore to low-water mark. It is true that in some early

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ments, and as his report is dated the very day upon which the feu-contract was executed by the Magistrates, the blank spaces must also have been filled in on that day. The defenders argued that as these blank spaces were filled in, while the blank space before the words 'River Esk' was not filled in, the inference is that it was not intended to fill in that space at all.

"I think that there are two answers to that argument. The first is, that if the blank space was not to be filled in with words, it ought to have been obliterated by stars or a line drawn along it, and it is to be observed that in the very line above that in which the space in question occurs, the space left for the dimensions of the feu was larger than was required, and the space not required was filled in with stars. In the second place, as I have pointed out, if the blank space was not to be filled up, it would have been necessary, to render that part of the feu-contract consistent and intelligible, to delete or alter the immediately following clause.

"Therefore, although I cannot tell why the blank space in question was not filled in, I think that those words must be read in to which the context so clearly points, the words namely 'bank of the.'

"The defenders, however, say further that, as matter of fact, there was no bank of the river which could be the boundary, because Mr Hay's measurements and the boundary lines defined by him, when taken in connection with old plans, shew that in order to get the area specified it was necessary to go to the high-water mark of the river. I am inclined to accept that view, but it does not lead me to the conclusion desired by the defenders. I think that it is plain enough that the Magistrates did not intend to retain any actual land between the feu and the river, but I also think that the terms of the feu-contract shew that they did not intend that the feuars should have a river boundary with all the rights which would result from such a boundary. The construction therefore which I put upon the contract is, that the feu extended as far as high-water mark of the river and no farther; and that by the bank of the river was meant the space covered at high tide but left dry at low water. That space, it appears to me, might very intelligibly be described as the bank of the river, because it was truly the river bank at low tide, when there was no water but that of the river.

"I have dealt fully with the question of the eastern boundary, because both parties, I think rightly, regarded it as very important, seeing that if the defenders were able to shew that they had a river boundary on the east, it would go far towards establishing that they had a sea boundary on the north, and conversely, if the defenders were cut off from the river, it is more easy to reach the conclusion that they were also cut off from the sea.

"I now come directly to the main question in the case, namely, what in this feu-contract is the meaning and effect of the northern boundary of the feu being described as the 'sea-beach.'

"As I have already indicated, the defenders' contention is that it is

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cases there are *dicta* which may be read as tending in that direction, but it has never been authoritatively decided that the two expressions must be read as meaning the same thing; and giving the best consideration I can to the matter I am unable to come to the conclusion that there is any ground for holding that "sea" and "sea-beach," when used as descriptions of boundary, do mean the same thing. On the contrary, I think that they are essentially different. The word "sea-beach" seems to me to describe a boundary by which the subject given off is bounded to the exclusion of the thing described as the boundary. In other words, that when the subject is said to be bounded on the north by the sea-beach, the line of boundary is reached when the beach is reached, and that to pass on to the beach is to pass the boundary, just as in the case of a boundary described as a certain wall, or a certain building, or a certain strip of plantation, when the wall

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settled that a boundary by the 'sea-beach' is synonymous with a boundary by the sea.

"I do not think that it is necessary to refer in detail to the numerous cases upon this branch of the law. I shall content myself with saying that, while in my humble opinion the well-known exposition of the law given by Lord Kinloch in the case of *Hunter* v. *Lord Advocate* (7 Macph. 899), was somewhat more sweeping and absolute in its terms than the previous decisions altogether warranted, I accept the result of all the authorities as being, that where there is nothing more to indicate the limits of a sea-board property than a description of the boundary as being the 'seashore' or the 'sea-beach,' these terms are regarded as being equivalent to a boundary by the 'sea,' because it is not in the general case to be presumed that the disponer intended to make a reservation which is not expressed, nor, on the other hand, that it was contemplated that it should be possible to interject another proprietor between the disponee and the sea.

"The expressions, however, the 'sea' and the 'sea-beach' are not, according to their ordinary meaning, identical, but, as ordinarily used, they denote different things. If, therefore, it appears from the terms of the grant, or from the terms of the grant when read in the light of the circumstances in which it was made, that the parties in using the term 'sea-beach' did not mean the 'sea,' I do not think that there is any rule of law which prevents effect being given to their intention.

"Turning now from the general question to the precise circumstances of this case, I think that it is plain that the Magistrates had an interest not to part with the property of the foreshore. The foreshore of the burgh lands is of large extent both along the shore and to seaward. The extent to seaward is illustrated by the fact that the part of the foreshore *ex adverso* of the eight acres of Mackinlay Park amounts to from seventy to eighty acres, or about ten times the area specified in the feu-contract. Then the foreshore, especially near the part where Mackinlay Park is situated, has large deposits of valuable sand and gravel from which a considerable revenue is derived, and further, the Magistrates have certain rights of harbour and of levying shore dues and customs. Their interest, therefore, to maintain absolute control over the foreshore appears to me to be plain enough, and accordingly I do not think that there is the same presumption here as in the ordinary case, that in giving out sea-board feus with a boundary by the sea-beach they intended to give the feuar a right of property down to the sea at low water.

"The question, however, depends mainly upon the terms of the feu-contract, to which I now return. The first observation which I have to make upon it is that there is no clause of parts and pertinents. In the next place, it is provided that the ground feued is to be 'staked off.' That might per-

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or building is reached the extreme limit of the feu is reached, or when the plantation is entered the person entering it is past the boundary. The case is not the same as where a river or a road is named as a boundary. The water of a river and the surface of a road are peculiar, inasmuch as there are rights of coterminous and higher and lower heritors over the whole water of the river, and the rights of coterminous proprietors on either side of the road are restricted by the existence of the highway set apart for public traffic. But the *solum* in such cases, unless there is anything to the contrary in the titles, belongs to the proprietors, each up to the *medium filum* subject to the flow of the river and the maintenance and use of the road respectively. But there is and could be no such presumption in the case of lands next the sea, and it appears to me that "sea-beach" as a boundary must be held to exclude the beach itself, for that which is bounded by another thing cannot include the whole of that thing itself.

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haps be read as meaning that the boundaries were to be staked off on the landward sides only, and not towards the river or the sea, but the natural meaning of the expression is that the boundaries were to be staked off on every side. If so, the provision, although by no means conclusive, is important, as is shewn by the case of *Smart* v. *Magistrates of Dundee* (3 Pat. 606, 8 Brown, Ca. in Parl. 119), where considerable weight was given to the fact that the property was described as an 'enclosed yard.'

"The measurement made by Mr Hay I take to have been the staking off of the ground, and the terms of his report, which I have already quoted, seem to me to be important. The boundary on the north is here said to be 'a line cut in the turf along the beach.' That shews that the northern boundary line laid down by Mr Hay was above the seashore and upon the links, otherwise there would not have been turf in which to cut a line. The existing wall upon the north side of Mackinlay Park is very strongly built, and appears to be the original wall which was presumably built soon after the feu was granted, and I think that there is little doubt that it substantially follows the line cut by Mr Hay in the turf. The wall stands upon the Links a little back from the point where the Links slope down to the sand of the shore.

"I may here say that the eastern wall, that towards the river, is not built upon the line laid down by Mr Hay, but is further from the river, with the result that the ground enclosed within the walls is a little less than the extent of the feu. I think, however, that the expert evidence shews that that was almost certainly done on account of the large expense which would have been necessary to build the wall upon the softer ground close to the river.

"I now come to the clause to which I have already referred, following the description of the eastern boundary, to the effect that the bank, 'not only along the river, *but also along by the sea*,' shall remain open and unfeued except to the Aitchisons, and also to the clause immediately following the description of the north boundary, to the effect that if ground is left by the receding of the sea or the river, or otherwise, and the Aitchisons take possession thereof, they shall be bound to pay additional feu-duty.

"The first question is, what is the meaning of the words in the first clause, 'but also along by the sea'? I have already pointed out that the feu lies at the corner of the Links formed by the river and the seashore, and I have also expressed my opinion as to what was meant by the bank of the river. Now, the only natural feature which could be referred to as the bank along by the sea seems to me to be the slope which leads down from the Links to the sand of the shore, which might quite appropriately

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Even if it were otherwise, and it could be held that unless there was something in the context to exclude the idea of "sea-beach" being read as equivalent to sea, it might be so read, I agree with the Lord Ordinary in thinking that in this case that result could not be arrived at. In saying this I feel bound to express my view that there is much to be said against what the Lord Ordinary does in reading into a blank left in the feu-contract certain words, viz., "the bank of the" whereby he gives a limitation to the grant so far as it relates to the east boundary at the River Esk, and founds on this and the words which follow, to which it is difficult to give an intelligible meaning unless some such words are supplied. I do not think it is competent to guess at words where there is a blank, and to read words in, and if the impossibility of reading what immediately follows in an intelligible sense without inserting words is apparent, then I fear the proper course is to disregard them. But, on the other hand, I am satisfied that all the terms of the feu-contract as fully expressed are quite consistent with

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be described as a bank. If that is what was referred to, then all the provisions are rendered intelligible and operative, whereas, if that is not what is referred to, the clauses which I have quoted are unintelligible and inofficious, and might as well have been scored out of the contract, and I need hardly say that that construction is to be preferred which gives meaning and effect to all the language used.

"The conclusion to which I come therefore is, that the foreshore was not included in the feu-contract, but that in order to prevent the feuars from being thereby prejudiced, it was agreed that in no event should anyone else be interjected between them and the river or the sea, but that if land was gained from the river or from the sea the feuars should, if they chose to do so, be entitled to take possession of it upon condition of paying feu-duty at the specified rate.

"In regard to the possession which has followed upon the feu-contract, it is only necessary to say that it appears to me not to have been inconsistent with the views which I have expressed as to the rights of parties. The pursuers have, generally speaking, possessed the foreshore in practically every way of which the subject is capable. It is the case, however, that since 1868 onwards the proprietors of Mackinlay Park have from time to time complained of and objected to the removal of sand and gravel from the foreshore *ex adverso* of their ground. I think, however, that the natural inference from the documentary evidence is that at first the complaints were not based upon alleged property in the foreshore, but upon apprehended injury to land or buildings at Mackinlay Park from inroads of the sea consequent upon removal of banks of sand and gravel from the foreshore. There does not appear to have been any definite claim to the foreshore put forward by the proprietors of Mackinlay Park until 1892, but the correspondence shews that from that date they have claimed right to the foreshore, while the pursuers have maintained that they had no right; that unsuccessful attempts were made to come to a settlement of that and other questions which had arisen between the parties; and that finally the present action was brought.

"Therefore, although the possession alone might not have been conclusive the one way or the other, I repeat that it appears to me to have been certainly not inconsistent with the title as I read it, and I am accordingly of opinion that the pursuers are entitled to decree that the foreshore belongs to them. I am not, however, to be taken as indicating an opinion that the defenders' property does not extend to high-water mark of ordinary spring tides, a question which I understand has been raised in another action."—(His Lordship then dealt with the questions raised as to Rosehall.)

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the reading that "sea-beach" as the boundary meant the line at which the land ended and the beach over which the sea flowed began. One of the stipulations seems very plainly to point to this, for the feu-contract bears that "it is hereby expressly agreed and stipulated that if at any time hereafter, either by the receding of the sea or river, or otherwise, the said William and James Aitchison shall take possession of the ground so left, then, and in that case, the said William and James Aitchison shall pay feu for the said increased quantity of ground at the rate of £6 sterling per acre, with free ish and entry thereto from the east and north." It seems to me that that plainly reads as referring to ground freed from the tide and immediately adjoining the ground for which feu-duty was to be paid at that rate from the first, which was described as "a portion of the Links of Fisherrow," an expression which undoubtedly refers to land, and to land never covered by the ordinary spring tide. To read this clause as referring to ground to be uncovered below low-water seems to me to be quite out of the question.

I do not refer at all to the draft with the interlineations and deletions, as I do not think that it is legitimate to look at drafts of deeds for the purpose of interpreting them or modifying them in any way.

Further, while there may be difficulty in giving its full meaning to what follows the blank in the deed to which I have referred, I think it sufficiently and intelligibly appears that what lay to the north "along by the sea" of what was feued was to remain open and unfeued to any but the Aitchisons, they alone having the right to claim feu northwards, if ground came to be left by the sea, and the burgh not being entitled to interpose any feuars between them and the sea—the feuars to have free ish and entry from the north. These stipulations would have been quite unnecessary had the feuars' right been one covering and not one bounded by the beach.

I do not think it to be necessary to notice what took place when questions were raised as to the removal of sand and gravel by persons authorised by the burgh from the shore to the north. Suffice it to say that the complaints made by the feuars of Mackinlay Park were not complaints of interference with or obstruction of property but of alleged danger to the feu as occupied by them from the shore in front of them being removed. Their first claim to anything else but protection to what they were actually occupying seems not to have been made until 1892.

I am, therefore, of opinion that the Lord Ordinary has rightly decided in favour of the pursuers as regards Mackinlay Park. (His Lordship then dealt with the questions as to Rosehall and continued)—I have not thought it necessary to notice the question of possession, as the case seems to me to turn upon the defenders' titles, and not upon any question of possession. There is in the view I take no need to consider the possession alleged by the Magistrates and Council in the case of Mackinlay's Park, as the title of the defenders does not give them the shore.

On the whole matter, I am of opinion that the decision which the Lord Ordinary has given is right, and ought to be adhered to, and I would move your Lordships accordingly.

LORD YOUNG.—I concur in the result of the judgment proposed by your

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Lordship, and think it enough to say that I agree with the Lord Ordinary in the reasons which he has stated.

LORD TRAYNER.—The pursuers of this action seek a declarator that they have the sole and exclusive right to and property in the foreshore *ex adverso* of two separate properties belonging to the defenders, known respectively as Mackinlay Park and Rosehall. The defenders on the other hand maintain that the foreshore belongs in property to them. Both parties found in support of their several contentions upon their titles and the possession following thereon. In my opinion the determination of the question at issue depends entirely on the construction and effect of the defenders' titles, and is not (as the case stands) affected by the possession had on one side or the other. But this matter of possession bulked so largely in the discussion and occupies so prominent a place in the evidence that it cannot be left unnoticed. I therefore deal with that matter first in order to disembarrass the case of it.

The defenders maintain that their infeftment covers the foreshore. If that is so, then their infeftment gave them (in the words of the old instrument of sasine) real, actual, and corporeal possession of the subject. They needed no possession beyond that to perfect and complete their right. But if the defenders' title did not cover the foreshore, their possession otherwise will not avail them. They have not had such possession of the foreshore as would by prescription confer a right to it as part and pertinent of their subject, even if their title was one "with parts and pertinents," which it is not. So far therefore as the defenders' case is concerned, their title is the only criterion of their right.

Again, the pursuers by their titles had undoubted right to the foreshore and have it still, unless they divested themselves of it in favour of the defenders' authors. Here again we are sent back upon the defenders' title to see what was disponed to them. The pursuers, however, argued, as I understood, that even if the foreshore had been conveyed by them to the defenders' authors, they had by exclusive, uninterrupted, and adverse possession for more than the prescriptive period re-acquired right to the foreshore. I think there is no sufficient proof of such adverse possession as would reinvest the pursuers.

The question therefore between the parties is narrowed down to this, what was conveyed by the pursuers to the defenders' authors? In dealing with this question it is necessary to consider separately the title to Mackinlay Park and to Rosehall, and in regard to the former of these properties the question at issue, as I have above stated, is further narrowed by the fact that the parties only differ (at least in the present process) as to one boundary of the subject conveyed—namely, the boundary to the north. In deciding this question of the northern boundary the Lord Ordinary finds some aid in a consideration of the description of the eastern boundary, and by supplying some words in a blank left in that description in the conveyance to the defenders' authors. I cannot concur with his Lordship in thinking that the Court may supply the missing, or supposed to be missing, words; but I say no more on that subject, because the eastern boundary, whether well or ill defined, is not here in question. What we have to

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decide is, what is the northern boundary of the defenders' feu? It is thus given in the feu-charter—"On the north by the sea-beach." The pursuers say that such a boundary does not carry any right beyond ordinary high-water mark, and does not therefore include the foreshore. The defenders maintain that a boundary by the "sea-beach" is synonymous with a boundary by the "seashore" or "by the sea," and includes the foreshore. The Lord Ordinary has given effect to the view urged by the pursuers, and I agree with him.

I think it has never yet been decided in express terms that a boundary "by the sea" and one by the "sea-beach" are synonymous or are equivalents. There have been no doubt opinions to that effect expressed by eminent Judges, from whom I venture to differ with great diffidence. But, as I think the question is still an open one, I feel bound to state my own view. It appears to me that the descriptions "sea" and "sea-beach" are not only different in expression but apply to subjects which are distinct and different in themselves. "Sea" and "sea-flood" may be the same, but "sea" and "sea-beach" in my opinion are not. These two things are so distinguished and distinguishable that in ordinary parlance they could never be confounded; and they have not (as yet at least) acquired any technical meaning differing from their ordinary meaning. Their character is different, for the one is water and the other is land. As a boundary one of them is fluctuating, varying with the rise and fall of the tide; the other is practically fixed. Accordingly I am unable to treat "sea" and "sea-beach" as synonymous or convertible terms. If they are not, then what does the boundary "by the sea-beach" confer on the defenders. The ordinary rule is that the thing by which a subject is bounded is excluded from the subject conveyed. It is not part of the subject conveyed, but is outside that subject. Applying this rule, the defenders' property extends to the sea-beach, not beyond it. If the northern boundary had been a wall three-quarters of a foot wide, no one would have suggested that the wall was covered by the conveyance. It makes no difference to my mind that the boundary is three-quarters of a mile broad—that it is a stretch of sand and not a wall of stone and lime. The defenders reach their boundary—that is the limit of their right—when going north they reach the beach. This I take to be the sound construction of the conveyance to the defenders' authors.

But I think there is a plain indication in that conveyance that what I regard as its legal construction is in accordance with the intention of the parties to it. In that part of the dispositive clause which is made somewhat difficult of interpretation through the want of some words bearing upon the eastern boundary, there is a statement that a certain bank "not only along the river" (*i.e.*, the east) "but also along by the sea" (*i.e.*, the north), "shall remain open and unfeued," but that the defenders' authors were to have a preference in the event of feuing. I think this indicates that ground which then was or might become suitable for feuing lay between the ground then conveyed and the sea, and that is inconsistent with the idea that the sea itself was the boundary on the north. I do not lay much stress on this, but it is worthy of being noticed. My opinion, agreeing with the Lord Ordinary, is that the foreshore *ex adverso* of

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Mackinlay Park was not conveyed by the pursuers to the defenders' authors, and that it is still vested in them. (His Lordship then dealt with the question as to Rosehall.)

LORD MONCREIFF.—As I read the Lord Ordinary's interlocutor he has only disposed of the first two declaratory conclusions of the summons, which are to the effect that the pursuers have the sole and exclusive right, title to, and property in (*a*) the foreshore *ex adverso* of Mackinlay's Park; and (*b*) the foreshore *ex adverso* of Rosehall, both belonging to the defenders the Musselburgh Real Estate Company, Limited. The remaining conclusions of the summons may have to be disposed of either by the Lord Ordinary or by this Court, but in the meantime I shall deal only with those conclusions which the Lord Ordinary has disposed of.

To deal first with the case of Mackinlay's Park, the first title to it is a feu-contract in favour of William and James Aitchison, dated 18th and 19th April 1826. The feu granted bears to be bounded "on the north by the sea-beach." Now, I may say at once that in a question between subject-superiors and their vassals I am of opinion that, in the absence of distinct conditions in the title or presumptions arising from the natural formation of the ground, or adverse possession which go to limit the grant, a boundary by "the sea-beach" or "seashore" is equivalent to a boundary by "the sea," and gives the feuar a right of property in the foreshore down to low-water mark subject always to public uses. The great bulk of authority is in favour of this view, beginning with the two cases of *Culross*[1] and ending with *Hunter* v. *Lord Advocate*.[2]

It is true that in some of the cases cited the observations of the Judges were *obiter* in this sense, that the point was conceded, but the opinions are of importance, because the distinguished Judges who delivered them held the point to be settled. I may refer to the case of *Campbell* v. *Brown*,[3] in which the boundary of one of the feus was "the seashore," and particularly to the opinion of the first Lord Meadowbank. In the case of *Boucher* v. *Crawford*[4] the boundary was "the sea on the north." In that case the Lord Justice-Clerk, referring to the case of *Culross*,[1] said:—"The Magistrates had there granted a feu bounded by the seashore; a public road intervened, but by certain operations on the shore Geddes was going to make a garden, and the argument was that a distinction was to be made between being bounded by the sea and the seashore. That argument was rejected." His Lordship also refers to the case of *Campbell* v. *Brown*,[3] and says—"Even there the property feued was limited in point of extent, yet your Lordships were clear that he was entitled to make what encroachment he chose on the sea. This case appears to me to be imperative. The only doubt was whether any of the operations would interfere with the right of harbour, but it is evident they would not have that effect."

The cases relied on as against the view that a boundary by "the seashore" carries with it a right of property in the foreshore seem to me to have been all decided upon what were, or were considered to be, specialties.

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[1] (1) 1769, M. 12,810, and (2) 1809, Hume, 554. [2] 7 Macph. 899.
[3] Nov. 18, 1813, F. C. [4] Nov. 13, 1814, F.C.

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In *Smart* v. *Magistrates of Dundee*,[1] the boundary was "the sea-flood," a term not so favourable to the feuar as "the sea" or "the seashore," and it was held not to comprehend the seashore. But in that case, in addition to the ground being within the limits of a burgh which possessed extensive rights of harbour and other rights in the shore, the ground feued was described as being an enclosed yard. Again, in *Berry* v. *Holden*[2] the boundary was "the flood-mark," and this was held not to include the shore uncovered by the tide. But in that case also the superior had rights of harbour, piers, and wharfs, and those peculiarities, coupled with the fact that the boundary was "flood-mark" and not "shore," were held sufficient for the decision of the case against the feuar. The next case cited is the case of *Todd* v. *Dunlop*,[3] in which the boundary was the "sea-flood," and the case was held to be ruled by the case of *Smart*.[1]

It is to be observed that all these cases were in the view of the Court which decided *Hunter* v. *Lord Advocate*,[4] in 1869, in which, notwithstanding that the boundary was "the sea-flood," the Court decided that the lands being situated on the banks of a navigable river, the superior had no title to alluvial ground subsequently deposited between the feu and the sea.

The only other class of case to which I need refer is that of which the *Officers of State* v. *Smith*[5] is an illustration, in which it was held that the feuar's operations on the shore were incompatible with the public uses of the shore.

I have only to add that I find in the first edition of Bell's Prin., sec. 154, published in 1829, the law is stated to be as I understand it; and in the latest edition, sec. 643, the law is stated in similar terms.

I cannot say that the *dicta* in all the cases can be easily reconciled, but I entertain little doubt that the great balance of judicial authority is in favour of the view which I have expressed.

I have been speaking hitherto on the general question without reference to the specialties of the present case, and I now proceed to consider whether there is anything in the titles of either property to take the case out of the general rule.

I shall deal first with the case of Mackinlay's Park. The pursuers represent a burgh which has certain rights of harbour, as in the cases of *Smart*[1] and *Berry*.[2] But it is to be observed that the pursuers sue as Magistrates and not as Harbour Commissioners. Further, they do not maintain that it was beyond their power to grant right to the foreshore, or that the interests of the harbour are affected, although they do found upon their right of harbour, as making it improbable that they should make such a grant.

I may say generally that I agree with the Lord Ordinary as to the terms of the title. I think there is intrinsic evidence that notwithstanding the description of the north boundary as being "the sea-beach," it was not the intention of the Magistrates of Musselburgh to make a grant of anything beyond at most high-water mark. As I read the description of the boundaries of the ground, there must have been at the date of the grant a fringe of ground along the side of the river Esk and along the seashore which it

[1] 3 Paton's Appeals, 606. [2] 3 D. 205. [3] 2 Robinson's Appeals, 333.
[4] 7 Macph. 899. [5] 8 D. 711, 6 Bell's App. 487.

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was not the intention of the granters of the deed to convey to their feuars at that time—a bank, however, which admitted of being feued, and which the town undertook not to feu except to William and James Aitchison. Again, it was provided that, if ground was gained from the sea by alluvium, the feuars should pay feu-duty for the increased quantity of ground at the rate of £6 per acre. These conditions are somewhat confused, but I take their meaning to be this, that the feuars should be entitled on payment of the feu-duty named to a feu, not only of the fringe of ground which I have mentioned, but of ground gained by alluvium from the sea—a provision which is not consistent with the idea that the feuars had an unqualified right of property down to low-water mark.

Again, the title bears that the feuars are to have free ish and entry from the north, which would not have been necessary if they had been bounded by the sea on the north. I therefore am inclined to hold that, apart from the proof of possession, there are specialties in this case sufficient to interpret the boundary by "the sea-beach" in a sense adverse to the defenders' claim.

In regard to possession, it is sufficient to say that while possession of the foreshore by the pursuers or those in their right may not have been enough to enable them to prescribe against their own grant, the evidence of possession is considerably stronger in favour of the town than in favour of the defenders, and helps to interpret the grant. It is true that there is evidence that since 1868 the feuars or their agents repeatedly complained of sand and gravel being removed *ex adverso* of their feu. But I agree with the Lord Ordinary that these complaints mainly related to damage caused or apprehended to the land occupied by the feuars. On the whole matter, I am of opinion that the Lord Ordinary's judgment in regard to the Mackinlay Park is right. (His Lordship then dealt with the questions relating to Rosehall.)

THE COURT adhered.

H. HUME M'GREGOR, S.S.C.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

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Dec. 21, 1904.* Tough v. Macdonald.

CHARLES TOUGH AND OTHERS, Pursuers.—*M'Lennan—Craigie.*
WILLIAM KID MACDONALD AND ANOTHER, Defenders.—*Macphail.*

*Process—Reclaiming Note—Leave to reclaim where earlier reclaiming note refused as incompetent—Administration of Justice and Appeals Act*, 1808 (48 *Geo. III. cap.* 151), *sec.* 16.—Defenders, against whom decree had been pronounced in the Outer-House, presented a reclaiming note, to which was appended a copy of the closed record in a previous action between the same parties, instead of the closed record in the action. Copies of the wrong record were also boxed with the boxing copies of the reclaiming note. The reclaiming note was refused as incompetent, in respect of the failure to box copies of the closed record. The defenders then presented a minute to the Lord Ordinary, craving leave to reclaim under sec. 16 of the Administration of Justice and Appeals Act, 1808. The defenders stated that the failure to box copies of the record had arisen through the mistake or inadvertency of the pursuer's printers in supplying copies of the wrong record.

The Lord Ordinary (Kyllachy) *granted* leave to reclaim.

* Decided Nov. 24, 1904.

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OUTER HOUSE.
Ld. Kyllachy.

IN an action at the instance of Charles Tough and others, against William Kid Macdonald and another, the Lord Ordinary (Kyllachy), on 8th June 1904, granted decree in terms of the conclusions of the summons, and found the pursuers entitled to expenses.

The defenders presented a reclaiming note, but instead of the closed record in the action there was appended to the reclaiming note a copy of the closed record in an earlier action between the same parties. Copies of the wrong record were also appended to the boxed copies of the reclaiming note.

On 15th November 1904 the Second Division, proceeding under sec. 18 of the Judicature (Scotland) Act, 1825, pronounced this interlocutor:—"Having heard counsel for the parties on defenders' reclaiming note against Lord Kyllachy's interlocutor of 8th June 1904—in respect that defenders have failed to box along with the reclaiming note copies of the record in the action, refuse the reclaiming note as incompetent: Find the pursuers entitled to additional expenses, and remit."

The defenders then presented a minute to the Lord Ordinary under sec. 16 of the Administration of Justice and Appeals Act, 1808,* craving leave to reclaim.

The minute set forth:—The defenders instructed their printers to print the reclaiming note against the Lord Ordinary's interlocutor of 8th June 1904, and to append the closed record, which they would obtain from the pursuers' printer, who, according to the ordinary practice, had printed the boxing copies of the closed record at the time the record was closed, and had meantime retained them to await a reclaiming note, if any, by either party. At the same time the defenders' agents wrote to the agents of the pursuers a letter requesting the pursuers' agents to instruct their printers to deliver the boxing copies of the record to the defenders' printers when they sent for them. The pursuers' agents replied that they had so instructed their printer. The defenders' printers applied to the pursuers' printer for the boxing copies accordingly, and received from him what purported to be the closed record in the action. The reclaiming note was thereupon printed, and was boxed and lodged on 21st June 1904 with copies of the record so supplied appended thereto. It was not again seen by the defenders or their agents until the case was called in the Short Roll of the Second Division on 4th November 1904, when it was discovered that the record which had been boxed to their Lordships was not the closed record in the present action. The case was continued in the roll of the Second Division till 15th November 1904, when the reclaiming note was dismissed as incompetent. What had been delivered by the pursuers' printer to the defenders' printers were copies of the closed record in an earlier action between the same parties, before the same Lord Ordinary. The record in that

* The Administration of Justice and Appeals (Scotland) Act, 1808 (48 Geo. III. c. 151), enacts, sec. 16,—"If the reclaiming or representing days against an interlocutor of a Lord Ordinary shall from mistake or inadvertency have expired, it shall be competent, with the leave of the Lord Ordinary, to submit the said interlocutor by petition to the review of the Division to which the said Lord Ordinary belongs; but declaring always that in the event of such petition being presented, the petitioners shall be subjected in the payment of the expenses previously incurred in the process by the other party."

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action was closed on 28th February 1903, and after discussion and the pronouncing of an interlocutor disposing of part of the case, and making a remit, the parties came to terms and settled the action in the summer of 1903. The pursuers' printer, by mistake or inadvertence erroneously furnished copies of the record in that action for boxing instead of those which the pursuers' agents had instructed him to supply.

In support of their motion for leave to reclaim, the defenders cited the undernoted authorities.[1]

The pursuers argued;—Leave to reclaim should be refused. The reclaiming days had not expired from "mistake or inadvertency" within the meaning of sec. 16 of the Act of 1808. It was incompetent for the Lord Ordinary to grant leave to reclaim after the Inner-House had written upon a reclaiming note and pronounced a final interlocutor.

On 24th November 1904 the Lord Ordinary pronounced this interlocutor:—"Having considered the minute for" the defenders, "and heard counsel, grants leave to reclaim, as craved."*

On 29th November 1904 the defenders presented a second reclaiming note, and on 8th December, in Single Bills, moved that the cause should be sent to the roll.

The pursuers opposed the motion, but in deference to a suggestion from the bench withdrew their objection.

THE COURT pronounced this interlocutor:—"Appoint the case to be put to the roll on condition of the reclaimers paying the expenses up to this date."

MILLER & MURRAY, S.S.C.—LINDSAY, HOWE, & Co., W.S.—Agents.

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Dec. 21, 1904. Mailler's Trustees v. Allan.

JOHN M'NEILL AND OTHERS (Mailler's Trustees), Petitioners.—*Mackenzie, K.C.—Constable.*

MARGARET PATON ALLAN AND OTHERS, Minuters.—*C. D. Murray.*

*Charitable Trust—Settlement of Scheme—Church—Union of dissenting churches—Ex officio trustees—Bursary.*—A minister of the United Presbyterian Church, who died in 1869, by his settlement appointed certain trustees to hold and administer the residue of his estate as an endowment for bursaries for students who were studying for the ministry of the United Presbyterian Church. Among the trustees appointed were the ministers of

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[1] Mills v. Hamilton, June 6, 1829, 7 S. 716; Magistrates of Leith v. Lennon, Nov. 23, 1875, 3 R. 152; Steedman v. Steedman, March 19, 1887, 14 R. 682; Watt's Trustees v. More, Jan. 16, 1890, 17 R. 318.

* "OPINION.—I think that the theory of the statutory enactment must be held to be that a reclaiming note not presented within the reclaiming days or otherwise irregular is no reclaiming note at all. In the same way if such reclaiming note has on presentment been refused as incompetent, that refusal simply ascertains that there has been no valid reclaiming note. I take it therefore that the position is the same as if a reclaiming note had not been presented, or, being presented, had been put aside as a nullity. In other words, Mr Macphail is in the position of having hitherto presented no reclaiming note against my judgment. Therefore having in view the opinions expressed in the case of *Steedman*, and apparently indorsed in the case of *Watt*, I see no reason why I should not allow Mr Macphail's client to present a new reclaiming note, leaving it to the Division to deal with it as it thinks fit."

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certain churches in the United Presbyterian Church and their successors in these several churches *ex officio*.

In 1900 the United Free Church was formed by the union of the United Presbyterian Church with a majority of the Free Church.

In a petition for the settlement of a scheme for the administration of the trust, *held* (1) that the ministers of the churches named by the truster, and since 1900 belonging to the United Free Church, and their successors in office, were entitled to act as trustees; and (2) that the bursaries fell to be awarded to students for the ministry of the United Free Church.

*Observations* on the *General Assembly of the Free Church of Scotland* v. *Lord Overtoun*, H. L., present vol. p. 1, and L. R. [1904], A. C. 721.

*Charitable Trust—Settlement of Scheme—Trustees—Meetings—Voting—Quorum.*—A proposed scheme for the administration of a charitable trust, under which there were four *ex officio* trustees, contained this article,—"At all meetings two of the trustees shall be a quorum. . . . All questions to be determined by a majority of those present. The chairman to have a second or casting vote in addition to his deliberative vote."

The Court *sanctioned* the article, but *altered* the word "two" into "a majority," in respect that if the clause were sanctioned as it stood the chairman might do what he liked if only two trustees were present.

*Charitable Trust—Settlement of Scheme—Accounts—Audit.*—The Court *refused* to sanction an article in a proposed scheme for the administration of a charitable trust under which the trust accounts were to be audited by the trustees themselves.

*Charitable Trust—Settlement of Scheme—Trustees—Powers.*—The Court *refused* to sanction an article in a scheme for the administration of a charitable trust conferring extensive powers of selling, leasing, borrowing, &c., on the ground that the trustees either had the power at common law or must make special application to the Court when circumstances made the exercise of the power necessary.

*Charitable Trust—Settlement of Scheme—Bursary.*—A truster left the residue of his estate for the endowment of bursaries restricted to students born in the counties of Perth or Kinross. The Court *refused* to sanction an article in a proposed scheme for the administration of the trust under which the trustees were to be empowered to confer the bursaries on students not born in Perth or Kinross, should there be no applicant who was born in either of these counties.

The truster further provided,—"No student when he gains a bursary shall be entitled to hold it longer than one year, and in order to retain it he must compete and gain it in each year."

The proposed scheme contained an article under which the bursaries were to be tenable for the whole of the student's curriculum, provided that in each year he passed certain of the University examinations for the degree of M.A.

The Court *refused* to sanction the article.

2D DIVISION.

THIS was a petition for the settlement of an amended scheme for the administration of the endowment held under the holograph deed of settlement (dated 14th March 1869) of the late Rev. James Whyte Mailler, United Presbyterian minister, Huntly, as a trust for bursaries for students in Arts at a University, who were studying for the ministry of the United Presbyterian Church.

The questions raised were (1) as to whether the purpose of the trust had failed in consequence of the United Presbyterian Church having in 1900 been merged in the United Free Church.—See *General Assembly of the Free Church* v. *Lord Overtoun*[1]; and (2) as to

[1] Aug. 1, 1904, H. L., present vol. p. 1, L. R. [1904], A. C. 721.

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whether, assuming that the trust had not failed, certain details of the scheme were such as the Court ought to sanction.

The truster, who died on 1st May 1869, by his settlement conveyed his whole estate, heritable and moveable, to the trustees therein mentioned. The nomination of trustees was in the following terms:—"I . . . do appoint and constitute the following persons as trustees to carry out the provisions of my will or testament, and I hereby nominate the same, namely, Mr John M'Neill, of William Frew & Sons, Perth; Mr Forrest Frew, of William Frew & Sons, Perth; Mr David Fleming, surgeon, Bridgend, Perth; the Rev. James M'Cowan, minister of North U.P. Church; the Rev. Thomas Miller, minister of South U.P. Church; the Rev. Alexander Henderson, minister of East U.P. Church. The above three clergymen have their charges in Perth, and their successors in their several charges shall be trustees *ex officio*. Along with the aforesaid I also nominate the Rev. Scott, U.P. minister, Logiealmond; the Rev. William Marshall, D.D., U.P. minister in Coupar-Angus, and clerk of the U.P. Presbytery of Perth, and his successors in said clerkship, shall be a trustee *ex officio*."

After bequeathing certain legacies, the testator directed:—"After paying off these legacies the trustees above mentioned shall hold all my property for the purpose of founding or forming a bursary, which shall be called the 'Mailler Bursary.' This bursary shall be open to competition only to students studying for the ministry, and the competition shall be restricted to students born in the counties of Perth and Kinross—students residing within these counties, but not born therein, shall have no right to compete. But students born in the counties, although residing elsewhere, shall have a right to compete. No student shall be qualified to compete unless he belong to the United Presbyterian Church, and by the term 'students' I hereby understand and declare that they must be young men studying for the ministry of the United Presbyterian Church."

The settlement further set forth that the available annual sum "may be estimated between £30 and £40. Whatever sum is at the disposal of the trustees, said annual sum of rental clear and free is to be divided into bursaries of £10 each. . . . When the rental can afford four £10 bursaries, one bursary is to be offered for competition to students entering college for the first year; a second is to be offered to students entering college for the second year; a third to those entering the third year; a fourth to those entering the fourth year. When the rental can only afford three bursaries, these shall be offered for competition to students entering college for the first, second, and third years, and one bursary shall be allotted to each year's class of students; if the rental can afford only two bursaries, one of them shall be allotted for competition to the students entering the college for the first year, and the other shall be granted on the same terms to the students entering college for the second year; if the rental can only afford one bursary of £10 it shall be given for competition to the students entering college for the first year. No student when he gains a bursary shall be entitled to hold it longer than one year, and in order to retain it he must compete and gain it each year. The particular time of year when the competition should be held is left to the discretion of the trustees, all minor details regarding the mode and manner of conducting the competition for the bursaries is left to the wisdom of the trustees." The truster then offered a "suggestion" as to the subjects of examination for each

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year's bursary, which was based on the lines of the ordinary four years' course in Arts usually followed in the Scottish Universities at the date of the deed.

The petition, which was presented on 5th March 1903, set forth: The trustees nominated in the settlement duly accepted office and entered on the management of the trust. The estate consisted of heritable property in Perth and in Milnathort, and £37, 1s. 5d. of moveable estate. In consequence of payment of Government duties and of the legacies left by the testator and of repayment of a sum borrowed in order to put the heritable property into good order, it was not until 1883 that the trustees found themselves in a position to establish the bursaries contemplated by the testator.

"In administering the scheme in accordance with the directions of the testator, the trustees experienced great difficulty in finding candidates for the bursaries, the difficulty being partly due to the smallness of the bursaries in comparison with other bursaries offered by the Church, and partly to the limited area from which students were drawn, while it was latterly also enhanced by a change in the University curriculum from four years to three years with a preliminary examination. In consequence of these difficulties, the trustees found that a considerable surplus income accrued from year to year, which they invested from time to time." The total value of the trust-estate at the date of the petition was £1623, 2s. 1d. "The free revenue for the past year amounted to £67, 6s. 8d., but this revenue cannot be maintained without a considerable sum being spent upon the improvement of the heritable property in Perth, which is very much out of repair.

"On account of the partial failure of the scheme, the trustees have for some time past contemplated approaching the Court for the purpose of getting it amended; but they delayed doing so on account of pending negotiations for the union of the Free and the United Presbyterian Churches. Partly in consequence of that union, and partly by the death or removal of the original trustees from their charges, considerable changes have taken place in the membership of the trust. Of the petitioners two, Mr M'Neill and Mr Frew, were original trustees. Mr Carruthers is the successor of Mr M'Cowan in the North United Presbyterian Church, now the North United Free Church, Perth; Mr Addie is the successor of Mr Miller in the South United Presbyterian Church, now called the Wilson United Free Church, Perth; and Mr Crawford is the successor of Mr Henderson in the East United Presbyterian Church, now the East United Free Church, Perth. The union of the Churches made considerable changes in the constitution of the United Presbyterian Presbytery of Perth. At the date of the union it consisted of twenty-three charges, but by the union seven of these were transferred to other presbyteries, while the remaining sixteen were united with twenty-two charges formerly belonging to the Free Church to form the United Free Church Presbytery of Perth. At the date of the union the clerk of the United Presbyterian Presbytery of Perth was the Rev. John C. Ingles, Crieff United Presbyterian Church, whose charge was transferred to the Presbytery of Auchterarder, and thereafter the petitioner Mr Rainnie was appointed clerk of the United Free Church Presbytery of Perth, and has since acted as a trustee.

"In consequence of these changes it is desirable to have it judicially declared that the trustees, now acting as successors in the

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charges and offices mentioned by the testator, have the right to do so, and that the bursaries are open to United Free Church students. In any case it is necessary that the scheme of administration laid down by the testator should be amended by adapting it to the new University curriculum, and by providing for the disposal of the trust income in the event of there not being sufficient candidates for bursaries from the limited class specially mentioned by the testator. It is also necessary, in view of the state of the heritable property belonging to the trust, that the trustees should have full power to effect improvements in the same. The trustees have accordingly, after careful consideration, drawn up an amended scheme for the administration of the endowment, which is printed in the appendix hereto."

The articles of the scheme in so far as material to the present report are given below,* the words within brackets being the words

* "2. The following parties, hereinafter called 'the trustees,' shall act as trustees under the said deed of settlement:—John M'Neill, Esq., Balhousie House, Perth; Forrest Frew, Esq., 2 King James Place, Perth; the Rev. James W. D. Carruthers, minister of the North United Free Church, Perth, and his successors as ministers in said church; the Rev. John Addie, M.A., minister of the Wilson United Free Church, Perth, and his successors as ministers in said church; the Rev. Thos. Crawford, B.D., minister of the East United Free Church, Perth, and his successors as ministers in said church; the Rev. John Rainnie, M.A., clerk of the United Free Church Presbytery of Perth, and his successors as clerk of said presbytery. On the death or resignation of the said John M'Neill or Forrest Frew, the vacancy thus occasioned among the trustees shall not be filled up.

"4. At all meetings [two] *a majority* of the trustees shall be a quorum, and at each meeting the trustees shall appoint a chairman. All questions shall be determined by a majority of those present. The chairman shall have a second or casting vote in addition to his deliberative vote. All deeds and other writings *authorised or approved of by the trustees* signed by two of the trustees shall be held to be validly executed."

"6. The trustees shall cause full accounts to be kept of the capital, income, and expenditures vested in and expended by them under this scheme. Such accounts shall be kept for each year from the 1st day of January to the 31st day of December, and the same shall be audited by [the trustees or by any one or more of them to whom the trustees may remit the audit, or by] a professional auditor to be appointed by the trustees. . . ."

[7. Gave the trustees extensive powers of feuing, selling, leasing, borrowing, improvement of heritable property, and investment.]

"9. The trustees shall establish bursaries to be called 'The Mailler Bursaries' to be awarded to students for the ministry in the United Free Church of Scotland, born in either of the counties of Perth or Kinross. Applicants for a bursary must either (*a*) have passed the University Preliminary Examination in Arts, or (*b*), have passed in subjects of that examination which will entitle them to attend two classes of the M.A. curriculum in the session subsequent to their application. In the event of there being more than one applicant, those who have the qualification (*a*) above mentioned, shall be preferred to those having the qualification (*b*) above mentioned; and in the event of there being more than one applicant equally qualified, the bursary shall be awarded after examination in such subjects as the trustees may fix. The bursaries shall be offered at such times as the trustees may from time to time appoint, and shall each be of such value as the trustees may in their discretion decide, *and* will with the

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deleted, and the words in italics being the words added, under the judgment of the Court, *infra*, p. 337.

The petition was intimated to the Lord Advocate in terms of the Trusts (Scotland) Act, 1867, and was served upon James A. Dalmahoy, W.S., Edinburgh, Secretary of the College Committee of the United Free Church, as representing said committee.

The Court remitted the petition to Mr Charles Young, W.S., to inquire and report, and a report by Mr Young was laid before the Court.

A minute was thereafter, on 23d May 1904, lodged on behalf of Margaret Paton Allan and others, who stated that they were the next of kin and heir-at-law of the truster.

The minuters maintained that the purposes of the trust had failed and had become impossible of fulfilment, and that if approval were to be granted to the proposed scheme, it would alter the terms and scope of the bequest, and divert its benefits to purposes and recipients never intended or contemplated by the testator by making the United Free Church the beneficiaries instead of the United Presbyterian Church, to which body the testator belonged, and of which he was a minister.

Argued for the petitioners;—The purposes of the trust had not failed. The United Presbyterian Church had received a large number of new members; it had modified the boundaries of certain of its Presbyteries; and it had changed its name; but none of these changes, nor all combined, altered its substantial identity. The case was a very clear one for the application of the doctrine of *cy-près*,[1] if indeed it was necessary to appeal to that doctrine. The decision of the House of Lords in the *Free Church* case[2] had no bearing. There was nothing in that decision to suggest that the United Presbyterian Church had ceased to exist.

The minuters argued that the effect of the union was that the United Presbyterian Church had ceased to exist.[3]

At advising,—

LORD JUSTICE-CLERK.—Having considered this petition I have come to the conclusion that there is no good reason why a scheme for the carrying out of the testator's wishes should not be adjusted at the present time. It is true that the amalgamation of a part of the Free Church with the United Presbyterian Church has led to differences and litigation as between the

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amount of bursaries then current, exhaust the free annual income of the trust-estate; [and] *such bursaries* shall be tenable for [the whole or remainder of the student's curriculum in Arts, provided he in each year passes the examination for the degree of M.A. in two subjects, or otherwise satisfies the trustees that he has made reasonable progress in his studies.] *one year, but the holder thereof may compete for and gain it for a succeeding year.* . . . [Should there in any one year be no applicant for a bursary the trustees may award it to a student recommended by the College Committee of the United Free Church of Scotland, although he may not have been born in either of the counties of Perth or Kinross.]"

[1] Governors of Mitchell's Hospital, Feb. 27, 1902, 4 F. 582; Trustees of the John Reid Prize, July 11, 1893, 20 R. 938; Trustees of the Carnegie Park Orphanage, March 12, 1892, 19 R. 605.

[2] Aug. 1, 1904 (H. L.), present vol. p. 1, L. R. [1904], A. C. 721.

[3] Grigor Medical Bursary Fund Trustees, July 15, 1903, 5 F. 1143; Young's Trustees v. Deacons of Eight Incorporated Trades of Perth, June 9, 1893, 20 R. 778.

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different parts of the Free Church. But the United Presbyterians have not by taking others into union with them and varying their name given up any of their principles or done anything to render the carrying out of this trust impossible in accordance with the desires of the truster. I think, therefore, that the scheme should be considered. That will not, of course, preclude the minuters from taking any action by declarator if they are advised to do so.

LORD YOUNG.—The petitioners are the testamentary trustees of the Rev. James Whyte Mailler, United Presbyterian minister, Huntly, who died on 1st May 1869, and the only purpose of the trust which we need consider is to provide bursaries to students for the ministry of that Church. The prayer of the petition is for judicial sanction of a scheme of administration prepared by the trustees and submitted to us as in their opinion necessary, or at least desirable, in consequence of changes which have taken place since the testator's death.

The chief of these changes, and indeed the only one which I propose to consider, is the union of the United Presbyterian Church and the Free Church, effected, or at least enacted and declared by their respective governing bodies, in October 1900.

When the petition was presented on 5th March 1903 that union was, by the judgment of this Court in the case, which for brevity I may refer to as the Church case, held to be legal and valid in all respects, the legal rights, proprietary or beneficial, of the respective Churches as existing prior to the union not being thereby affected, although, of course, and necessarily as we thought, the tenure and administration passed to the governing body of the United Church.

The name given to the United Church was the "United Free Church," and the view of the petitioners (Mailler's trustees) was and is that this Church now comes in place of the United Presbyterian Church, and that the purpose of the trust under Mr Mailler's testament will be legally and properly executed by making such provision as existing circumstances require for awarding bursaries to students for the ministry of the United Free Church. On the other hand, the nearest of kin, including the heir-at-law of the truster, contend in a minute of compearance which they have lodged as respondents to the petition that the United Free Church is not the United Presbyterian Church specified in the truster's testament, and that the truster's estate, now in the hands of the trustees, must as intestate succession be transferred to them.

On 24th May last, when the question between the petitioners and minuters was first argued before us, our judgment in the Church case was under appeal to the House of Lords, and after a brief argument by counsel it was thought expedient to delay consideration of it until the decision of the House of Lords. It was delayed accordingly with the approbation of both parties, it being understood that the parties should have an opportunity of stating further argument if they thought fit. That opportunity was accordingly given on 1st November last (the judgment of the House of Lords having been pronounced), when after some further argument we took time to consider our judgment.

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The question, and the only question, now before us is, whether or not, having regard to the judgment of the House of Lords, and upon a just construction of Mr Mailler's testament, we can hold that the United Free Church and students for its ministry are in the same position as were the United Presbyterian Church and students for its ministry before the union, and on that footing deal with the petition before us.

In dealing with this question we are of course concerned only with the effect, if any, and if so what, of the House of Lords judgment upon the position of the United Presbyterian Church. But there being no suggestion, or room for any, that anything has occurred to affect the position of that Church other than its union with the Free Church, the legality of which was disputed by a few members of the Free Church who in the Church case (as I shall continue to call it) sued for its reduction, it is, I think, impossible to exclude from consideration the effect of the judgment upon the position of the Free Church as it existed before the disputed union in October 1900. This Court when affirming the legality of the union, and therefore refusing reduction of it, necessarily held that it must subsist with respect to both Churches, it being plain that if illegal and invalid with respect to one of them, it must be so with respect to the other also. It is not and never was suggested that there was any other union than of these two Churches made in October 1900. If that union was legal, as we held, the result is that the United Free Church is a legal body, there being no suggestion of illegality in the name. The judgment of the House of Lords must import this result or the reverse, there being no mean between these extremes. If it import this result, that is, the legality and validity of the United Free Church composed of the Free Church and the United Presbyterian Church lawfully united into one, I see no ground for the contention that the rights of the United Presbyterian Church and the students for its ministry as theretofore existing were thereby extinguished or in any way prejudicially affected.

On the other hand, should we, in respect of the judgment of the House of Lords, or on any other satisfactory ground, hold that the disputed union was illegal—what would be the result? Necessarily that the resolutions for and consequent enactments of such union by the governing bodies of the respective Churches were null and inoperative—as were of course also any enactments by the governing and legislative body of the erroneously supposed to be United Church for carrying it into effect.

The House of Lords certainly in terms reversed the judgment of this Court whereby the legality of the union in question was affirmed, and the demand made for its reduction refused, but I do not read that as a reduction by that House of the union. If so read, the consequence would, as I have pointed out, be that there was no union—the proceedings whereby any union could be effected being reduced as null and void. I say "could be effected," because two Churches can be united only by the Churches themselves—or, of course, by Parliament—an event which has not hitherto occurred.

The minuters (the heirs *ab intestato* of the testator Mailler) base their claim and consequent opposition to the petition on their averment that in 1900 the United Presbyterian Church went into union with the Free

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Church, and is in such union now, the United Church being called the "United Free Church." It is thus, and only thus, that we are in the dispute between the petitioners and minuters, the only parties before us, concerned with the judgment and views of the House of Lords regarding the Free Church. Is that judgment, and are the views of the noble and learned Lords who expressed it, favourable or adverse to that averment of union? The judgment seems to import that in the General Assembly of the Free Church sitting in October 1900 the 650 members of the Assembly who voted for the union thereby—that is to say, by so voting—ceased to be members of the Free Church, and necessarily of the General Assembly thereof. This is probably perplexing to some and even to many, and that whether the union approved of and voted for by these 650 members was legal or not. The judgment seems also to import what may be thought equally perplexing, that all who were members of the Free Church when this vote was given, and who subsequently signified their approval of the union (amounting to hundreds of thousands), thereby ceased to be members of that Church, and so went out of the union if lawful, as clearly perhaps as that they were never in it if it was from the first unlawful, and so never existed. I have thought it my duty to notice this perplexing topic, but do not pursue it further.

I am clearly of opinion that the union of the Free Church and the United Presbyterian Church into one was lawful, and was regularly and effectually made without transgressing any statute or rule of the common law which we administer. It follows that in my opinion the United Presbyterian Church now exists as one of the two Churches thus lawfully united and called the United Free Church. At and prior to the death of the testator (Mailler) it (that is, the United Presbyterian Church) existed as a Presbyterian Church formed, as its name distinctly expresses, by the union of several Presbyterian Churches into one. The testator, who was a minister of this United Church, knew this, and when by his testamentary trust he made an enduring provision of bursaries to students for its ministry, I am unable to impute to him the intention that the provision should cease and determine if it ever united with another Presbyterian Church. I am therefore of opinion that the position of the United Presbyterian Church now does not in any material respect differ from its position at and prior to the testator's death in 1869. It is the same Church in all respects, though increased in size as it probably is, and students for the ministry of the United Free Church are I think undoubtedly in the same position, in the sense and meaning of the testament we are construing, as before the union in 1900 students for the ministry of the United Presbyterian Church were or would have been.

Before concluding, I ought, I think, to explain distinctly why I have made no reference to the judgment of the House of Lords in so far as it affects or may affect the proprietary or beneficial trust rights of the Free Church as existing prior to the union, legal or illegal, of October 1900. This Court had by the judgments which the Lords reversed decided that the property held by and vested in the trustees nominated by and on the trust constituted by the Church—that is to say, by its supreme governing body—was the property of the Church, and passed with them into the

United Church constituted by their union with the United Presbyterian Church. The House of Lords decided, and I assume rightly, that the Free Church had not in 1900, and indeed never had, any property whatever, that which was vested in their trustees being to the last shilling the property of the beneficent individuals from whom it came, who, and not the Church, were the true trusters of the trustees, who held it not as the trustees of the Church but as theirs.

In the case now before us no such question arises, and so the judgment of the House of Lords in the Church case is not in point. It is not suggested that the property in the hands of the petitioners as Mailler's trustees is or ever was the property of the United Presbyterian Church or of the United Free Church, or that it is administrable otherwise than under the truster's settlement.

LORD TRAYNER.—I agree with Lord Young in thinking that the decision of the House of Lords case does not bear on the question we are here to consider. That judgment decided, as I understand it, that as between the two sections of the Free Church, as it existed before 1900, the rights of property went to one section and not to the other. In the case we are dealing with, the trust-estate never was the property of the Free Church, and never was the property of the United Presbyterian Church. Even if it had been the property of the United Presbyterian Church I should still have been of the opinion of which I am now, that the judgment of the House of Lords did not affect that because there has been no change whatever on the United Presbyterian Church except the addition to it of a great many people who have left the Free Church and joined it. But I do not pursue that, because, as I have said, I am of opinion with Lord Young that the House of Lords judgment does not touch the question before us at all.

Mr Mailler left certain funds to be administered by trustees under very specific directions. The trustees, having some doubt as to whether they were the proper persons to carry on the administration of the trust, presented this scheme to us to ask in the first place for our authority to carry it on, and in the second place to enable them by certain alterations on the trust purposes to administer it with more success in carrying out the views of the truster. Now, the first thing I notice is that the only objectors to it are the next of kin and heir-at-law of the truster. I think their claim is altogether untenable. I cannot see any reason whatever for supposing there is any intestacy here; but the judgment we are now to pronounce will not prevent these compearers from pursuing any claim they think they have in a proper action to try that question. The purpose for which Mr Mailler left his money was to enable certain students who were studying for the ministry to qualify themselves as clergy of the United Presbyterian Church. The amount left by the truster is not large, and the bursaries must needs be small; but there is no doubt as to the purpose for which the bursaries are designed and are to be held. I do not think it necessary to go over them in detail, because the observations I have to make on the proposed scheme will shew your Lordships the views I take, so far as necessary to express them, on the trust-deed.

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The second head of the proposed scheme sets forth that certain parties shall be the trustees. Now, it is upon that point that the trustees first applied to us. The difficulty they had was this, that the truster named two personal friends as trustees, and several others who may be called *ex officio* trustees, that is to say, they were not selected in respect of the truster's predilection for them, but because they were incumbents of certain churches there described, all belonging to the United Presbyterian Church in Perth or in that district. These *ex officio* members who were incumbents of these particular churches thought their trusteeship might be disputed because they were no longer members of the United Presbyterian Church but of the United Free Church. The change in the name to my mind makes no difference whatever in their character. The name may be right or the name may be wrong, but there is no doubt they are the persons indicated by the truster as the persons whom he desired to carry on and administer the trust. They are the incumbents of certain churches well defined, and their successors. I think the present incumbents of these churches (the petitioners), though called ministers of the United Free Church, are in fact ministers of the United Presbyterian Church, and are the persons to whom the truster committed the administration of the trust. Accordingly I think the second article may be approved.

The third article calls for no observation. The fourth does. It is there proposed that "at all meetings two of the trustees shall be a quorum, and that at each meeting the trustees shall appoint a chairman," who should have not only a deliberative vote but also a casting vote. Now, it is obvious that any such provision as that would be an unwise provision, for if only two trustees were present the chairman might do what he liked; I do not think that that is a wise power to put into the hands of any one trustee, and therefore I propose that it be altered, and should read "at all meetings a majority of the trustees shall be a quorum." If the article is altered to that effect, and embracing another alteration which I need not notice, it may be passed.

In article 6 the trustees ask this, that the accounts shall be audited by "the trustees or by any one or more of them to whom the trustees may remit the accounts." I think that again is not a wise provision for the trustees themselves; and accordingly I have struck out these words and leave the article that the accounts shall be audited by "a professional auditor to be appointed by the trustees."

The 7th article I have struck out altogether because it contains powers to the trustees either of a general or special character. In so far as general the trustees have these powers at common law; in so far as they are special powers I think the trustees must apply to the Court for these when the circumstances emerge which render such an application necessary.

The 9th article contains a provision that the trustees shall confer the right to a bursary for the whole period of the student's curriculum. I think that cannot be allowed, because it is in direct opposition to the truster's direction, which says that each bursary shall be held for one year only, though the holder of it may compete for it in the succeeding year. I therefore propose to alter that article so as to give direct effect to what the truster proposes. There is another part of the article I have struck out,

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namely, that the trustees shall be entitled to award a bursary to a student recommended by the College Committee of the United Free Church of Scotland although he may not have been born in either of the counties named. The truster has provided for students who were born in certain counties only, and I think we have no right to go beyond these.

Then I think the trustees may competently confer these bursaries on students for the ministry of what is now called the United Free Church. These two Churches (whether they are two or one) are practically one in doctrine and government, and as it was the purpose of the testator to promote the welfare of students who were studying for the United Presbyterian Church, students of the United Free Church may very well be admitted to the benefit.

These are the alterations I propose; and with these I think your Lordships may approve of the scheme.

LORD MONCREIFF was absent.

The minuters moved for expenses out of the trust-estate.

LORD TRAYNER.—I think that the compearers are not entitled to any expenses as against the trust. The trustees will charge their expenses against the trust-estate.

The scheme having been amended as shewn *supra*, pp. 330-331, *note*:—

THE COURT pronounced the following interlocutor:—"The Lords having resumed consideration of the petition along with the report by Mr Charles Young, Writer to the Signet, Edinburgh, No. 13 of process, approve of the scheme annexed to the petition as finally amended and adjusted, in terms of the judgment of the Court, as the scheme for the future administration of the bequest: Find the petitioners entitled to the expenses of the application as the same may be taxed by the Auditor, to whom remit."

MILLAR, ROBSON, & M'LEAN, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

No. 59.
Dec. 22, 1904.
M'Callum v. M'Culloch's Trustees.

JOHN BUNTING M'CALLUM, Pursuer (Reclaimer).—*C. N. Johnston, K.C.*—*Kemp.*

ARCHIBALD NICOL AND OTHERS (Mr and Mrs M'Culloch's Marriage-Contract Trustees), Defenders (Respondents).—*Watt, K.C.*—*Morton.*

*Marriage-Contract—Trust—Constitution—Spouses a majority of trustees—Power to trustees to advance trust funds to spouses—Alimentary Provision.*—An antenuptial marriage-contract appointed the spouses and the wife's father the sole trustees, and the trustees were empowered at the joint request of the spouses to advance such portion of the trust-estate to the husband as the trustees might think right. Under the marriage-contract the wife had a liferent allenarly, which was declared not to be affectable by her own or her husband's debts or deeds or the diligence of their creditors. *Held* that as the spouses were a majority of the trustees, and might consequently lend any part of the trust funds to the husband, the marriage-contract was not effectual to protect the wife's liferent.

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Dec. 22, 1904. M'Callum v. M'Culloch's Trustees.

1st Division. LdStormonth-Darling.

Mr John Findlay M'Culloch, Glasgow, was married to Miss Euphemia Nicol in 1882. By antenuptial contract between the intended spouses, dated 17th March 1882, Mr M'Culloch disponed to Archibald Nicol, Miss Nicol's father, Miss Nicol, and himself, as trustees, *inter alia*, certain heritable subjects belonging to him in trust "(First) For payment to the said Euphemia Nicol during her lifetime of the free annual income and revenue thereof for her liferent use allenarly; declaring that the same shall not be affectable by the debts or deeds, or the diligence of the creditors, of either of us the said parties hereto: (Second) After the death of the said Euphemia Nicol, for behoof of the child or children of the said intended marriage in fee. . . ." Mr M'Culloch also renounced his *jus mariti* and right of administration.

Miss Nicol assigned, disponed, and conveyed to the same trustees the whole estate, heritable or moveable, then belonging to her or to which she might acquire right during the subsistence of the marriage (excepting her paraphernalia and the provisions made by Mr M'Culloch in her favour by the marriage-contract) in trust for purposes substantially the same as those above narrated with regard to the property conveyed to the trustees by Mr M'Culloch.

By the marriage-contract power was conferred upon the trustees "to lend or advance (but only if both are surviving and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates hereby conveyed as they may think right, and as he may desire."

The trustees accepted office.

By assignation, dated 26th January 1897, Mrs M'Culloch and her husband, in security of a loan of £200, received from John Bunting M'Callum, Glasgow, disponed and assigned to him their and each of their whole right, title, and interest, present and future, whether of liferent or fee, under their antenuptial contract of marriage. The assignation was intimated to the marriage-contract trustees on 30th January 1897.

In January 1904 Mr M'Callum raised an action against the trustees under the marriage-contract, and against Mr and Mrs M'Culloch as individuals, for declarator that the pursuer had acquired right, as from 30th January 1897, to the whole rights of the spouses under the marriage-contract in security of the repayment of the loan, interest, and expenses due under the assignation. Then followed conclusions for payment and count and reckoning.

The marriage-contract trustees lodged defences, and pleaded, *inter alia*;—(2) The assignation condescended on being invalid, and inoperative to transfer to the pursuer the interests of Mr and Mrs M'Culloch under the antenuptial marriage-contract, the defenders are entitled to be assoilzied from the first conclusion of the action.

Six children were born of the marriage, all of whom were alive.

The Lord Ordinary (Stormonth-Darling), after hearing counsel in the Procedure-roll, by interlocutor dated 4th June 1904, assoilzied the compearing defenders from the conclusions of the action.*

* "Opinion.—This case would, in my opinion, be governed by the judgment of the First Division in *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*, 18 R. 615, were it not for one circumstance which creates a distinction. The wife in that case had by antenuptial marriage-contract conveyed her whole estate to trustees, *inter alia*, for payment to herself of the free income during the subsistence of the marriage, such payment being

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The pursuer reclaimed, and argued;—No question was raised meanwhile as to the fee. The liferent only was claimed by the pursuer. This case was ruled by *Reliance Mutual Life Assurance Society* v. *Halkett's Factor*.[1] The liferent here was not declared alimentary. A provision that a liferent right should not be affectable by debts or deeds was not equivalent to a provision that it should be alimentary.[2] But apart from that, in view of the fact that the spouses were a majority of the trustees, and of the terms of the power to advance to the husband, the provisions in favour of the wife were not effectually protected against her deeds. This was in effect an attempt on the part of the husband to put certain funds beyond the reach of his creditors while retaining full control of them for himself. This the law would not allow. The protection given to the wife must be absolute. If it was not, it was ineffectual. The power to advance to the husband was, in the circumstances, inconsistent with the provi-

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made exclusive of the *jus mariti* and right of administration of her husband, and her own receipt being declared a sufficient discharge. The wife became a party to a bond and assignation granted by her husband in security of a loan, and she thereby bound herself to the extent of her own separate estate to repay the sum borrowed. In security of her personal obligation she, with her husband's consent, assigned to the lenders her whole right and interest, present and future, under and in virtue of the marriage-contract. In answer to an action by the lenders for declarator that they had acquired right to the whole sums of money payable to the spouses under the marriage-contract, and for payment of the income of the trust-estate until the amount due to the pursuers should be paid off, the wife pleaded that, her estate having been conveyed to trustees for her protection, she could not validly convey away the same *stante matrimonio* to her own prejudice. But the judgment was that she had power to make, and had made, an effectual assignation of the income of her estate, whether arising during marriage or after its dissolution.

"Here the pursuer's demand is substantially the same as in *Halkett's* case. On 26th January 1897 he lent to the spouses the sum of £200, in return for which they assigned to him the whole right and interest of each of them, present and future, whether of liferent or fee, under and in virtue of their marriage-contract, which had been entered into on 17th March 1882; and they specially assigned to him their whole interest in the annual rents and proceeds of certain house property in Glasgow which had been put in trust by the husband. It is admitted that no part of the sum lent, or interest thereon, or expenses in connection therewith, has been repaid to the pursuer, and it is said that the sum now due to him amounts to more than double the original loan. The action is directed against the marriage-contract trustees, who are the spouses themselves and the father of the wife, and also against the spouses as individuals. What the pursuer asks is a declarator of his rights under the assignation, and for payment by the trustees of the free annual proceeds of the trust-estate until his debt shall be satisfied. I gather from the record that the trust-estate consists entirely, or mainly, of the house properties specially conveyed by the husband. The marriage-contract also contained a conveyance by the wife of her whole estate then belonging to or afterwards to be acquired by her during the subsistence of the marriage, but the record makes no mention of there being, as yet at least, any property of that description in the hands of the trustees.

"The trust purposes as regards the wife are for payment to her during

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[1] March 4, 1891, 18 R. 615.

[2] Rogerson v. Rogerson's Trustee, Nov. 6, 1885, 13 R. 154.

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sion to the wife being alimentary,—that is to say, for subsistence only. There was a repugnancy between the two clauses, and if so, the interests of creditors, and the presumption for freedom of disposal, must prevail.

Argued for the defenders and respondents;—A provision in favour of a wife might be protected effectually to such extent as might be intended.[1] The test was whether the trust was for protection or administration merely. There was no authority for the proposition that unless the protection was absolute it was ineffectual. The clause here giving power to advance was not enough to nullify the previous clause as to the wife's liferent not being affectable by debts or deeds. The clause last mentioned expressly provided what was merely implied from a declaration that a right was to be alimentary, and was therefore fully equivalent to such a declaration. Moreover here there had been no advance to the husband under the power. The only

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her lifetime, for her liferent use allenarly, of the free annual income of the estate conveyed by the husband, and then follows a declaration 'that the same shall not be affectable by the debts or deeds or the diligence of the creditors of either of us the said parties hereto.' There is a similar provision for payment to her of the free annual income of her own estate, with a corresponding declaration that it shall not be affectable by the debts or deeds of either of the spouses or the diligence of their creditors; and there is a renunciation by the husband of his *jus mariti* and right of administration over both the estate coming from the wife and the provisions made by himself in her favour. The contract also contains provisions of fee to the children (of whom there are six), but these provisions are not material to the present question. There is, however, a clause on which counsel for the pursuer laid considerable stress, giving power to the trustees 'to lend or advance (but only if both are surviving, and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates hereby conveyed as they may think right, and as he may desire.'

"The decision in *Halkett's* case proceeded entirely upon the ground that the income of the trust-estate had been placed by the marriage-contract absolutely at the wife's disposal, without any declaration that it should be alimentary or not assignable by her. In this marriage-contract there is no declaration that the income payable to the wife shall be alimentary, but there is a declaration that it is not to be affectable by the debts or deeds or the diligence of the creditors of either herself or her husband, and the question comes to be whether that is not sufficient to take this case out of the rule applied in the case of *Halkett's Factor*. I think it must be conceded that an alimentary declaration would have had that effect, for the case of *Cosens* v. *Stevenson*, 11 Macph. 761, shews that a wife cannot discharge an alimentary annuity secured to her by marriage-contract, even where there is no trust to protect it, her position being distinguishable from that of a wife whose liferent or annuity is not declared alimentary, as in *Cowe's* case, 4 R. 695. I fail to see why the declaration which we find here should not have the same effect as a declaration that the provision is to be purely alimentary. Even as regards the income of property put in trust by herself, a woman can by marriage-contract make her interest non-assignable, her power to do so being an exception to the general rule that property cannot lawfully be put beyond the reach of the owner's creditors without creating some right, direct or contingent, in a third party. As regards the income of property put in trust by the husband there is still less doubt of the power of the

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[1] Menzies v. Murray, March 5, 1875, 2 R. 507; Ker's Trustees v. Ker, Dec. 13, 1895, 23 R. 317; Christie's Factor v. Hardie, March 7, 1899, 1 F. 703, *per* Lord M'Laren at p. 708.

competent mode of obtaining an advance to the husband had not been adopted. What had been done was just what the marriage-contract declared could not be done effectually. A protection to the wife had been effectually given subject to a certain limitation. What had been done did not fall within that limitation. The protection, therefore, prevailed, and the assignation was invalid.

At advising,—

LORD PRESIDENT (read by Lord Adam).—The question in this case is whether the antenuptial contract of marriage entered into between the defenders John Findlay M'Culloch and Mrs Euphemia Nicol or M'Culloch his wife, on 17th March 1882, is effectual to secure the free annual income of the funds and estate settled under it, and in particular, the free annual income of the estate settled by the husband, against the creditors of the spouses, or either of them.—(His Lordship narrated the provisions of the deeds and the facts of the case.)

The pursuer maintains that under the assignation he is now in right of the liferent of the trust funds conveyed by both Mr and Mrs M'Culloch to their marriage-contract trustees, or at all events that he is entitled to have the money arising under that right made over to him in so far as may be necessary to make repayment of the sum advanced by him to the spouses as above mentioned, and it appears to me that he is entitled to prevail in this demand.

The obligation imposed upon the trustees to lend the trust-estate, or any part of it, to Mr M'Culloch without security is, in my judgment, inconsistent with either the wife or children having a secure provision under the contract, and if Mr M'Culloch is entitled to demand and receive such an advance, it seems to me that in a question with the pursuer he is bound,

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spouses to contract that the interest of the wife shall be inalienable. Where they do so, it seems to me that the declaration must receive effect, and that an attempt by her to assign her interest is one which the trustees cannot recognise. If it be said that such a result is unfair to an onerous assignee who has lent his money on the faith of the wife's deed, the answer must be that, if he had examined the marriage-contract, he would have seen that no deed of hers could affect her liferent *stante matrimonio*.

"It is suggested on behalf of the pursuer that the clause in the marriage-contract giving power to the trustees, at the joint request of the spouses, to lend or advance any part of the trust-estate to the husband, is a clear indication that the contract was not truly intended to protect either the immediate or eventual liferent of the wife, particularly as the spouses themselves formed a majority of the trustees. The clause is certainly a peculiar one, and I am not aware that anything like it is to be found in any of the cases to which the principle of protection of the wife's interest has been held to apply. I concede that the intention of the marriage-contract is material, and is to be gathered from the whole tenor of the deed. I further agree that the wife's provisions under a deed containing such a clause as this must be allowed to be very precarious. But I do not think that a mere power which has not been, and may never be, exercised can outweigh a positive declaration that the wife's liferent shall not be assignable.

"The result must be to assoilzie the defenders from the whole conclusions with expenses, but I shall reserve to the pursuer any claims competent to him against the spouses as individuals in respect of their personal obligation under the assignation in his favour referred to in the summons."

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or is at all events entitled to use the power to enable him to repay the advance. In this connection it is to be kept in view that the wife bound herself to the extent of her own separate estate to repay the sum borrowed. If the estate is thus left open to a demand for an advance to the spouses, or either of them, it cannot, in my judgment, be said that the rights of the children are indefeasible. It appears that Mr M'Culloch's creditors could directly or indirectly reach the trust-estate as being vested with his rights, including the right to demand an advance. The spouses are a majority of the trustees—the remaining one being Archibald Nicol, the wife's father, and I think that they are thus in a position to demand and receive from the trustees an advance for the purpose of enabling them to pay the debt due to the pursuer. It appears to me that in order to being effectual the protection of a wife's rights under a marriage-contract must be absolute, and that it would be anomalous if marriage-contract funds were in such a position that the wife could reach them but that her creditors could not.

For these reasons, I think that, although the present case is not identical with that of *The Reliance Mutual Life Assurance Society* v. *Halkett's Factor*,[1] and although it is narrow and difficult, the considerations upon which that case was decided are also applicable to this case.

Lord Adam.—On 26th January 1897 the pursuer lent to the defenders Mr and Mrs M'Culloch the sum of £200, and in security of the loan they assigned to the pursuer their whole right, title, and interest, whether of liferent or fee, under an antenuptial contract of marriage entered into between them of date 17th March 1882.

The pursuer claims, in virtue of this assignation, to be now in right of the liferent of the trust funds in the hands of the trustees, conferred on Mrs M'Culloch by that contract, and to have the balance of income in their hands paid to him. As appears from article 7 of the condescendence that is the extent of his present claim.

The question in the case is therefore whether the assignation in question contains a valid assignation of Mrs M'Culloch's liferent of the trust funds in the pursuer's favour.

By the antenuptial contract Mr M'Culloch disponed to Mr Nicol, Mrs M'Culloch's father, and to Mrs M'Culloch and himself, and the survivors or survivor of them as trustees, certain heritable subjects in Glasgow therein described, as also the whole estate and effects to which he might be, or might become, entitled to as heir, or otherwise, of the deceased George M'Culloch, or under or in virtue of George M'Culloch's settlement in favour of his wife.

The purposes of the trust were (first) for payment to his wife during her lifetime of the annual revenue and income of the said subjects for her liferent use allenarly, declaring that the same should not be affectable by the debts or deeds, or the diligence of the creditors, of either of the spouses.

After the death of Mrs M'Culloch the subjects were to be held for behoof of the children of the marriage in fee and divisible among them as therein mentioned. It was further declared that the fee should vest in the children,

[1] 18 R. 615.

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or the issue of predeceasing children, on the dissolution of the marriage. In the event of there being no children of the marriage, the subjects were to be reconveyed to Mr M'Culloch. Mr M'Culloch renounced his *jus mariti* and right of administration.

Mrs M'Culloch, on the other part, conveyed to the trustees the whole means and estate then belonging to her, or to which she might acquire right during the subsistence of the marriage.

I do not think it necessary to examine in detail the provisions of the contract with regard to this part of the trust-estate. They are substantially the same as those with regard to the portion contributed by Mr M'Culloch —giving a successive liferent to the wife and husband and the fee to the children—and as regards the liferent, declaring it to be for liferent allenarly, and that it should not be affectable by the debts or deeds of the spouses, or either of them, or subject to the diligence of their creditors.

To return, then, to the clause of the contract conferring a liferent of the subjects brought into settlement by Mr M'Culloch, it will be observed that it contains no declaration that the liferent is to be alimentary, but only that it is to be in liferent allenarly and not to be subject to the debts or deeds of the spouses or the diligence of their creditors. Now, had there been no peculiarities in this deed, I should probably have concurred with the Lord Ordinary in thinking that the liferent, though not declared to be alimentary, should be so considered.

But the first peculiarity in this deed is that the trustees are the two spouses themselves and the father of the wife. The result is that the two spouses alone, if they happen to be the survivors, and, in any event, as the majority of the trustees, are in a position to exercise all the powers conferred on the trustees by the deed. Now, the deed contains this power—"With power also to the said trustees to lend or advance (but only if both are surviving, and at the joint request of said spouses) to the said John Findlay M'Culloch such portion or portions of said whole estates as they may think right and as he may desire." No doubt the power is only to advance such portions as the trustees may think right, but, for the reasons I have stated that appears to me, in this case, to mean just what the spouses themselves think right. I see nothing, accordingly, in this deed to prevent Mrs M'Culloch lending or advancing, or consenting to lend or advance, the trust funds to her husband, and so it might be, and probably would be, putting an end to the fund from which her liferent was derived.

It may be that, if the trustees had been entirely independent, the fact that their consent was necessary to an advance might have afforded the wife some protection against her own acts. But I do not think that was the intention of the parties to this contract, and I think that was the reason why the liferent was not declared to be alimentary, which would have had that effect. I think the intention was that the husband should have the use of the trust funds during the joint lives of the spouses, but at the same time that they should not be open to the diligence of his creditors. But that the law will not permit,—neither do I see how a liferent can be considered as alimentary when the liferenter has power to alienate or consent to the alienation of the fund from which it is derived.

So far as appears, the trust funds in this case are entirely heritable.

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Had the trustees, that is in effect the spouses, had money in hand, no doubt the loan or advance would have been made direct to the husband, but the subjects being heritable, it was more convenient for the spouses to borrow the money and to assign their interest in the trust-estate in security. But the result as regards the trust-estate is the same in either case, as, if the assignation is valid, it will now be applied in so far as necessary in extinction of the loan made to the husband. In the one case the loan would have been made directly to the husband, in the other indirectly.

On the whole matter I am of opinion that the liferent in question is not alimentary, but is assignable and has been validly assigned.

LORD M'LAREN.—I concur in Lord Adam's opinion. I may add that in my opinion it is essential to the constitution of an effectual marriage-contract trust that at least one of the trustees should be a neutral person.

A trust in which the spouses are the sole trustees gives no protection to the beneficiaries against the voluntary acts of the spouses, and therefore would not be effectual against creditors.

There may be cases in which there were originally other trustees, but where owing to the death or resignation of some of the original trustees, the spouses have come to be the sole continuing trustees. In such a case the spouses may assume a new trustee if they wish that the destination should be protected, but nothing of the kind was done in this case.

But here the trust is in its inception a trust in which the spouses, being a majority of the trustees, are virtually the acting trustees having the control of the trust funds, with a power to advance capital without restriction, and such a marriage-contract trust cannot in my opinion be regarded as effectual against creditors. It follows that the pursuer is entitled to have the obligations of the spouses made effectual.

LORD KINNEAR.—I agree with Lord Adam upon the grounds stated by him. I wish to add only that I think the point is settled by authority. I assume that the Lord Ordinary is right when he says that the declaration in this marriage-contract, that the income is not to be affectable by the debts or deeds or the diligence of the creditors of the wife herself or her husband, has the same effect as if the income had been declared to be alimentary. I assume this to be correct for the purpose of the argument, but, on that assumption, I hold the law to be that no one can settle property in such a way as to give himself the full beneficial enjoyment of it, and at the same time to protect it against his creditors. That is settled by the case of *White's Trustees* v. *Whyte*.[1] In that case it was proposed to wind up a trust where all the trust purposes had been fulfilled except payment of an annuity which was declared by the trust-settlement to be an alimentary provision and not arrestable nor assignable by the annuitant. For the purpose of winding-up the trust, it was proposed that the trust property should be made over to the truster's heir and residuary legatee on condition of his granting a bond of annuity over the heritable property which formed the residue of the trust-estate, in favour of the annuitant, in precisely the same terms as provided in the trust-deed. It was held that this was perfectly incompetent, and the

[1] June 1, 1877, 4 R. 786.

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reason given in the Lord President's opinion is decisive of this case. The Lord President says:—"No man can tie up his own property so as to exclude the diligence of his own creditors, and I do not think that anybody by a mere conveyance to an individual can exempt that individual from the diligence of his creditors as regards the property conveyed. But if a settler desires to provide an alimentary payment to some person in whom he has a want of confidence . . . and desires to make a provision which the party recipient shall not have the power to discharge or assign, or give up in any way, he may do this:—he may place a sum of money in the hands of trustees, and may direct them to use that money in such a way that without a breach of trust they could not possibly listen either to an assignee or an arresting creditor, because the directions of the truster would be . . . 'You shall pay over term by term a certain sum of money to the beneficiary whom I have named; you shall not pay it to anybody else. The trust is created for the purpose of the money getting into her hands, and I forbid and restrain you from doing anything else with it.' I apprehend a truster can do that. This has been recognised for a long time as an effectual way of creating such a restrictive alimentary right, and I know of no other way in which it has ever been supposed that it can be done." I think this is conclusive of the whole matter. It is obvious that a restraint imposed upon trustees must be futile if the beneficiary can relieve the trustees of the restriction at pleasure, and require the trust fund to be made over to himself or his assignees. The attempt to protect the funds against the deeds of the beneficiary or her husband here was I think quite ineffectual. For this and the other reasons expressed by your Lordships I concur in the judgment proposed.

THE COURT recalled the interlocutor reclaimed against; found and declared in terms of the declaratory conclusions of the summons; and remitted to the Lord Ordinary to proceed.

ROBERT WHITE, Solicitor—W. A. HYSLOP, W.S.—Agents.

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JAMES COLQUHOUN AND OTHERS, Pursuers (Reclaimers).—*Shaw, K.C.* —*Campbell, K.C.*—*Macmillan.*

THE SOCIETY OF CONTRIBUTORS TO THE WIDOWS' FUND OF THE FACULTY OF PROCURATORS IN GLASGOW, AND OTHERS, Defenders (Respondents).—*Ure, K.C.*—*Hunter.*

*Insurance—Widows' Fund limited to members of a Society—Contributor expelled from the Society—Right to remain a contributor—Glasgow Faculty of Procurators Act*, 1875 (38 *Vict. cap. vi.*), *sec.* 3.—By the Act 3 Will. IV. c. lxiv., the contributors to the Glasgow Procurators' Widows' Fund were incorporated into a Society, and persons under fifty years of age becoming members of the Faculty of Procurators of Glasgow were required to become contributors.

By the Act 38 Vict. c. vi. it was enacted that after the passing of the Act [April 1875], "No person shall be obliged or be entitled to become a member of the Society or a contributor to the fund," and that "no person other than the widows and children of then deceased contributors . . . and the persons who shall then be contributors . . . shall have any interest in the fund."

In 1901 C., a Glasgow procurator, who had become a contributor to the

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Widows' Fund in 1870, was struck off the roll of the Faculty in respect of his having been convicted of a crime, and subsequently the Widows' Fund Society declined to receive his contributions.

In an action brought by C. and his wife and children against the Widows' Fund Society, *held* that as C. was no longer a member of the Faculty of Procurators he was not entitled to contribute to the Widows' Fund, and that at his death his widow and children would have no right to the benefit of the fund, *diss.* Lord M'Laren, who was of opinion that while it was a condition of a person being admitted as a member of the Widows' Fund that he should be a member of the Faculty of Procurators, it was not a condition of the contract of insurance that he should continue to be a member of that Faculty during his life.

1st Division. Lord Low.

THE FACULTY OF PROCURATORS IN GLASGOW was erected into a corporation and body politic by royal charter, dated 6th June 1796, and the Faculty obtained a supplemental charter dated 20th August 1897. By the royal charter of 1796 the members of the Faculty were granted the exclusive privilege of practising as law-agents in the Sheriff Courts in Glasgow.

Prior to 1833 the Faculty gave aid, and, under a scheme which it had established, granted annuities to widows and children of members of the Faculty.

In 1833 an Act of Parliament * was passed for the more effectual management of the fund, and it was declared by that Act that all and each of the members of the Faculty of Procurators in Glasgow who were members of or contributors to the fund, and every other person or persons who should thereafter become members of or contributors to the said fund in manner thereinafter mentioned, should be members and contributors to the fund established under the provisions of the Act, and should be called "The Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow." The Society was also incorporated by the Act.

Under the Act only members of the Faculty were eligible for admission to the Widows' Fund Society, and all who became members of the Faculty, and who were under fifty years of age, were required to become members of and contributors to the Society.

The Law-Agents Act, 1873,† abolished the exclusive privileges previously enjoyed by the Faculty, and in consequence it was seen that there would be no adequate inducement to Glasgow law-agents to become members of the Faculty, and that the Widows' Fund could not continue to be maintained on the same footing as before. New regulations for the fund were accordingly made by The Glasgow Faculty of Procurators' Widows' Fund Act, 1875.‡

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* Glasgow Faculty of Procurators' Widows' Fund Act, 1833 (3 Will. IV. cap. lxiv.).

† 36 and 37 Vict. c. 63.

‡ The Glasgow Faculty of Procurators' Widows' Fund Act, 1875 (38 Vict. cap. vi.), enacts, section 3,—"From and after the commencement of this Act all the provisions of the Act of 1833 by which persons becoming members of the Faculty are required to become members of the Society and contributors to the fund, and to pay any sums to the treasurer of the fund, shall be and are hereby repealed, and after the said date no person shall be obliged or be entitled to become a member of the Society or a contributor to the fund; and no person other than the widows and children of the deceased contributors who shall not have renounced or forfeited their interest in the fund under the provisions of the Act of 1833, and the

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On 28th February 1870 James Colquhoun became a member of the Faculty and a contributor to the Widows' Fund. He duly paid the entry-money to the Widows' Fund, amounting to £65, and his marriage-tax, amounting to £12, 10s. He also paid his half-yearly contributions of £1, 15s. each from the year 1870 till Candlemas 1899.

On 4th October 1899 James Colquhoun pleaded guilty to a charge of embezzlement, and was sentenced to five years' penal servitude.

On 2d March 1900, at a meeting of the Faculty of Procurators, James Colquhoun's name, in consequence of his conviction and sentence, was struck off the roll of the Faculty.* Thereafter, on the application of the Faculty of Procurators Colquhoun's name was struck off the rolls of law-agents and notaries-public by the Court of Session.

In July 1903 James Colquhoun wrote to the treasurer of the Widows' Fund inquiring the amount of the arrears of contributions due by him, and stating that he was prepared to pay the amount of the arrears, with interest thereon. In reply to this letter Mr Arthur Forbes, the treasurer of the Widows' Fund Society, wrote to Colquhoun stating that at a meeting of the Widows' Fund Society held on 4th February 1901, he had been instructed to decline to accept payment of any contributions tendered by him, and to strike his name off the list of contributors.

After further correspondence the following excerpt from the minute of meeting of the Widows' Fund Society, held on 4th February 1901, was sent to Colquhoun:—"It was reported that Mr Colquhoun had been convicted of a crime and sentenced to five years' penal servitude, and his name had been struck off the roll of the Faculty on the 2d day of March 1900, and from that day he ceased to be a member of Faculty or to have any interest therein, and that thereafter, upon the petition of the Faculty, his name had been struck off the rolls of law-agents and notaries-public by the Court of Session. The half-yearly subscriptions to the Widows' Fund due by Mr Colquhoun upon the 2d of February 1901 had not been paid. The treasurer asked for instructions as to how he was to deal with the case in the event of a subscription being tendered in future. The meeting was of opinion that Mr Colquhoun had ceased to be a contributor to the Widows' Fund or to have any interest therein, and instructed the treasurer to decline to accept payment of any contribution tendered by or on behalf of Mr Colquhoun, and to strike his name off the roll of contributors."

On 22d January 1904 James Colquhoun, his wife, and children raised an action against the Society of Contributors to the Widows' Fund of the Faculty of Procurators in Glasgow, and David Murray, LL.D., writer, Glasgow, and others, the trustees of the Society, con-

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persons who shall then be contributors and shall not have renounced or forfeited their interest as aforesaid, shall have any interest in the fund."

The Glasgow Faculty of Procurators' Widows' Fund Act, 1833 (3 Will. IV. c. lxiv.), enacts, section 25, that every person who shall lodge a certificate or produce evidence on the subject of his wife's age knowing the same to be false, "shall *ipso facto* forfeit all right and interest in said Society for himself and his widow and children."

Section 26 provides for a similar forfeiture in the event of a member's annual contributions being five years in arrear.

* By the supplementary charter obtained by the Faculty of Procurators, dated 20th August 1897, it was provided (section 3) that the Faculty should have power to remove any member's name from the roll.

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cluding (1) for reduction of the minute or resolution of the Society dated 4th February 1901, whereby it was resolved that James Colquhoun had ceased to be a contributor to the Widows' Fund, or to have any interest therein; and whereby it was also resolved to strike his name off the list of contributors; and (2) for declarator that, notwithstanding the passing of said minute or resolution, James Colquhoun was, at the date thereof, and still is, a contributor to the Widows' Fund, and entitled to all the rights, privileges, and benefits of a contributor, and that his wife and children were, notwithstanding the said resolution, still entitled to all the rights, privileges, and benefits of the widow and children of a contributor to said Widows' Fund.

The pursuers in their condescendence narrated the facts above set forth, and averred, *inter alia*;—(Cond. 10) "In the original charter of 6th June 1796, the Faculty had no power to remove any member for unprofessional conduct, but, by the supplementary charter of 20th August 1897, it was provided (section 3) that the Faculty should have power to remove any member's name from the roll."

To this averment the defenders replied:—(Ans. 10) "The charters mentioned are referred to. Explained that section 3 of the charter of 1897 confirmed and recognised a power, which the said Faculty had previously exercised, of removing any member for unprofessional conduct from the roll. *Quoad ultra* not admitted."

(Cond. 14) "The said resolution of 4th February 1901 was *ultra vires* of the Society. From the date of the Act of 1875 the defenders' Society was really an annuity or insurance company in liquidation, and no action on the part of the Faculty of Procurators, which, after the passing of the Law-Agents Act of 1873, and more particularly after obtaining the supplementary charter of 20th August 1897, had ceased to have any real connection with the Widows' Fund Society, could entitle the said Society to remove a contributor from the roll on the plea that he was no longer a member of Faculty, the Faculty being, to the extent of three-fourths of its membership, composed of persons who were not contributors to the fund administered by the defenders' Society."

The pursuers pleaded, *inter alia*;—2. The said minute or resolution falls to be reduced in respect—(1st) that it was *ultra vires* of the defenders, null and void, and illegal; and (2d) that no notice that said resolution was to be considered was given to the pursuer, James Colquhoun. 3. The pursuers are entitled to declarator, as concluded for, in respect that the said James Colquhoun has not incurred forfeiture of his interests in the defenders' Society, and is still legally a contributor thereto. 4. The pursuer, James Colquhoun, not having been legally and validly expelled from the defenders' Society, is still a contributor thereto, and is entitled to decree of declarator to that effect.

The defenders pleaded, *inter alia*;—2. The said minute or resolution being within the powers of the defenders, and legal and valid, the defenders are entitled to be assoilzied. 3. The only persons entitled to receive benefit from the funds of the Society being the widows and children of members of the said Faculty of Procurators, and the said James Colquhoun being no longer a member of the said Faculty, and it not being possible for the other pursuers ever to be the widow and children of a member of said Faculty, the pursuers have no interest in the said society or the funds thereof.

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On 25th June 1904 the Lord Ordinary (Low) dismissed the action.*

The pursuers reclaimed, and argued;—Mr Colquhoun was admitted to the Widows' Fund under the provisions of the Act of 1833,[1] and there was no provision in that Act which made it an essential condition of the contract that he should remain a member of the Faculty of Procurators during the whole of his life. On the contrary, sections 25 and 26 of the Act specially provided that a contributor should forfeit his rights in certain events, and no other forfeiture, such as was here suggested, could be implied. Section 3 of the Act of 1875[2] secured the benefit of the fund to the persons who were contributors at that date, and their widows and children. The supplementary charter which had been obtained after Mr Colquhoun became a contributor to the Widows' Fund, and which alone gave the Faculty of Procurators the power of expulsion, did not interfere with the rights of contributors to the Widows' Fund.

Argued for the defenders;—A contributor to the Widows' Fund must be a member of the Faculty of Procurators, and this condition applied not only at the time of joining the Widows' Fund but so long as he desired to remain a contributor. This was clear from the preamble

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* "OPINION.—I think that under the Widows' Fund Act of 1833 it is plain—(1) That no one could be a contributor to the Widows' Fund unless he was a member of the Faculty of Procurators of Glasgow; and (2) that no persons were entitled to the benefit of the fund except the widow or children of a contributor. When the name of the pursuer, James Colquhoun, was struck off the roll of the Faculty, he lost the necessary qualification of a contributor, and had no longer a right to contribute to the fund, and therefore at his death his widow and children will, if their rights are to be determined by the Act of 1833, not be among the class of persons who alone are entitled to the benefit of the fund.

"It was argued, however, that the position of matters was materially changed by the amending Act which was passed in 1875, and that the effect of that Act was to secure the benefit of the fund to the widow or children of all persons who at the passing of the Act were contributors.

"That argument was founded chiefly upon the provisions of the 3d section of the Act of 1875. The reason why that Act was passed was that certain exclusive privileges of the Faculty of Procurators had been taken away by Act of Parliament, and it was therefore considered to be expedient to repeal the provision of the Act of 1833 that all persons becoming members of the Faculty should be contributors to the Widows' Fund. The 3rd section therefore repealed that provision, and enacted that after the date of the Act no person should 'be obliged or entitled to be' a contributor to the fund, and that 'no person other than the widows and children of then deceased contributors . . . and the persons who shall then be contributors . . . shall have any interest in the fund.'

"It seems to me that enactment does not support the pursuers' contention. What the section provided was that no person who was not a contributor at the passing of the Act should have an interest in the fund, but it did not provide that every person who was then a contributor should have an interest in the fund.

"It therefore seems to me that the Act of 1875 does not alter the condition that, unless a person is at the time of his death a contributor to the fund, his widow and children have no claim to participate in the profits thereof.

"I am accordingly of opinion that the pursuers are not entitled to decree."

[1] 3 Will. IV. cap. lxiv.

[2] Quoted *supra*, p. 346.

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of the Act of 1833, and from an examination of its clauses. The Faculty of Procurators had power to expel members who had misconducted themselves before the power was in terms conferred by the supplemental charter of 1897, but in any case Mr Colquhoun must be held as having acquiesced in the provisions of the new charter. The Act of 1875 gave no indefeasible right to the contributors, and made no alteration on the condition which required a contributor to be a member of the Faculty.

LORD PRESIDENT (read by Lord Adam).—(After narrating the facts set forth *supra* and the proceedings taken to remove Mr Colquhoun's name from the roll of contributors)—The pursuers maintain that the proceedings thus taken by the Society were *ultra vires*, that from the date of the Act of 1875 the defenders' Society was really an annuity or insurance company in liquidation, and that no action on the part of the company in liquidation, or of the Faculty of Procurators, after the passing of the Law-Agents Act, 1873, and more particularly after the granting of the supplementary charter of 20th August 1897, as it had ceased to have any real connection with the Widows' Fund Society, could entitle the Society to remove a member from the roll on the plea that he was no longer a member of the Faculty, which it is stated is to the extent of three-fourths of its membership composed of persons who were not and are not contributors to the funds administered by the defenders' Society.

The defenders having been called upon to accept payment of the arrears of contributions which became due by the pursuer, James Colquhoun, and having declined to do so on the ground that he had either ceased to be a contributor to, or had been expelled from, the Society on 4th February 1901, the pursuers seek to have what they maintain to be their rights affirmed in this action.

I am, however, of opinion that the contention of the defenders is right, and that the Lord Ordinary's judgment should be adhered to.

It appears to me that the condition of a person being entitled to contribute to the Widows' Fund has throughout been, and now is, that he is at the time a member of the Faculty of Procurators in Glasgow, and that no persons were or are entitled to the benefit of the fund except the widows and children of contributors. I agree with the Lord Ordinary in thinking that when James Colquhoun was struck off the roll of the Faculty he lost the necessary qualification for being allowed to be a contributor, so that he had no longer right to contribute to the fund, and that consequently at his death, his widow and children will, if their rights then depend upon the Act of 1833, not belong to the class of persons who are alone entitled to the benefits of the fund.

It was maintained on the part of the pursuers that the effect of the amending Act of 1875 was to secure the benefits of the fund to the widow and children of all persons who, at the passing of that Act, were contributors, whether they did or did not continue thereafter to be members of the Faculty. In support of this contention the pursuers relied chiefly upon section 3 of the Act of 1875, which, we were told, was passed because, certain exclusive privileges of the Faculty having been taken away by Act of Parliament, it was deemed expedient to repeal the requirement of the Act of 1833, that

all members of the Faculty should be contributors to the Widows' Fund. I concur with the Lord Ordinary, however, in thinking that this argument of the pursuers is not well founded. The section in question contains a negative proposition that no person who is not a contributor to the fund should have any interest in it, but it does not declare affirmatively that every person who was then a contributor shall have an interest in the fund.

I therefore agree with the Lord Ordinary in thinking that the Act of 1875 does not alter the condition that unless a person is at the time of his death a contributor to the fund, his widow and children have no claim to participate in the benefits of it.

For these reasons, I am of opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD ADAM.—I concur with his Lordship.

LORD M'LAREN.—After giving my best attention to this case, I find I am unable to concur in the opinion that has been read, but my opinion will not affect, as I understand, the judgment of the Court, and I shall only indicate the general grounds of it.

My view is that it was a condition of membership of this Widows' Fund that an insurer should, at the time of his insurance, be a member of the Faculty of Procurators of Glasgow, but I can find no evidence that it was a condition of membership of the Widows' Fund that a party should continue to the end of his natural life to be a member of that Faculty. On the contrary, it appears to me to be reasonably clear that if a member chose to resign his position as a member of the Faculty, he would not thereby forfeit the benefit of the insurance he had effected in order to make a provision for his family. I need hardly say that, when I speak of resignation, I am not putting an imaginary case, because it may well be that a member of the Faculty of Procurators might desire to join some other legal Faculty, such as the Bars of England, Scotland, or Ireland, and could only do so, in accordance with the rules of these higher branches of the profession, by severing his connection with this body of solicitors. In such a case I think it would be inequitable that a party who had contributed to the fund for a series of years should forfeit the benefit resulting from his contract with the Widows' Fund. Of course if it were a term of the contract that he should lose the benefit of the fund on leaving the Society, *cadit quæstio*, but I see no evidence, either in the charters or in the Act of Parliament establishing the Widows' Fund, that it was ever made a condition of membership of the fund that the member should continue a procurator.

Now, the way in which Mr Colquhoun's connection was severed was that he was expelled by the Faculty from their body as a consequence of a conviction for fraud. Nobody suggests that his expulsion was not a proper exercise of the powers of the Faculty of Procurators. Whether it involved the forfeiture of his rights in the Widows' Fund is, as I have endeavoured to state, a different question.

The Faculty defend their action upon their common law right to maintain the purity and integrity of their body, and also upon the terms of their supplemental charter. I do not doubt that the Faculty have power to

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expel a fraudulent member from their body independently of any express power in their original charter. The granting of the exclusive privilege to a body of solicitors to practise in the Courts of Lanarkshire necessarily implied a moral fitness to practise, and would justify the exclusion of anyone convicted of a crime against property, such as fraud. I do not think it necessary to consider what are the powers of the Crown in regard to a clause of pecuniary forfeiture in a charter. In general, the Crown could neither levy a tax nor impose a penalty without the authority of Parliament, but when a penalty or forfeiture is introduced into a charter, the validity of the condition, and the legality of its exercise, do not depend upon the powers of the Crown but upon agreement, because those who applied for the charter, and those who subsequently applied for membership of the society, must be taken as assenting to all the conditions of the charter. If, as I think, it is an implied condition that a member shall have the qualification of honesty for the discharge of his duties, he cannot complain of being expelled when convicted of fraud. If the charter or the Act establishing the Widows' Fund had provided that the benefit of the fund should be lost through expulsion, I should admit that anyone joining the body accepts membership on this condition. There is no such condition in writing, and I have been unable to discover any legal grounds on which the Faculty of Procurators, when expelling a member, should also impose on him the penalty of being deprived of the benefits of a contract of insurance for which he has paid. No private corporation has the right to impose penalties on its members, apart from their consent, and it seems to me that this contract right, being once established, must continue until it is voluntarily relinquished, or is dissolved by the breach of some condition on the part of the assured.

But then it is said that the action of the Faculty is supported by the supplemental charter. I observe that the supplemental charter was obtained long after Mr Colquhoun became a member of the Faculty of Procurators. If it had been proposed in the application for the charter that anyone who was so excluded from the Society should forfeit his right to the pension fund, it would have been in the power of any member of the Society to make a representation to the Crown against the granting of the power, and according to practice that representation would have been remitted to a committee of the Privy Council to be heard on its merits. I am not surprised that no member of the Faculty should have represented against the supplemental charter, because it merely gives the power of expulsion which I think the Society already possessed, and which it was proper that they should have in express terms. The application for the charter was in terms of the charter itself and gave no notice to anybody that it was intended to interfere with pecuniary rights under the Widows' Fund. Nor was it likely to occur to anyone that this could be intended, because, as a matter of fact, a large number of members of the Faculty at that time were not contributors to the fund.

That being so, in my opinion the supplemental charter does not advance the question. I think it leaves the powers of the Faculty exactly where they were, the power of expulsion being for the purpose of discipline only, and for the carrying out of the fundamental object of the charter, viz., the

establishment of a Society whose members are intellectually and morally qualified to assist in the conduct of the business of the Sheriff Court. No. 60.

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For these reasons, my opinion is that Mr Colquhoun, notwithstanding his having justly incurred the censure of the Faculty, and having been justly expelled from the Faculty, is entitled to make payment of the premiums in order to secure for his family the benefits which the Widows' Fund was intended to provide to all its subscribers.

LORD KINNEAR.—I concur in the opinion of the Lord President, which I have read.

THE COURT adhered.

J. GORDON MASON, S.S.C.—WEBSTER, WILL, & Co., S.S.C.—Agents.

ANN HENDERSON ARMSTRONG AND OTHERS, Pursuers (Reclaimers).—*Young—W. Thomson.*
ANDREW KER AND OTHERS (Walter Wilson's Trustees) AND OTHERS, Defenders (Respondents).—*Wilson, K.C.—Steedman.*
WALTER WILSON ARMSTRONG AND OTHERS, Defenders. No. 61.

Dec. 22, 1904. Armstrong v. Wilson's Trustees.

*Trust—Administration—Personal Liability of Trustees—Rebuilding Heritable Property—No express power to rebuild—Investment of Trust-Funds—Duty of trustees towards liferenter and fiar respectively.*—Circumstances in which *held* that trustees who had expended trust funds in rebuilding and improving heritable subjects belonging to the estate, which twenty-one years after the rebuilding realised £100 less than the sum expended upon them, had not acted imprudently or negligently, and that loss had not been caused by their fault.

1ST DIVISION. Lord Kincairney.

THIS was an action of count, reckoning, and payment at the instance of Ann Henderson Armstrong and others, beneficiaries under the trust-disposition of the late Walter Wilson, baker in Hawick, against (1) Walter Wilson's testamentary trustees; (2) the testamentary trustees of Elizabeth Wilson, Hawick; and (3) the whole beneficiaries, other than the pursuers, under Walter Wilson's settlement.

By his trust-disposition and settlement Walter Wilson, who died on 6th July 1878, had conveyed his whole estate, heritable and moveable, to his sister, Elizabeth Wilson, and others as trustees for the trust purposes therein mentioned. He directed his trustees, *inter alia*, (3) to make over his household furniture and personal effects to Elizabeth Wilson, and to pay her a legacy of £600; (4) in the event of Elizabeth Wilson being unmarried at his death (as she was) to pay to her or to permit her during her life, so long as she remained unmarried, to uplift the rents, interests, and profits of the whole residue of the estate, declaring that if she married (which she never did) her liferent should be restricted to the rents of the heritable part of the estate; and (5) as the residue of the estate should be freed from Elizabeth Wilson's liferent interest therein (which event occurred upon her death in 1901) to divide it into thirteen equal shares to be held, paid, and applied as specified in the settlement, and, *inter alia*, after the death of the survivor of Jane Wilson or Armstrong, the testator's sister and her husband (an event which had occurred), for payment equally of four of these thirteen shares to her children therein mentioned *nominatim*, among whom were the pursuers. Power was conferred on the trustees to borrow money for the purposes of the trust; to sell

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all or any part of the trust-estate; and to invest the trust funds, *inter alia*, in the purchase of heritable property.

Defences in the present action were lodged for the defenders, Walter Wilson's trustees, and the defenders, Elizabeth Wilson's trustees.

Accounts were lodged by Walter Wilson's trustees. These accounts disclosed that these trustees shortly after the death of Walter Wilson had expended the whole residue of the moveable estate left by him, amounting to £625, and also a sum of £597 borrowed from Elizabeth Wilson, the liferentrix, on a bond and disposition in security bearing interest only after her death, upon rebuilding a house and bakery at No. 10 Howegate, Hawick, in which the testator had lived and carried on his business, and in which after the rebuilding the liferentrix and her successors also carried on business as bakers. The trustees had also subsequently acknowledged the liability of the trust, and had granted promissory-notes for the cost of certain alterations and improvements made upon the same premises at the expense of the liferentrix, amounting in all to £276, 2s. 7d. The sums in the bond and promissory-notes had been repaid to the liferentrix's representatives after her death in 1901, but with interest only from the date of her death. Upon the sale of the subjects, No. 10 Howegate, in 1901 the price realised was £1400, being about £100 less than the sum expended on them out of capital since the testator's death. It further appeared that the gross moveable estate, as shewn in the accounts as at the date of death, was £1939, and the free residue, after payment of expenses, debts, and legacies, £625, as above mentioned. The deceased left three heritable properties, viz., Nos. 8 and 10 Howegate and No. 7 Buccleuch Street, all in Hawick. The saleable values of these properties entered in the succession-duty account, given up for the liferentrix in 1878, were respectively:—No. 8 Howegate, £1150; No. 10 Howegate (the property rebuilt), £500; and No. 7 Buccleuch Street, £700. These amounts were in each case about fifteen years' purchase of the rental at that time. These properties ultimately in 1901 realised—No. 8 Howegate, £530; No. 10 Howegate, £1400; and No. 7 Buccleuch Street, £600.

The sum brought out as the balance available for division under the fifth purpose of the settlement after realisation of the whole trust-estate was £1514.

The pursuers lodged objections to the trustees' accounts, in which they maintained (1) that the trustees had no power to expend the trust-funds in rebuilding; (2) that the rebuilding was a speculation which had resulted in loss; (3) that it was undertaken at the request and for the advantage of the liferentrix, and in disregard of the interest of the ultimate beneficiaries; and (4) that the loss to the trust-estate resulting from the original rebuilding and subsequent expenditure in improving and extending the buildings as rebuilt amounted to about £1000, for which the defenders were responsible.

The trustees in answer maintained that the rebuilding and subsequent expenditure were necessary and expedient, and had not caused loss to the trust-estate.

After sundry procedure the Lord Ordinary (Kincairney), on 30th December 1903, before further answer, allowed both parties a proof of their averments on record, and in the minutes of objections to the accounts and answers thereto.

Proof was led accordingly. The facts established sufficiently

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appear from the opinions of the Lord Ordinary and of the Lord President, *infra*.

On 30th June 1904 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary, having considered the proof, productions, and whole cause, finds that it has not been proved that in the management of the trust-estate of the late Walter Wilson, baker, Hawick, the trustees acted imprudently, negligently, or unfairly, or that loss to the estate has been caused by their fault: Therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses," &c.*

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* "OPINION.—This is an action of count and reckoning brought against the trustees of Walter Wilson, baker, Hawick, who died on 6th July 1878. The pursuers are beneficiaries under the trust-deed. They are children of Jane Wilson or Armstrong, the truster's sister, and their interest in the estate is, as I gather, about two-thirteenth parts of the residue after the death of the truster's sister Elizabeth, liferentrix of the whole estate, heritable and moveable. She died on 23d January 1901.

"The trustees lodged their accounts, and the pursuers have lodged objections, which have been twice amended. The accounts, objections, and the trustees' answers have not been printed, and on that account the case is not brought out so plainly as it might have been; but the objections seem to me to fall under three heads: firstly, the pursuers say that the trustees are not entitled to take credit, as they have done, for three sums, £1223, 14s. 10d., £146, 14s. 1d., and £129, 8s. 6d., amounting in all to £1499, 17s. 5d., being money expended on the property; secondly, they object that no credit is given for any sum as the value of the goodwill of the business; and thirdly, they charge the trustees with sacrificing the trust to the interests of the liferentrix. I think these objections cover the whole of the pursuers' attack on the management and accounts of the trustees. Certain strictures are made about the trustees borrowing money from the liferentrix and granting her a bond and promissory-notes. But whether in doing so they violated the trust or not, that does not appear to me to enter into this case.

"In considering these objections it is necessary to keep in view the position of the liferentrix, Miss Wilson. She managed the truster's baking business, which was a large business for the place, and she was the person who dealt with all the customers, and latterly it appears that it was she, rather than the truster, who carried it on. In point of fact she continued it after his death, the whole stock in trade having been made over to her by the trustees at a valuation. The pursuers take no objection to this transaction, which appears to have been the most advantageous course which the trustees could have followed for the trust. Miss Wilson was herself nominated a trustee. But she did not attend the earlier trust meetings. At least she does not sign the earlier minutes, but on 1st April 1879 she signed a contract as a trustee. That was after a meeting held on 24th March 1879, when the trustees resolved, on consideration of a communication from her, to rebuild the premises.

"This case is somewhat unusual, for it does not proceed on any allegation of investment of the trust funds on bad security, or on any allegation of negligence, with which apparently the trustees were not at all chargeable and are not charged, but on questions arising in their management of the trust heritable property, consisting chiefly of buildings in Hawick. It is a case to which the observations of Lord M'Laren at sec. 2140 (on Wills) apply—where he says that 'a less rigorous view of the responsibilities of trustees has been taken with reference to charges of alleged omission or neglect in the collection of arrears of rents or debts prestable during the continuance of the trust. . . . Where the Court is satisfied that it has

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The pursuers reclaimed, and argued;—(1) The expenditure of the trust funds in rebuilding was *ultra vires* of the trustees.[1] *Brotchie* v. *Stewart*,[2] and *Sprot's Trustees* v. *Sprot*,[3] were exceptions to the general rule, and were decided as they were in deference to what was found to be the intention of the testator. The trustees here were not granted power to rebuild, and there was nothing in the settlement from which such power could be implied. The intention of the truster was that the heritable and moveable estate should be kept separate. *Drake* v. *Trefusis* (1875), L. R. 10 Ch. 364, and *Conway* v. *Fenton* (1888), 40 Ch. D. 512, were decided upon applications for powers, and the latter was only a single Judge decision. The demands of the tenants and of the authorities were the result of the rebuilding. (2) The liferentrix had no right to reimbursement for expenditure on repairs and improvements.[4] (3) Even if the rebuilding was *intra vires* it was a speculative and imprudent investment of

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been on the whole beneficial, it will not, and it would be unjust that it should, enforce the rules of strict diligence against trustees in respect to such arrears of moderate amount as they may have failed to reduce into possession.'

"These observations have no precise bearing on the facts of this case—and in particular, I do not see that it can be affirmed that the trustees' management was on the whole beneficial—but still they shew the manner in which the Court is in use to regard such cases of the management by trustees of trust property.

"I think that the objection that no price for goodwill has been entered in the account should not be sustained, for I think it has not been proved that anything could have been got for goodwill; and it seems to me that an endeavour to recover a separate sum for goodwill would have been inconsistent with the transaction of the trustees with Miss Wilson, and the proof appears to be that the trustees got more by their transaction with her than they could have got by a public sale or in any other way. It was she who dealt with the customers, and any goodwill which could be ascribed to the business must have been created to a large extent by her own dealings with customers in the conduct of the business. I think the fair conclusion from the proof is that she paid the trustees a full price for all she received. On this point reference may be made to the case of *Bell's Trustees* v. *Bell*, 8th November 1884, 12 R. 85. The allegation that the trustees favoured Miss Wilson and sacrificed the interests of the trust to her interests raises a question of evidence, and I am of opinion that that allegation or insinuation is quite unproved as matter of fact. No doubt, whatever money was spent on the trust property may have benefited her as liferentrix and as continuing the business, and probably it did; but I think that the motive of the trustees was not to benefit her but the estate. Two of them were examined as witnesses, and I think they seem to have been honourable men, and to have managed the trust property carefully and conscientiously. I cannot affirm that their management was beneficial or successful, but I think that the want of success arose mainly from the facts that there occurred a dulness

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[1] M'Laren on Wills, par. 2195; Lewin on Trusts (11th ed.) pp. 697-8, and 585; Bleazard v. Whalley (1854), 2 Eq. Rep. 1093; Brunskill v. Caird (1873), L. R., 16 Eq. 493; *in re* De Teissier's Trusts, [1893], 1 Ch. 153.

[2] July 10, 1869, 7 Macph. 1031, 41 Scot. Jur. 583.

[3] March 11, 1830, 8 S. 712, 5 F. C. (octavo) 559.

[4] Erak. Inst. ii. 9, 60; Scott v. Haliburton, June 27, 1823, 2 S. 388 (435); Wallace v. Braid, March 14, 1900, 2 F. 754, and authorities there cited.

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the trust funds, which had resulted in loss, and for which the trustees were liable.[1] (4) The trustees had unduly favoured the liferentrix, who was one of the trustees, and disregarded the interests of the fiars. The rebuilding and liability for the subsequent expenditure were undertaken at her request and solely for her benefit, and with the object of benefiting her only, whereas the interests of the fiars ought to have been the paramount consideration.[2] The trustees were not entitled to confer a benefit upon or enter into a contract with one of their own number, thus allowing a mixture of interests to arise.[3] The personal interests of the liferentrix in the transaction were antagonistic to those of the trust. Her absence from the meeting made no difference.

Argued for the defenders and respondents;—(1) The condition of the old buildings was such as to make their demolition necessary,

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in the staple trades of Hawick, and that the establishment of co-operative stores in the town affected very adversely such properties as were held by the trustees.

"At the same time I think that the objection of the pursuers, which I have mentioned first—that, namely, to the expenditure of £1499, 17s. 5d.—raises questions of very considerable difficulty. I do not know that it raises questions of legal difficulty. It regards the trustees' management of the property, and depends on the special circumstances.

"The property of which the trustees found themselves in the management was of a special character, at least that part of the property to which the pursuers' objections relate. It consisted of buildings in which the truster had lived and carried on his business. That business was well established, good, and lucrative, and I cannot think that the trustees were bound or would have been entitled to let it drop. They might reasonably have thought that the site was of value.

"Now, in regard to this branch of the case, it is worthy of some notice that none of the pursuers (being beneficiaries) who come into Court complaining of the mismanagement of the trustees are witnesses. There are four of them. One seems to be resident in London, but the other three appear to reside in the neighbourhood. They have not appeared to explain as witnesses their discontent with the management of the trustees, or their views as to what the trustees should have done in the circumstances which occurred.

"Now, the case which the defenders have made or endeavoured to make is of this nature. They say that the buildings were old and dilapidated and were indeed dangerous and liable to fall from their age and decay. I do not say the evidence is wholly satisfactory, but it is hardly met by the evidence of the pursuers. What the trustees did was to take down the old buildings and erect new ones. And on the whole, and without going into details, I am not prepared to say that in doing so they were grossly imprudent or over-speculative. Certainly I do not think that they were

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[1] Raes v. Meek, Aug. 8, 1889, 16 R. (H. L.) 31; Hutton v. Annan, May 14, 1897, 24 R. 851, Feb. 28, 1898, 25 R. (H. L.) 23; Alexander v. Johnstone, March 3, 1899, 1 F. 639; Henderson v. Henderson's Trustees, July 20, 1900, 2 F. 1295.

[2] Ker, March 3, 1855, 17 D. 565, *per* Lord Deas at p. 567, 27 Scot. Jur. 240, at p. 241; Molleson v. Hope, May 26, 1888, 15 R. 665.

[3] Perston v. Perston's Trustees, Jan. 9, 1863, 1 Macph. 245, 35 Scot. Jur. 166; Knox v. Mackinnon, Aug. 7, 1888, 15 R. (H. L.) 83, *per* Lord Halsbury, L. C., at p. 85.

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and the rebuilding was expedient in the interest of the trust. Part of the expenditure was necessitated by a fire. In the circumstances the trustees had an implied right to rebuild, and indeed a duty to do so.[1] But apart from that, they were given power to purchase heritage, and the expenditure on rebuilding was equivalent to expenditure on purchase. A power to purchase implied a right to rebuild.[2] The subsequent expenditure on improvements and extension was in the same position as the original expenditure on rebuilding. But further, the later expenditure was necessary either (*a*) because it was demanded by the authorities, or (*b*) in order to retain good tenants, which was in the interest of the fiars as well as of the liferentrix. The trustees had throughout acted with due regard to the respective rights of liferentrix and fiars in such circumstances.[3] (2) No benefit was conferred on the liferentrix by the actings of the

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negligent, or that they acted in the interests of Miss Wilson and in disregard of the interests of the trust.

"I am inclined to think on the evidence that they were justified in taking down the old buildings. They might perhaps have lasted a few years longer, perhaps not. But I do not consider that their conduct was such as to give rise to liability for breach of their trust.

"Having taken down the old buildings, what were the trustees to do? Was it their duty to leave the ground a barren site or were they entitled to continue the property as old, well-established baker's premises? I have great difficulty in dealing with this question. The pursuers maintain that it was wholly *ultra vires* of the trustees to employ the trust money in such a way, seeing the trust-deed contains no power to build, and that it was not within their authority to invest the trust money in such a manner. If the fact in this case had been that the trustees found a vacant piece of trust property, and had built on it premises for the conduct of some business, such as a baker's business, I would have held such an application of trust funds wholly beyond their powers, and would have held them liable for any loss that might have happened. I would have held it an investment of trust money quite *ultra vires*. But the very special circumstances of this case require consideration. Suppose it was necessary (not only expedient) to take down the whole buildings, or that the trustees were justified or excusable (which might be enough) in thinking so, are the trustees liable for replacing the old buildings which they were compelled to take down? I think that no case was quoted going that length. This, as I have observed, is not a case about unauthorised or imprudent investment of trust money. Several cases were quoted relating to such investments. But I think such cases (as for example the cases about investing in Greenock Harbour shares) are not at all in point. It was argued that investing trust money in building was *ultra vires* without express power. But I think that argument puts the proposition too high. In more than one case power to build has been held implied and to be *intra vires* of trustees without express power—*Sprot's Trustees* v. *Sprot*, 1830, 8 S. D. 712; *Drake* v. *Trefusis*, 1875, L. R. 10 Ch. 364; *Conway* v. *Fenton*, 1888, 40 Ch. 512. I am not prepared to hold that, in the circumstances, the expenditure of the trust money in rebuilding the baking premises must needs be disallowed as wholly *ultra*

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[1] Menzies on Trustees, vol. i. p. 133; Drake v. Trefusis (1875), L. R. 10 Ch. 364; Conway v. Fenton (1888), 40 Ch. Div. 512; Brotchie v. Stewart, July 10, 1869, 7 Macph. 1031, 41 Scot. Jur. 583; Sprot's Trustees v. Sprot, March 11, 1830, 8 S. 712.

[2] Drake v. Trefusis (1875), L. R. 10 Ch. 364.

[3] Bell's Pr. 1063; Graham v. Graham's Trustees, Dec. 21, 1850, 13 D. 420, 23 Scot. Jur. 184; *In re* Hotchkys (1886), 32 Ch. Div. 408.

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trustees. She was entitled to the interest of the moveable estate, and she got the increased rental instead of the interest. (3) The nett loss which had in fact been sustained was fully accounted for by ordinary tear and wear, and by the depreciation in value of property in Hawick, and particularly property of this class, due to dull trade and co-operative stores. (4) The pursuers were barred by *mora* and acquiescence.[1] The trustees had been prejudiced by the delay in challenging their actings. Many of the persons who knew the circumstances were dead. The pursuers and their father knew what was being done and took no objection at the time, or until now. Even now the pursuers did not come forward to give evidence in support of their contentions.

At advising,—

LORD PRESIDENT (read by Lord M'Laren).—This is an action of count, reckoning, and payment, at the instance of beneficiaries having right to

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*vires* without regard to the special circumstances. I think they have to be examined, and that in this case the trustees must have the benefit of all presumptions arising from care in management and honest intentions.

"But then it is said that this scheme of the trustees of rebuilding the premises was speculative, imprudent, and unsuccessful. The pursuers say that the trust money was thrown away. At first the trustees certainly did not think so. There is a minute of trustees dated 10th February 1880 (No. 178) from which it appears that the buildings had been completed at a cost of £1223, 14s. 10d. (there were additions afterwards), and it bears that 'the trustees, after carefully considering the whole circumstances, expressed themselves as extremely gratified with the result of the rebuilding, and recorded and do hereby record their opinion that the rebuilding of the property has very considerably enhanced the value of the deceased's estate.'

"It is not unfairly suggested that those of the pursuers who lived in the neighbourhood must have thought the idea of the trustees at least plausible and hopeful, seeing that they allowed the demolition of the old buildings and the erection of the new ones to proceed without objection. But I am afraid this observation cannot be brought up to a defence of bar.

"I have no doubt that this was an honest opinion by the trustees, and if it was, it has some bearing on the present question. I fear, however, that the trustees could not have long retained their favourable opinion of the building operations, because there were two sums spent afterwards, £146, 14s. 1d. and £129, 8s. 6d., bringing the total cost up to £1499, 17s. 5d.; and when the property was sold on 10th October 1901 no more was obtained than £1400 (see minute, 10th October 1901) for the buildings and the site. This price was obtained by private bargain, after the property had been exposed on several occasions to public sale.

"The pursuers maintained that this shewed a loss on the whole transaction of £100 plus the value of the site, which they maintained was of itself, apart from all buildings, worth £500.

"If this fall of price could not be accounted for on some special ground, then it certainly would appear that the operations of the trustees had resulted in a considerable loss.

"But the trustees say, and I think they have proved, although the proof is not all one way, that a great fall in the value of such property had taken place in the meantime, in consequence partly of dulness of trade in Hawick, but chiefly in consequence of the establishment of co-operative stores there, in consequence of which (some of the witnesses say) the value of other shops had been much diminished. I do not know how far the opinions of

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[1] Barns v. Barns' Trustees, March 5, 1857, 19 D. 626, 29 Scot. Jur. 292.

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certain shares of the estate left by the late Walter Wilson, baker in Hawick, under his testamentary settlement, and the question presented for decision is whether they have established against the defenders, who are the trustees under that settlement, personal liability in respect of loss which they allege to have been incurred by their (the trustees) rebuilding certain property in Hawick which belonged to the truster, as well as by their failing to give credit for what they allege to have been a saleable goodwill in a baking business in Hawick, and otherwise favouring the life-rentrix of his testamentary estate at the expense of the fiars.

Walter Wilson died on 6th July 1878, leaving a testamentary trust-disposition and settlement dated 11th February 1876, by which he disposed of his means and estate. Under that settlement, Miss Wilson, his sister, had right to the liferent of his free means and estate, and the present action was not raised till 30th September 1902, more than twenty-four years after his death.

The first meeting of the trustees appointed by him under his testamentary settlement was held in Hawick on the 16th July 1878, four of the trustees, Messrs Wilson, Ker, Dryden, and Grierson, being present. Miss Wilson, though nominated a trustee under her brother's testamentary settlement, was not present at any of the first three meetings of his trustees.

At that (the first) meeting, the trustees appointed Mr Thomas Dryden, one of their number, to be factor on the trust, with power to manage the heritable property, to collect the rents and interests of the trust-estate, and to account to the trustees half-yearly for his intromissions.

Mr Haddon was appointed law-agent for the trust, with the usual powers,

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these witnesses are well founded. But it is a circumstance which requires to be taken into account in considering both the action of the trustees and the apparent loss to the trust-estate. It was argued that what was apparently loss caused by the trustees' operations was really not so at all, but was the result of certain definite adverse circumstances which the trustees could not control or foresee. If that was so, then I think that loss to the trust by the buildings would not have been proved.

"With regard to the two smaller sums, £146, 14s. 1d. and £129, 8s. 6d., I do not think there are sufficient materials in the proof to admit of treating them on a different footing. Both were additions to the cost of the new building. The former sum is mentioned in the minute of the trustees, dated 3d December 1889, from which it appears that the expense had been defrayed, when incurred, by Miss Wilson, and that the factor on the property, Mr Dryden, had reported that the works as permanent improvements should be charged against capital; but should not be repaid until Miss Wilson's death, she getting the benefit of the improvements and bearing the burden of them during her life.

"The other sum, £129, 8s. 6d., is mentioned in the minute of date 7th March 1894 (No. 180 of process). This is in much the same position as the former sum, only the necessity of this expenditure is not so clearly made out. I have to regret, on this part of the case, the absence from the proof of the factor, Mr Dryden, who was indisposed at the date of the proof. As the proof stands, I do not find that I have sufficient grounds for separating these two additions to the cost from the rest, and I think the case must be dealt with as if the primary cost had been £1499, 17s. 5d. instead of £1223, 14s. 10d.

"On the whole case I think that the pursuers have failed to make out a case of liability against the trustees."

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and he was instructed to take the necessary steps for ascertaining and realising the personal estate, and completing the title of the trustees to both it and the heritable property left by the truster.

The trustees present at the meeting resolved to make over to Miss Wilson the stock in trade, shop and bakehouse, furniture, fittings, utensils, &c. in the premises in the Howegate, Hawick, in which the truster had carried on his business as a baker, and such portion of the book debts as she might wish to acquire, at a valuation. Miss Wilson had long assisted her brother in the conduct of that business.

The formal business appropriate to a first meeting of trustees was transacted, and recorded in the minute, and I understood that the pursuers' counsel did not complain of anything which is recorded as having been done at that meeting.

The next meeting was held on 21st October 1878, when an inventory and valuation of the stock in trade, shop and bakehouse furniture, fittings, utensils, &c., in the baking premises, made up in terms of the instructions given at the last-mentioned meeting, were submitted. That inventory and valuation amounted to £116, 2s., and the trustees directed that these assets should be made over to Miss Wilson at that price. A list of the book-debts due to the deceased considered good, amounting to £226, 3s. 10d., was also submitted, and the trustees directed that these debts should be made over to Miss Wilson on payment of that amount.

The minute of the next meeting of the trustees, held on 24th March 1879, bears that Mr Dryden stated that in consequence of the property No. 10 Howegate, which formed part of the trust-estate, being thatched, the expense of upholding it was very great, and that the property was besides old and dilapidated, and that the meeting had been called to consider an application by Miss Wilson that the trustees should rebuild the premises. Plans and specifications directed to carry out this proposal were submitted, the total estimated cost of the proposed rebuilding being £692, 19s., exclusive of painting and extras, which, it was expected, would raise the total cost to £850. Mr Dryden explained that the then present rental of the property was £32, 10s., and that it was believed that after being rebuilt the property would yield a rental of upwards of £85. The minute bears that the meeting having carefully considered the proposal, three of the four trustees present were of opinion that the rebuilding of the property was necessary and expedient, and in the whole circumstances offered a fair and legitimate investment for the balance of the trust funds which would be available for investment at the following Whitsunday, and that they resolved to proceed with the rebuilding forthwith, on condition that Miss Wilson bound herself to observe and perform the terms and conditions therein mentioned, the first of which was that she should undertake the whole responsibility in connection with the rebuilding, and the whole management of it. It was resolved that the trustees should expend the whole trust funds available for investment, after payment of the truster's debts, and the legacies and other bequests payable in terms of his settlement, in rebuilding the property, on the express condition and understanding that Miss Wilson would provide whatever further sums might be necessary for fully completing the property after the available trust funds had been exhausted.

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The minute further bears that it was arranged that an agreement should be entered into between the trustees and Miss Wilson, containing the conditions and provisions mentioned, and that the law-agent was instructed to have the necessary agreement prepared and executed at once, so that the work might be proceeded with. Mr Grierson, one of the trustees, stated that he did not consider the rebuilding of the property either necessary or expedient, and he consequently resigned the office of trustee and executor, and his resignation was accepted.

A meeting of the trustees was held on 10th February 1880, the minute of which bears that an account of charge and discharge of the trustees' intromissions with the proceeds of the estate as at 3d February 1880 was submitted, and that after examination it was found to be correct and sufficiently vouched. That account closed with a balance of £597, 16s. 3d. due to the trustees, which sum, the minute bears, "falls to be borrowed from Miss Wilson on bond as formerly arranged," and the agent in the trust was instructed to have the bond for that amount in Miss Wilson's favour prepared, executed, and delivered forthwith.

Mr Dryden, who had superintended the erection of the new buildings, reported that the total cost of rebuilding the property was £1223, 14s. 10d., this cost having been much less than was anticipated, owing to the fact that the cost of labour and material was considerably less than it had been for many years. He also stated that the rental of the new buildings was £123, which might be considerably increased, that the annual value of the old buildings was £32, 10s., and that as the old property was dilapidated and covered with thatch, considerable expense was annually incurred in repairing it.

The minute further bears that the trustees after carefully considering the whole circumstances, expressed themselves as extremely gratified with the result of the rebuilding, and recorded their opinion that it had very considerably enhanced the value of the deceased's estate. The trustees further resolved, as the whole trust-estate then consisted of the properties Nos. 8 and 10 Howegate and 7 Buccleuch Street, Hawick, with the view of avoiding expense, to permit Miss Wilson to uplift and receive the rents and annual produce of the estate until her death or marriage, and they authorised her accordingly. Instructions were also given to Mr Thomas Dryden to see that Miss Wilson kept the properties in good and sufficient repair, and also that the insurances in name of the trustees over the properties were maintained in force.

A fire occurred at the Howegate property in 1882, and after the buildings destroyed by it had been reinstated by the insurance company with whom they were insured, it was found necessary to take down the back gable and replace part of the roof of the back house, owing to its insecure and dilapidated condition, the cost of these works being £66, 11s. 4d. In 1884 the local authority called upon the trustees to put water-closets into the Howegate property, and they were consequently obliged to do so. It appears that a washing-house was also erected, as being necessary for retaining good tenants, and that in 1886 the sum of £53, 12s. 3d. was incurred in increasing the accommodation in the Howegate property, and these sums, amounting together to £146, 14s. 1d., were paid by Miss

Wilson. It was stated at the meeting that all these works were in the circumstances necessary, and formed permanent improvements on the property, and increased its value by more than the cost. The trustees granted a promissory-note to Miss Wilson for the £146, 14s. 1d. above mentioned, payable at her death, without interest during her life.

It appears from a minute of the trustees of 7th March 1894, that the tenant of a shop and dwelling-house in the property No. 10 Howegate, belonging to the trust, had represented that it was subject to various inconveniencies, and alterations and additions were made to it at the cost of £129, 8s. 6d., which sum was paid by Miss Wilson. The trustees accordingly granted a promissory-note for that amount in her favour, payable on her death, and not to bear interest during her life.

The total value of the moveable estate left by the truster in the United Kingdom was ascertained to be £1939, 2s. 6d.

Miss Wilson died on 23d January 1901, and the truster's estate consequently became available for division amongst the beneficiaries under his testamentary settlement.

The question which we have now to decide is whether the beneficiaries under the truster's testamentary settlement have established grounds for holding his trustees personally liable for the losses to the trust-estate, which they maintain to have been incurred by the trustees, especially with respect to the Howegate property, and I concur with the Lord Ordinary in thinking that they have not.

The action of the trustees in regard to the heritable property of the trust turned out in the result to be unfortunate, but I do not think that it was in any way dishonest or blameworthy. They had to consider a difficult question as to the best mode of dealing with the Howegate property, and I cannot say that the course which they followed was *ultra vires* or even injudicious. It appears that the property never was structurally of a good class. It was an old property, apparently constructed of boulder stones and thatched, and it was altogether unsuitable for the purposes of a dwelling-house and baker's shop according to modern ideas. The truster and Miss Wilson seem to have been successful in the business, and it was not unreasonably thought desirable to preserve the goodwill of it in so far as that depended upon customers continuing to resort to the old shop. It appears that the heritable goodwill might have remained of value had it not been that Hawick has suffered from depressed trade conditions, and that the competition of co-operative stores has proved detrimental, as it has done to many shops throughout the country. No doubt rebuilding involved elements of risk, and perhaps of speculation, but it was practically forced upon the trustees by circumstances, and I see no reason to doubt that they acted honestly and intelligently, and therefore I do not think it would be reasonable to make them personally liable for the consequences of circumstances over which they had no control. A considerable fall appears to have taken place in the value of property in the locality, partly due to dulness of trade in Hawick, and perhaps still more to the establishment of co-operative stores there, by which the business of individual shopkeepers, including bakers, has been seriously affected, but I do not think that the trustees could have foreseen this in the exercise of an honest and intelligent

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judgment. I see no evidence of any desire or intention on the part of the trustees in any way to favour Miss Wilson at the cost and risk of the estate and the other persons beneficially interested in it.

Upon the whole matter I think that the Lord Ordinary is right in finding that it has not been proved that in the management of the trust-estate the trustees acted imprudently, negligently, or unfairly, or that loss to the estate has been caused by their fault, and I am therefore of opinion that his Lordship's interlocutor of 30th June 1904 should be adhered to.

LORD M'LAREN, LORD KINNEAR, and LORD ADAM concurred.

THE COURT adhered.

STEELE & JOHNSTONE, W.S.—STEEDMAN & RAMAGE, W.S.—Agents.

No. 62.
Dec. 24, 1904.
Currie's Trustees v. Currie.

JAMES RICHARDSON CURRIE AND OTHERS (Currie's Trustees), AND OTHERS, First, Second, Third, and Fifth Parties.—*D. Anderson—Christie.*

WILLIAM FULTON (Curator Bonis to Miss Jane Richardson Currie), Fourth Party.—*Sandeman.*

*Succession—Testament—Pencil alterations on holograph will—Writ.—Held* that unauthenticated holograph pencil alterations on a holograph will written in ink had no effect.

2D DIVISION.

ADAM CURRIE, who resided at Firgrove, Castlehead, Paisley, died at Rothesay, on 8th February 1904, leaving a holograph trust-disposition and settlement, dated 27th October 1903.

At the time of his death Mr Currie was from home, and his settlement, along with an unsigned and uninitialed list written in ink of the names of the legatees and legacies mentioned in the settlement with pencil alterations thereon, were found in a travelling bag which he had with him at the time of his death.

The settlement bore a number of pencil alterations, consisting of deletions by a pencil line drawn through the names of certain legatees and their legacies, and in other cases by the substitution of different sums for those mentioned in the settlement. The pencil markings were not authenticated in any way.

Questions having arisen as to the effect to be given to the pencil alterations, a special case was presented to the Court, to which the trustees of Mr Adam Currie, the testator, were the first parties, and the second, third, and fifth parties were persons interested in supporting the will as it originally stood. The fourth party was William Fulton, accountant, Paisley, curator bonis to Miss Jane Richardson Currie, who contended that the alterations and deletions made by the testator shewed that he did not intend the settlement to remain as an operative will, and alternatively that said alterations and deletions inferred a cancellation of the legacies to which they applied.

It was stated in the special case that "the alterations so far as in writing are holograph of the testator, and it is presumed that the other alterations and deletions on the documents were also made by the testator."

The questions were:—"(1) Is the said trust-disposition and settlement valid and effectual? (2) If the preceding question be answered in the affirmative, do the deletions and alterations on said trust-disposition and settlement, or any and which of them, fall to receive

effect in construing the testamentary writings of the deceased Adam Currie?"

The first, second, third, and fifth parties referred to *Pattisons' Trustees* v. *Edinburgh University*[1] and *Hamilton's Trustees* v. *Hamilton*.[2]

The fourth party referred to *Lamont's Trustees* v. *Magistrates of Glasgow*.[3]

At the close of the discussion, LORD YOUNG stated that he was not prepared to express an opinion without further consideration, and the parties thereupon agreed to accept the opinions of the other three Judges.

LORD JUSTICE-CLERK.—I think this is a very clear matter on the decisions. Mr Sandeman has argued his case very fairly and frankly, and has been unable to put before us any judgment that would favour his contention. In several cases it has been distinctly decided that alterations on a signed will, in order to be valid, must be authenticated in some way, and here there is no authentication whatever. On the authorities it appears to me that alterations like the present made by pencil must be held to be merely deliberative, and I should have arrived at that conclusion apart from the decisions. When a man has signed his will, and is considering whether he should alter it, it is quite natural that he should draft proposed alterations in pencil. But that he should suppose that in making these pencil alterations he was indicating his final opinion I cannot conceive. At anyrate I am perfectly clearly of opinion that it cannot be held that he did so. In the case of *Hamilton's Trustees*,[2] an unsigned holograph memorandum was handed by the testator to his law-agents to be put up with his settlement, and nevertheless it was held that that memorandum was not effectual as a bequest, because the Court considered that it was merely deliberative. We were referred to the case of *Lamont*,[3] but that was a very different case. In that case the truster had expressly directed his trustees to give effect to any writing, although defective in the solemnities required by law, from which they might be satisfied as to his intention and wishes. That is an entirely different case from the present, on which its only bearing is as an illustration of the general rule that alterations of a will must, except in very special circumstances, be authenticated.

On these grounds I am of opinion that the pencil alterations here were not effectual, and therefore that the second question in the case should be answered in the negative.

LORD TRAYNER.—I concur with your Lordship. It appears to me that this is a clear case, ruled absolutely by authority, and that there is no room for argument.

LORD MONCREIFF.—I am quite of the same opinion. There are here two documents under consideration, the one being the original will of the deceased on which there are certain deletions and alterations in pencil, and the other an uninitialed holograph note or jottings also altered both in pencil and in ink. I take the latter first. The manner in which the

[1] Nov. 9, 1888, 16 R. 73. [2] Dec. 4, 1901, 4 F. 266.
[3] March 10, 1887, 14 R. 603.

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alterations have been made shews the tentative or deliberative way in which the testator has made them. He writes in ink, and then cancels in pencil. The question is what effect is to be given to the jottings and to the pencil alterations. I think it is evident that the deceased changed his mind from day to day, and made these alterations on the document without arriving at any fixed or settled resolution as to changing his will. With regard to the will the alterations thereon are so faint as to be hardly visible. However, it is quite sufficient for the decision of this case that on the authorities alterations of this kind are not to be given effect to unless they are in some way authenticated, or amount to distinct evidence of an evinced intention to alter or cancel which the law can recognise. I therefore agree with your Lordships.

THE COURT answered the first question in the affirmative, and the second in the negative.

LISTER SHAND & LINDSAY, S.S.C.—ALEXANDER WYLIE, S.S.C.—F. J. MARTIN, W.S.—Agents.

No. 63.
Dec. 24, 1904.
Foreman v. Duke of Buccleuch.

DAVID WALLACE FOREMAN AND ANOTHER, Pursuers (Respondents).—*F. C. Thomson.*

DUKE OF BUCCLEUCH, Defender (Reclaimer).—*Younger.*

*Expenses—Taxation—Remit to English Taxing Officer—Account incurred to English solicitors in preparing case.*

1ST DIVISION. LdStormonth-Darling.

IN an action at the instance of the owners of a vessel against the proprietor of Granton Harbour for damages arising from their vessel grounding on a reef in the harbour, the pursuers obtained decree, with expenses, and a remit was made to the Auditor. To the account of expenses lodged by the pursuers there was appended an account incurred to a firm of London solicitors in connection with the preparation of the case. The Auditor having refused to deal with the English account, counsel for the pursuers moved the Court to remit it to the Taxing Officer of the Supreme Court of Judicature, London, with a request that he should tax it as between party and party, and referred to *Camper & Nicholsons, Limited*, v. *Wemyss*.[1] Counsel for the defender objected, and contended that the English account should in the first place be remitted to the Auditor to report what items therein were chargeable as between party and party according to Scottish practice.

THE COURT (LORD ADAM, LORD M'LAREN, and LORD KINNEAR, the LORD PRESIDENT being absent) pronounced this interlocutor:—"Find that the account of expenses incurred to Messrs Pritchard & Sons, solicitors, London, which is appended to the pursuers' account of expenses, falls to be taxed as between party and party according to English rules: Therefore remit the said account to the Taxing Officer of the Supreme Court of Judicature, the Taxing Office of the Royal Courts of Justice, London, with a request that he will examine and report at what figure the said account falls to be taxed as between party and party."

BOYD, JAMESON, & YOUNG, W.S.—STRATHERN & BLAIR, W.S.—Agents.

[1] July 16, 1903, 11 S. L. T. 290.

No. 64.

Jan. 10, 1905.

Inland Revenue v. Alexander's Trustees.

THE LORD ADVOCATE (on behalf of the Commissioners of Inland Revenue), Pursuer (Respondent).—*Sol.-Gen. Dundas—Young.*
ELIZA, LADY ALEXANDER, AND OTHERS (Sir Claud Alexander's Trustees), Defenders (Reclaimers).—*Lorimer, K.C.—Grainger Stewart.*

*Revenue—Estate-Duty—Deductions allowable as Debts—Marriage-Contract Provisions—Interim Aliment to Widow—Finance Act*, 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 7.—Sec. 7, subsec. (1) (*a*), of the Finance Act, 1894, enacts:—"In determining the value of an estate for the purpose of estate-duty allowance shall be made for reasonable funeral expenses, and debts, and incumbrances; but an allowance shall not be made—(*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest . . .; and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto."

*Held* that an obligation by a husband in a marriage-contract to make certain payments to his marriage-contract trustees for behoof of his wife and children, as the counterpart of similar obligations by his wife, could not be regarded on his death as a debt incurred by him "for full consideration in money or money's worth wholly for the deceased's own use and benefit," in the sense of the Finance Act, 1894, and did not form a proper deduction in determining the value of his estate for the purposes of estate-duty.

*Held* also that a similar obligation by a father in his son's marriage-contract, as the counterpart of an obligation by the son's wife and her father, could not be deducted as a debt.

1ST DIVISION. LdStormonth-Darling.

MAJOR-GENERAL SIR CLAUD ALEXANDER of Ballochmyle, Baronet, died at Westminster, on 23d May 1899, survived by his wife Eliza, Lady Alexander, and by his son Claud Alexander younger, an only child.

Upon Sir Claud Alexander's death his trustees and executors gave up an inventory of his personal and moveable estate, and in appropriate accounts annexed to it they specified other property in respect of which estate-duty was payable on his death.

In the schedule of debts which were deducted from the personal and moveable estate were included the following entries:—"115. Cost of aliment of the deceased's widow from date of death to November 1899, when her provisions became payable, and mournings, £1000." "116. Amount of provisions covenanted to be paid by deceased to his widow by their antenuptial contract of marriage, dated 11th February 1863, for the considerations therein specified, and at the first term of Whitsunday or Martinmas happening after his death £2000." Also, in preparing an estimate of the gross principal value of the heritable estate a deduction from its gross annual value was made of the following item:—"Annuity of £1500 in favour of Eliza, Lady Alexander, deceased's widow, secured by deceased over Ballochmyle estate, or a portion thereof, by his antenuptial contract of marriage, dated 11th February 1863, for the considerations therein specified, £1500." And in bringing out the net principal value of the heritable estate for assessment to duty a deduction was made on account of the sum of £30,000 as a debt constituted by the deceased's bond and disposition in security, dated 6th December 1889, in favour of the trustees in the said antenuptial contract of marriage between Claud Alexander younger and Lady Diana Montgomerie.

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Objection was taken by the Commissioners of Inland Revenue to these deductions on the ground that sums which the defenders had deducted did not represent debts incurred by the deceased, or incumbrances created by a disposition made by him *bona fide* for full consideration in money or money's worth wholly for his own use and benefit, and did not come within the terms of sec. 7, subsec. (1) (*a*), of the Finance Act, 1894,* and on 15th January 1904 the present action was raised on their behalf by the Lord Advocate against Eliza, Lady Alexander and others, the trustees of Sir Claud Alexander, to have the defenders ordained to render a full account of the estate of the deceased and for payment of estate-duty.

*Marriage-Contract of Sir Claud Alexander.*

By antenuptial contract of marriage, dated 11th February 1863, Major-General Sir Claud Alexander of Ballochmyle, Baronet, in contemplation of his marriage, and in consideration of a conveyance on her part by his intended wife, then Miss Eliza Speirs, afterwards Lady Alexander, bound and obliged himself, his heirs, executors, and successors whomsoever to pay to the trustees under the contract, (1) during the lifetime of the said Eliza Speirs, in the event of her surviving him, an annuity of £1500, free of all deductions whatever; and (2) the sum of £2000 in lieu of household furniture. He also bound himself to aliment his widow from the day of his death until the first term of Whitsunday or Martinmas thereafter. In security of these obligations Sir Claud Alexander conveyed to the trustees certain portions of the land of Ballochmyle.

On her part Miss Speirs conveyed to the trustees a sum of £11,000 belonging to her, and her own and her mother's interest in a sum of £6000, provided and settled by her mother's antenuptial contract, for the following purposes,—(1) payment of the free yearly proceeds to the spouses and the survivor; (2) division of the capital among the children of the marriage after the death of the surviving spouse; and (3) in the event of there being no issue of the marriage, disposal of the capital as Miss Speirs might direct.

Miss Speirs accepted the provisions in her favour in full satisfaction of her legal rights in the event of her survivance.

*Marriage-Contract of Claud Alexander younger.*

Sir Claud Alexander, in the antenuptial contract of marriage, dated 6th, 9th, and 11th December 1889, between his son Claud Alexander younger of Ballochmyle and Lady Diana Montgomerie, daughter of the Earl of Eglinton and Winton, bound himself to pay to the marriage-contract trustees £30,000 as a provision for the intended spouses and the children of the marriage. In security of this sum Sir Claud Alexander granted a bond and disposition in security, dated 6th December 1889, over the estate of Ballochmyle under the declaration that the trustees should not be entitled during his lifetime to demand payment of the £30,000, so long as he regularly paid to his son or the trustees the sum of £1000 per annum, to which amount the annual interest was restricted. The trust purposes were (1) payment of the income of the fund to Claud Alexander the younger, subject to an annuity of £750 to Lady Diana Montgomerie if she survived her husband; and (2) payment of the capital to the

* Quoted in rubric.

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children of the marriage and issue of predeceasers, and, failing children or issue, to the survivor of Sir Claud Alexander and his son.

On the other part Lady Diana Montgomerie conveyed to the trustees the whole means and estate then belonging to her, or that she might acquire *stante matrimonio*, including £5000 belonging to her, and £12,000, contingently restrictable to £9000, the share apportioned to her by her father out of a provision of £36,000 for younger children under his own marriage-contract. She also bound herself, in the event of her succeeding to the entailed estate of Montgomerie, to disentail and convey it to the trustees. Further, the Earl of Eglinton and Winton agreed to pay his daughter £400 a year during the joint lives of Sir Claud Alexander and himself. The purposes of the trust were:—(1) Payment of the income to Lady Diana during her life; (2) after her death payment of the income to Claud Alexander, the younger, should he survive her; and (3) after the death of the spouses payment of the capital to the children of the marriage and the issue of predeceasers as Lady Diana Montgomerie might appoint. Lady Diana Montgomerie further accepted the provisions of the marriage-contract in full satisfaction of her legal rights.

The pursuer pleaded, *inter alia*;—(1) The deductions, which the defenders claim a right to make in assessing the value of the deceased's property for the purpose of duty, are not such as can be allowed on a sound construction of the Finance Act, 1894.

The defenders pleaded, *inter alia*;—(2) On a sound construction of the Finance Act, 1894, the defenders are entitled to make the deductions claimed in assessing the value of the deceased's property for the purpose of estate-duty.

On 24th November 1904, the Lord Ordinary (Stormonth-Darling) appointed the defenders to deliver to the pursuer the account called for in the summons,* and on 10th December 1904 his Lordship granted leave to reclaim.

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* "OPINION.—The first question in this case is whether, in determining the value of the late Sir Claud Alexander's estate for the purpose of estate-duty, his trustees are entitled to make certain deductions in respect of provisions contained in his own marriage-contract, and in that of his son, to which he was a party. The question turns on section 7 of the Finance Act, 1894, which provides that allowance shall be made for 'debts and incumbrances,' but not 'for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth, wholly for the deceased's own use and benefit.' The obligations undertaken by Sir Claud in his own and his son's marriage-contract were undoubtedly debts, and, in so far as secured over his estate, they were also 'incumbrances.' But the trustees must shew that the debts or incumbrances are of a kind which satisfy the other requirements of section 7. They endeavour to do this, as regards Sir Claud's own contract, by pointing to the fact that his intended wife brought into settlement a considerable fortune, which she had partly in her own right and partly in expectancy, and that she accepted Sir Claud's provisions in her favour as in full satisfaction of her legal rights in the event of her surviving him. As regards his son's contract, they find the 'full consideration in money or money's worth' required by section 7 for the provision of £30,000 made by Sir Claud in the counter-stipulations undertaken by the lady and her father, Lord Eglinton, in favour of the spouses and children of the marriage.

"Now, even if this question had to be solved on the words of sec. 7 of

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The defenders reclaimed, and argued;—The trustees were entitled to make the deductions claimed. In the case of Sir Claud Alexander's own marriage-contract, Miss Speirs had brought in a considerable fortune, and she had renounced valuable rights. Similarly, in the case of the son's marriage-contract Lord Eglinton and his daughter had contributed largely to the marriage-contract funds, and the daughter had given up her legal rights. In each case, therefore, the provisions had been made by Sir Claud Alexander in consideration of provisions made on the other side, and full consideration in money or money's worth had therefore been given for these provisions. The present case was distinguished from *Lord Advocate* v. *Sidgwick*.[1] In that case the parents on either side had provided the funds, while here the parties were contracting with their own money. The obligation to aliment was a debt at common law, and the fact that it had been made matter of contract did not

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the Finance Act alone, without the aid of decision, I should find it very difficult to resist the argument for the Crown. I should say that, to make a debt incurred or incumbrance created by the deceased himself deductible in determining the value of his estate for the purpose of estate-duty, the debt or incumbrance must be shewn to have originated in something of the nature of a proper purchase, in which the deceased received, for his own use and benefit, full consideration in money or money's worth. I should say that it could not, therefore, cover any stipulation in a marriage-contract, although reciprocal in character and issuing in a debt incumbrance, where the true consideration is a thing incapable of being expressed in money or money's worth—to wit, the marriage itself.

"But I find that the question is, for me at least, foreclosed by the decision in *Lord Advocate* v. *Sidgwick* (4 R. 815). That judgment is none the less apposite for having been pronounced before the date of the Finance Act, inasmuch as it proceeded on the words of sec. 17 of the Succession-Duty Act of 1853, which are similar to, but less forcible than, the words of sec. 7 (1) (*a*). I call them less forcible, for, instead of 'valuable consideration in money or money's worth,' the latter Act speaks of 'full consideration in money or money's worth.' It is true that Lord Deas dissented, but the view of the majority (Lord President Inglis, Lord Mure, and Lord Shand) found support in the reasoning of Lord Westbury in *Floyer* v. *Bankes* (3 De G. J. and S. 306). *Sidgwick's* case presented both of the important elements that are here founded on, viz., that the intending wife and her father brought her own fortune into settlement, and that she accepted the intending husband's provisions in her favour as in full satisfaction of her legal rights. Some stress is laid in the opinions of the Judges on the intending husband having had no estate of his own at the date of the contract on which terce or *jus relictæ* could arise, whereas here, it is said (at least in the case of Sir Claud's own contract), the intending husband had a valuable estate. But I do not read the opinions as turning essentially on that circumstance; and, indeed, it is manifest that, whatever may be the state of the husband's property at the date of the contract, the legal rights emerging in the event of his predecease are always more or less problematical in value. In another respect this case is stronger than *Sidgwick's*, for the words of the Finance Act requiring that the deductible debts or incumbrances must have been incurred or created 'wholly for the deceased's own use and benefit' are not to be found in the Succession-Duty Act, and it would be difficult to say that Sir Claud took any personal benefit either from the renunciation of Lady Alexander's legal rights in his own marriage-contract, or from the provisions made by Lord Eglinton and

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[1] June 6, 1877, 4 R. 815.

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alter its character. It was still a debt exigible from the estate of the deceased.[1] In view of the decision in *Inland Revenue* v. *Stewart's Trustees*[2] it was admitted that settlement estate-duty was due.

Argued for the respondent;—No consideration in money or money's worth had been given for the provisions made by Sir Claud Alexander in the marriage-contracts. The case of *Sidgwick*[3] was directly in point. The ground of judgment in that case was that the true consideration for the mutual obligations undertaken in a marriage-contract was not the money but the marriage. The consideration of marriage was not a consideration in money or money's worth.[4] The ratio of the decision in *Sidgwick*[3] was not displaced by the distinction attempted to be made in this case, on the ground that Sir Claud Alexander and Miss Speirs were dealing with their own money. In point of fact, the son had put no funds of his own into his marriage-contract. The rights which were said to have been renounced by Miss Speirs and Lady Diana Montgomerie were not vested rights, and the provisions made by these ladies were family provisions for the benefit of their children as well as themselves. Further, the £30,000 provided in the son's marriage-contract had not been paid at the date of Sir Claud Alexander's death, and was therefore chargeable with estate-duty.[5] At anyrate, it was quite clear that the provisions made by Sir Claud Alexander were not debts or incumbrances incurred or created "wholly for the deceased's own use and benefit." The payment of interim aliment might or might not be a debt against Sir Claud Alexander's estate, but in any case it did not come under the proviso last quoted, and could not therefore be deducted.

LORD KINNEAR.—I think the Lord Ordinary has disposed of this case rightly, and I am for adhering to his judgment, substantially for the reasons

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his daughter in the marriage-contract of the son. Accordingly my judgment on the first question is for the Crown.

"The second question relates to the liability of the trustees for settlement estate-duty; but the trustees concede that this question is determined against them by the case of *Stewart's Trustees*, 1 F. 416.

"There is a subsidiary question as to the obligations undertaken by Sir Claud, in the event of his predecease, to aliment his widow from the day of his death until the first term of Whitsunday or Martinmas thereafter, and to provide mournings for her. I understood the Crown to concede that a sum for mournings was deductible as falling under 'reasonable funeral expenses,' which are expresly mentioned in sec. 7; and that is the legal category to which a widow's mournings may be referred, according to Lord Fraser's book on 'Husband and Wife,' at p. 967. But it is clear that the claim for interim aliment cannot be brought under that head; and however much it may be a proper debt against an executor, I do not see that where it forms part of the provisions in a marriage-contract it is in any different position from the other provisions of the deed, for the purposes of estate-duty.

"I shall therefore order an account, both as regards estate-duty and settlement estate-duty."

[1] Fraser, Husband and Wife, pp. 965-967; Hanson, Death Duties, 5th ed., p. 168.

[2] Jan. 20, 1899, 1 F. 416.

[3] Lord Advocate v. Sidgwick, June 6, 1877, 4 R. 815.

[4] Floyer v. Bankes, 1863, 3 De G. J. and S. 306.

[5] H. M. Advocate v. Gunning's Trustees, Jan. 28, 1902, 39 S. L. R. 534; Attorney-General v. Holden, [1903], 1 K. B. 832.

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he has given. I think, with his Lordship, that the case of the *Lord Advocate* v. *Sidgwick* [1] is a very valuable authority, but I agree that the present case is, in one important respect, distinguished from that, because the question which had to be considered in the case of *Sidgwick* [1] was whether moneys settled in contemplation of marriage by the father of the bride were to be treated as a consideration in money for a settlement made by the father of the bridegroom. It might very well be that these two settlements could not be considered as counterparts of one another, and yet that when each of the contracting parties themselves agrees to settle a sum of money their contributions might be taken as reciprocal considerations. But although that distinction has been taken, and is certainly justified by the facts, I think that, in substance, the two cases are not distinguishable. But if they were, I think we must keep in view that we are not construing the same words as those which were construed in the case of *Lord Advocate* v. *Sidgwick*,[1] but a different provision of a different statute, and that we must consider whether in the present case the condition of the Finance Act of 1894 is or is not satisfied. The provision is this, that in determining the value of an estate for the purpose of estate-duty, allowance shall be made for debts and incumbrances, but such an allowance is not to be made for debts incurred by the deceased, or incumbrances created by dispositions made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit. Therefore the question we have to consider is whether any of the items which are said to constitute debts deductible from the estate of the deceased Sir Claud Alexander were debts incurred or incumbrances created for full consideration in money or money's worth, and wholly for the deceased's own use and benefit. Now, the consideration in respect of which it is said the marriage-contract provisions for his widow and children are to be deducted is said to be the settlement by Miss Speirs, afterwards Lady Alexander, in contemplation of the marriage, of two sums of £11,000 and £6000, which were settled in trust for payment of the free yearly proceeds to the spouses and the survivor of them, for paying the whole proceeds for behoof of the children of the marriage, and for division of the capital amongst them after the death of the surviving spouse, and in the event of there being no issue of the marriage, for disposal as Lady Alexander might appoint.

I think the main consideration upon which the case of the *Lord Advocate* v. *Sidgwick* [1] was decided is directly in point. The question is whether this settlement of money belonging to Miss Speirs was the full consideration in money or money's worth of the settlement made by her intended husband. The doctrine laid down by the Judges in the *Lord Advocate* v. *Sidgwick* [1] is this, that where the obligations, or mutual obligations of that kind, are undertaken in a marriage-contract, they are not money considerations for one another, but that the true consideration is not the money but the marriage. The ground upon which that doctrine is rested is very fully and clearly explained in the judgment of the Lord President. The distinction to which I have already adverted does not seem to me to displace that

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consideration at all. The marriage is still the counterpart of the money obligation upon both sides, because the true moving cause and consideration for the settlement of money is the marriage. But if it could be suggested that the mutual money obligations were still, in a reasonable sense, counterparts of one another, so that they might be treated as considerations for one another, still I think the words of the statute we are now construing would not be satisfied, because we must determine, in order to give effect to the defender's contention, that the money contributed by the wife was not only a part consideration for any benefit she took under the marriage-contract from her husband's funds, but the full consideration in money or money's worth for all that she got by the contract. Now, it seems to be clear enough that the true consideration was not the money settled by her, but the marriage, and at all events that it is impossible to say that her settlement in money was the sole consideration for the settlement made by the husband. But even if it were, that would not be enough to satisfy the condition of the statute, because it goes on to say that allowance is not to be made for debts unless they were incurred "wholly for the deceased's own use and benefit," and that clause appears to me to be conclusive of the whole matter. I think it is quite impossible to say that the money settled upon Lady Alexander herself and the children of the marriage was settled solely for the use and benefit of the husband, and as a consideration for his own benefit—given to him in return for the money which he had himself settled. That last clause is, as I have said, I think, quite conclusive.

For these reasons I agree with the Lord Ordinary as to the effect of the contract of marriage between Sir Claud Alexander and Lady Alexander. But then I think it was conceded—at all events I think it is quite clear—that the same reasoning applies even more obviously and directly to the question arising under the second contract, the son's contract of marriage, and I think it furnishes also the true answer to the last point that was raised, whether a deduction ought not to be made in respect of the obligation under Sir Claud Alexander's marriage-contract to aliment his widow from the date of his death until the first term thereafter. The question whether deduction is to be made on that account must be determined by exactly the same consideration, whether it does or does not fall within the words of the statutory provision allowing deductions—that is to say, a statutory provision allowing debts to be excluded from the account.

Is the obligation upon Sir Claud Alexander's executry to aliment his widow until the first term of Whitsunday or Martinmas a debt incurred for full consideration in money or money's worth, and wholly for the deceased's own use and benefit? I think it is quite clear that it is not; and therefore, upon the same grounds as I think we ought to decide the question upon the two marriage-contracts, I am for adhering to the Lord Ordinary's judgment upon that third question also. We are told that there is a question as to the liability of the trustees for settlement estate-duty, but the reclaimers concede that the question is ruled by the decision in the case of *Stewart's Trustees*,[1] which they also concede is binding on this Court. We have heard no argument upon that matter,

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and I express no opinion upon it, but upon the questions which have been argued I agree with the Lord Ordinary, and am for adhering to his judgment.

LORD M'LAREN.—I agree with the opinion of the Lord Ordinary, and concur in the opinion of Lord Kinnear.

LORD ADAM.—I concur.

THE COURT adhered.

A. & A. CAMPBELL, W.S.—SOLICITOR OF INLAND REVENUE—Agents.

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HECTOR SUTHERLAND, Pursuer (Reclaimer).—*Salvesen, K.C.—D. Anderson.*

PROVOST, MAGISTRATES, AND COUNCILLORS OF WICK, Defenders (Respondents).—*Shaw, K.C.—M'Lennan.*

*Burgh—Town-clerk—Munus publicum—Salary—Extension of burgh—Discretion of Town-Council as to fixing salary.*—A royal burgh having been extended by the inclusion of a neighbouring burgh, the town-council raised the town-clerk's salary from £100 to £120. The town-clerk brought an action against the town-council for declarator that the defenders were bound to pay him a reasonable and suitable salary as fixed by the Court. The pursuer averred that the increased salary as fixed by the town-council after the extension was quite inadequate looking to the increase of the town-clerk's duties.

The Court (*aff.* the judgment of Lord Kincairney) *assoilzied* the defenders, holding that the question of an increase in the amount of the salary of a town-clerk was a matter for the discretion of the town-council, with the *bona fide* exercise of which the Court would not interfere.

2D DIVISION. Lord Kincairney.

IN January 1904 Hector Sutherland, designing himself as "solicitor, Wick," brought an action against the Provost, Magistrates, and Councillors of the burgh of Wick, concluding for declarator "(1) that the defenders are bound and obliged to provide for and pay to the pursuer, as town-clerk of the said burgh of Wick, a reasonable and suitable remuneration for his services as town-clerk foresaid; and (2) that the defenders are bound and obliged to make payment to the pursuer, as town-clerk foresaid, of the sum of £280 sterling per annum, or such other sum as our said Lords may find to be reasonable and suitable remuneration to the pursuer as town-clerk foresaid, as from the 18th day of November 1902."

The circumstances out of which the action arose were thus explained in the opinion of the Lord Ordinary:—"This action has arisen out of the recent amalgamation of the adjacent burghs of Wick and Pulteneytown, and relates to the salary of the town-clerk of the burgh as extended by the Act by which the amalgamation was effected. That Act confirmed a Provisional Order, and was passed on 18th November 1902. It is entitled 'The Wick Burgh Extension Order Confirmation Act, 1902.' It takes the form of an extension of the burgh of Wick rather than of an amalgamation of Wick and Pulteneytown, and its effect seems to be to extinguish the burgh of Pulteneytown and to enlarge the burgh of Wick so as to include within its boundaries the old burgh and royalty of Wick, the burgh of Pulteneytown, the harbour of Pulteneytown, and other adjacent lands.

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"By section 3 of the Act (the interpretation clause) it is provided that the 'existing burgh of Wick' means the burgh of Wick, including the royalty as existing immediately previous to the commencement of the Order; that the 'burgh' and 'royal burgh' mean the existing burgh of Wick as extended by the Order; and that 'town-clerk' means the town-clerk of the 'existing burgh of Wick and of the burgh.'

"The pursuer of this action is the town-clerk of the extended burgh. He does not take that title in the instance, but he sues in that capacity, and can have no possible case unless he is so. He is not an applicant for the office, nor a person to whom the office has been offered, or who claims to be entitled to be appointed; he is, or at least must claim to be, the actual holder of that office.

"His position is as follows:—He has been town-clerk of the burgh of Wick since 1886. It is not very distinctly set forth what his salary or emoluments were then. In 1897 the Magistrates instituted an inquiry in regard to the salaries of the various servants and officials of the burgh, the result of which as regards the town-clerkship was that the town-clerk's salary was fixed at £100, besides business chambers rent free. To what extent he was allowed legal charges for work done for the burgh is not stated quite distinctly. The salary was fixed after inquiry as to the salaries of the town-clerks of various Scotch burghs. An allocation was made of the £100 among the various offices or duties which were covered under the general term of town-clerk. I suppose that this allocation was thought to be necessary for the accurate statement of the burgh accounts. It appears that the town-clerk was far from satisfied either with the amount of the salary fixed or with the allocation of it, and he laid before the Magistrates a long memorandum on the subject; but he undertook the office and entered on its duties.

"When the Act extending the burgh was passed on 18th November 1902 the pursuer became town-clerk of the extended burgh without any express appointment to that effect; and I apprehend that he was so necessarily, unless he resigned all connection with the town-clerkship of Wick. He could not possibly have claimed to be town-clerk of the old burgh of Wick (which had ceased to exist) and refused to undertake the duties of town-clerk of the extended burgh. In truth he merely continued in the office of town-clerk of the burgh which he held by permanent tenure.

"It does not appear that when the Act was being carried through he took any steps to secure any provision for his salary. He allowed the Act to pass, fixing on him the position of town-clerk of the enlarged burgh with all its duties, trusting, I suppose, to the liberality of the Magistrates."

After the Act came into operation the town-council fixed the salary of the town-clerk at £120 a year. The pursuer then brought the present action.

The pursuer averred, *inter alia*;—(Cond. 7) "Subsequent to the amalgamation of the two burghs . . . the town-council, by minute dated 3d August 1903, resolved to fix the pursuer's salary at the sum of £120 for the duties devolving upon him as town-clerk under the Town-Councils (Scotland) Act, 1900. The said sum is totally inadequate remuneration for the amount of work required since the extension of the burgh, and is so unreasonably small that it is an attempt to force the pursuer to give up the office of town-clerk by making it

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not worth his while to retain it. The defenders are thus endeavouring to impose upon the pursuer conditions inconsistent with the due discharge of his duties, and to force his resignation of an office he holds for life. . . . It is believed and averred that the resolution of the Town-Council to fix the pursuer's salary at the figure above mentioned was not a *bona fide* exercise of the powers intrusted to them, and was not arrived at on a fair consideration of the circumstances, but it was engineered for purposes and arrived at on considerations quite foreign to a fair exercise of the defenders' discretion. The said resolution was brought about through the exertions of three members of the Town-Council, viz.," Messrs Alexander Rae, Ernest Buik, and George Jamieson Ross, "who had conceived feelings of ill-will and animosity against the pursuer in connection with matters quite foreign to the pursuer's duties as town-clerk. The said members avowedly entered the Town-Council for the purpose of paying off their private grudge against the pursuer. From the time they were elected they set about doing so, and they did not rest until they accomplished their aim. They unduly influenced the other members, and under the guise of public duty they attacked the pursuer, and persuaded their fellow-members to fix the pursuer's salary at the figure above stated. The said resolution was the result of a preconceived scheme to make a personal attack upon the pursuer with the object of gratifying the vindictive feelings of the said members. In these circumstances the offer of the Town-Council is entirely disproportionate to the services required by them from the pursuer, and the said resolution is also nimious and oppressive. It was not arrived at in the impartial or *bona fide* discharge of the defenders' duties, but amounts to an attempt to deprive the pursuer of his office by imposing impossible conditions upon the performance of his duties."

The pursuer pleaded;—(1) The defenders being bound to provide for the pursuer, as town-clerk foresaid, reasonable and suitable remuneration, the pursuer is entitled to decree in terms of the first conclusion of the summons. (2) The defenders having failed to fix a reasonable and suitable remuneration for the pursuer as town-clerk foresaid, the pursuer is entitled to have the same fixed by the Court, and to decree in terms of the second conclusion of the summons, with expenses. (3) The resolution of the defenders fixing the pursuer's salary not being a *bona fide* exercise of the defenders' powers, the pursuer is entitled to decree.

The defenders pleaded, *inter alia*;—(2) The action is incompetent, *et separatim*, is irrelevant. (3) The pursuer's salary as town-clerk of Wick having been fixed by the defenders after full consideration of the whole facts and circumstances, and in the deliberate exercise of their discretionary right and duty, the defenders should be assoilzied from the conclusions of the summons. (4) The salary fixed by the defenders being reasonable and suitable remuneration for the duties devolving upon pursuer, the defenders are entitled to absolvitor.

On 28th July 1904 the Lord Ordinary (Kincairney) pronounced the following interlocutor:—"Finds (1) that the pursuer was town-clerk of the burgh of Wick before the enlargement of its boundaries by the inclusion of the burgh of Pulteneytown by Act dated 18th November 1902: (2) That he is town-clerk of the burgh as extended by that Act: (3) That the pursuer's salary as town-clerk of the burgh as enlarged was fixed at £120 by resolution of the Magistrates dated

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3d August 1903: (4) That there is no relevant averment that in coming to that resolution the defenders acted corruptly and not in the due exercise of their powers under the Act 63 and 64 Vict. c. 49, sec. 78: (5) That no relevant ground is stated for refusing effect to that resolution: Therefore assoilzies the defenders from the conclusions of the summons and decerns: Finds the defenders entitled to expenses," &c.*

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* "OPINION.—(After the narrative above quoted)—When the Act came into operation the Magistrates took into consideration the salaries of the various officials, including the salary of the town-clerk. They seem to have considered the subject carefully, and so far as the minutes shew, impartially and fairly. I find nothing in the minutes to indicate the reverse, and they fixed the salary of the town-clerk at £120. I observe that there was a division in the Council on this point, a minority being for £140.

"The pursuer, who had thought the salary of £100 fixed in 1897 inadequate, was greatly dissatisfied with the addition to it, which he thought quite insufficient, seeing, as he says, that the population and valuation of the extended burgh were more than double those of the old burgh; and he has brought this action, which contains two conclusions of declarator, the former a general conclusion that the defenders are bound to pay the pursuer as town-clerk 'a reasonable and suitable remuneration' for his services; the other that they are bound to pay him £280 per annum, 'or such other sum as our said Lords may find to be reasonable and suitable remuneration.' The pursuer's whole case seems embodied in his second conclusion, and the first appears to be superfluous.

"The pursuer's pleas are"—(His Lordship quoted the pursuer's first and second, and the defenders' third and fourth pleas).

"This is not an action for remuneration for services rendered founded either on contract or on the principle of *quantum meruit*, although it is true that the conclusions go back to the date of the Act. It is an action asking the Court to fix the pursuer's salary, to order payment of that amount for the years byegone, and also, and chiefly, to determine his right to it in future. If the pursuer were on the footing of an ordinary servant or clerk or other official, it is quite obvious that he could have no action. He could only claim a salary on contract; and if he did not choose to accept the salary offered his action would necessarily fail, unless he claimed a *quantum meruit* for the years byegone, which is not the nature of this action at all. I suppose that none of the other servants hired and paid by the Magistrates could raise such an action. If dissatisfied with their wage they could do nothing but decline the appointment.

"But the question raised in this case depends on the circumstance that the pursuer is not in the position of an ordinary servant, subject to dismissal at the defenders' pleasure. He contends, and I think rightly, that his office of town-clerk is a *munus publicum*, and that he is not answerable to the magistrates as a servant is to his master or a clerk to his employer. He maintains that he is a state official, and that he holds his office by a permanent tenure, and is not liable to dismissal by the Magistrates.

"This is an important question, but I cannot but think it not open to doubt. The relation between town-clerks and Magistrates is regulated in the first place by section 78 of the Town-Councils Act, 1900, 63 and 64 Vict. c. 49, which provides 'that the Council shall from time to time appoint a fit person to be town-clerk of the burgh,' and that in the case of royal burghs 'the tenure of office' (when not regulated by local Act) 'shall be the same as the tenure of the office of town-clerk in such burghs respectively according to the existing law.'

"This is a reference to common law, and the pursuer contends that at common law the tenure of the office of town-clerks is permanent, and that

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The pursuer reclaimed, and argued;—The pursuer held his office *ad vitam aut culpam*.[1] To impose serious extra duties without corresponding remuneration was practically equivalent to dismissing him, and not for *culpa*, since he would be obliged to resign. Further, magistrates had no power to reduce a town-clerk's salary;[2] but to impose extra duties without additional remuneration was just the same thing as reducing his salary. The defenders were practically trying to get the work of two town-clerks done for the salary of one. The pursuer's averments of *mala fides* on the part of the defenders were relevant to be admitted to probation.

The nature of the arguments for the defenders sufficiently appears from the opinions of the Lord Ordinary and the Lord Justice-Clerk.[3]

LORD JUSTICE-CLERK.—The pursuer was town-clerk of Wick, and as such is now town-clerk of the extended burgh of Wick, which includes Pulteney-

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he holds it *ad vitam aut culpam*, and is not subject to dismissal by the Magistrates. On this point the pursuer cited *Simpson* v. *Tod*, June 1824, 3 S. D. 150; *Farish* v. *Magistrates of Annan*, 1836, 15 S. D. 107, aff. 14th July 1837, 2 S. and M'L. 930; *Magistrates of Rothesay* v. *Carse*, 31st January 1903, 5 F. 383; *Board of Supervision* v. *Parochial Board of Old Monkland*, 17th January 1880, 7 R. 469, *per* Lord President and Lord Deas, 473.

"I need not refer to these authorities at length, because I do not think the point open to doubt. I think it was not disputed, and I think it clear that the pursuer holds the present office *ad vitam aut culpam*. He may resign, no doubt, if he chooses, and so bring his office to an end, but he cannot be dismissed.

"The position of the pursuer is, no doubt, somewhat peculiar. Just before the Act passed he held the office of town-clerk of the old burgh of Wick. It might be argued that when the Act was passed that office came to an end by the act of the Legislature; but I am of opinion that that was not so, and that the pursuer's office never came to an end, but that the burgh of Wick was enlarged, and the duties of the town-clerk were continued and extended over the new boundaries.

"The pursuer contends that the principle that a town-clerk cannot be dismissed by the Magistrates involves the consequence that his salary cannot be reduced. He cited, among other cases, the *Magistrates of Dundee* v. *Kerr*, 1833, 12 S. 173; and *Downie* v. *Magistrates of Annan*, 7th January 1871, 6 R. 457, which seem to afford some support to that contention. The latter case is difficult to follow, as the judgment seems to decide a point which was not in the case. I do not find it necessary to decide that point, because here there was no reduction of the pursuer's salary, but an addition to it, said, no doubt, to be inadequate. But the pursuer further contends that the permanence of his tenure of office involves the further consequence that the conditions of it cannot be altered

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[1] Simpson v. Tod, June 17, 1824, 3 S. 150; Farish v. Magistrates of Annan, Nov. 22, 1836, 15 S. 107, aff. July 14, 1837, 2 S. and M'L. 930; Board of Supervision v. Parochial Board of Old Monkland, Jan. 17, 1880, 7 R. 469; Magistrates of Rothesay v. Carse, Jan. 31, 1903, 5 F. 383; Town-Councils (Scotland) Act, 1900 (63 and 64 Vict. cap. 49), sec. 78.

[2] Downie v. Magistrates of Annan, Jan. 7, 1876, 6 R. 457; Cuningham v. Convention of Royal Burghs, June 22, 1839, 1 D. 1077, rev. Aug. 5, 1842, 1 Bell's App. 628; Abercromby v. Goldsmiths of Edinburgh, 1802, M. 13,154; Magistrates of Dundee v. Kerr, Dec. 6, 1833, 12 S. 173.

[3] Forbes v. Magistrates of Banff, Feb. 23, 1856, 18 D. 645, 28 Scot. Jur. 278; Maxton v. Magistrates of Dunoon, Dec. 16, 1904, *supra*, p. 276.

town. This action takes the form of a declarator that the defenders, the Magistrates and Town-Council of the burgh of Wick, (1) are bound and obliged to provide for and to pay to the pursuer as town-clerk of the burgh of Wick a reasonable and suitable remuneration for his services as town-clerk foresaid; and (2) that the defenders are bound and obliged to make payment to the pursuer, as town-clerk foresaid, of the sum of £280 sterling per annum, or such other sum as the Court may find to be reasonable and suitable remuneration. Now, Mr Salvesen in the course of his address made it plain that he did not press the proposition upon the declarator at all, but that he based his case upon the petitory conclusion that the Magistrates and Council of Wick were bound to pay to the town-clerk such a salary as this Court shall think adequate. I know of no precedent whatever for such procedure. The Town-Council when appointing a town-clerk offer him such a salary as they think adequate and sufficient for the duties, and if

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to his disadvantage. He argues that to increase the duties is just an indirect way of reducing the salary. I am not prepared to assent to that argument, for which, I think, no authority was adduced. I cannot see that the duties of the office of a town-clerk could be accurately and finally defined when he was appointed. The salary might be, but not the duties. The duties of the office of town-clerk are essentially liable to change from various causes; by extension of the boundaries of the burgh, and by the imposition of various duties connected with the municipal and local government, as is well illustrated by the various heads and divisions in which the salary of the town-clerk in this case was subdivided. I think it was never heard of that on every alteration of the boundaries of a burgh the salary of the town-clerk would necessarily be altered. No authority to that effect was produced; and if in this case the pursuer's salary had not been increased at all, I do not perceive any legal ground on which an increase of the salary could have been enforced. I agree that a town-clerk is a public officer, and that he holds an independent position. But I think that so long as he holds that public office he must fulfil all the duties with which the Legislature thinks fit to burden it; and if, as in this case, the duties of a town-clerk are increased by Act of Parliament which does not provide for an increase of his salary, I do not see that the magistrates of a burgh can be compelled to increase it.

"In this case, however, they have increased his salary, and the pursuer argues that the increase ought to have been greater. Perhaps it should; I do not know. The local authorities, I take it, must be the judges. I think that is a matter which the law has entrusted to the discretion of the local authorities; and, so long as they exercise that discretion honestly I think the Court has no duty to interfere. If they should be held entitled and bound to interfere in this case they might be called on to adjust the salaries of all public servants in the country. But that is a duty which the law has entrusted to the local authorities, or has left to be adjusted by mutual contract.

"Therefore, upon the general law of the case, I am of opinion that the Court has no power, or at least no duty, to interfere in this case.

"But the pursuer raises a point of a totally different kind; for he pleads that, assuming the Magistrates have power to fix his salary, they have not exercised their power honestly. Now, if there be a relevant averment of corruption by magistrates in the exercise of their duties, I am not prepared to say that that might not be made the subject of inquiry. But if that were so, one would have expected conclusions of reduction. But I am of opinion that the averments of the pursuer are wholly irrelevant. What is averred is that three of the members of the Council entertained feelings of animosity towards the pursuer and avowedly 'entered the Town-Council for

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those who are candidates for the office do not think such salary sufficient they are under no obligation to accept the office. If at any time in the course of his fulfilment of the duties of the office he thinks the duties of that office have increased upon him to such an extent that his salary is inadequate, he may apply for an increase, and it is in the discretion of the Magistrates and Town-Council to decide whether the duties which he is doing call for that increase or not. If they do not think so, the town-clerk has simply to consider whether he will remain at the salary as it is, or whether he will retire.

I do not consider that this question is affected at all by the fact, which is no doubt true, that the town-clerk is a public official and holds his office *ad vitam aut culpam*. That simply results in this, that whatever salary is fixed for him, either at first or from time to time by additions, cannot be cut down so long as he remains town-clerk without his consent. Therefore he has a fixed position and a right to receive that salary as long as the performance of these duties is to the satisfaction of the Magistrates and Town-Council. But it is a totally different thing when he demands a rise of salary. There cannot be the slightest doubt that there are a great many duties which have been imposed upon public officials by Act of Parliament, which have added largely to the duties they have to do, and in some places the Act of Parliament has ordained that the putting of these additional duties upon him shall give him a right to a reasonable increase of salary. But then there are other Acts of Parliament which have not introduced that matter at all, and in regard to these it has been held by this Court that the town-clerk had no claim for an additional salary notwithstanding

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the purpose of paying off their private grudge against the pursuer.' What the reasons of their supposed animosity and grudge were is not explained. I think that averment is irrelevant on account of its vagueness and want of meaning. Then it is said that these three individuals persuaded their fellow-members to fix the pursuer's salary at the low rate agreed to, but it is not said what the nature of the persuasion was, and in particular it is not averred that they bribed or endeavoured to bribe their brother councillors, or that anything which they told them was untrue or was defamatory of the pursuer. If all that is meant was that the other councillors yielded to the bad arguments of the three who are complained of, it would be absurd to contend that on that account the resolution of the Magistrates should not receive effect.

"It is not pretended that the resolution of the Magistrates could be reduced on the ground that three of them were hostile to the pursuer, or on the ground that all of them were so, and accordingly there are no conclusions of reduction. But if a resolution of a public body, like the magistrates of a burgh, cannot be reduced, it must surely follow that it must receive effect.

"I am not disposed to doubt that the work thrown on the pursuer will be much increased. How much I do not know, and I would not have been surprised had the Magistrates been more liberal in adding to his salary; but my opinion is that they are the proper judges, and that their decision must receive effect if it was fairly and honestly arrived at, which of course it must be presumed to have been.

"For these reasons I am of opinion that there is no relevant averment of corruption or failure of duty by the Magistrates in performing the duty of fixing the town-clerk's salary, that no relevant grounds are stated for refusing effect to their decision, and that they must be assoilzied."

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the increase of his duties. Now, in this particular case it is not the ordinary mere extension of a burgh by the taking in of certain outlying districts, or by the increase of the population and the work to be done within the existing district. The only peculiarity about it is this, that instead of absorbing what was before a mere outlying part of the country to which the burgh development had extended, it was in this case the actual absorption of a burgh itself. That is nothing new. Glasgow, I think if I remember right, some fifteen or sixteen years ago absorbed a number of parasitical burghs into the city, and I do not think it makes any practical difference whether the district absorbed has been a burgh before or simply an area with no burghal character at all. The question therefore comes to be, whether we can interfere with the Provost, Magistrates, and Town-Council of Wick, in the discretion which they have exercised, in saying that the salary of the town-clerk, which was formerly £100, shall only be increased by £20. We are told that that is not really the actual state of matters. Whereas formerly for his £100 he had to do the duties of law-agent as well without further remuneration—now he gets his salary of £120, and for the law business which he is asked to do he charges the ordinary fees. But whether that is so or not, the Provost, Magistrates, and Council were entitled to consider the matter, and dispose of it, as to whether the town-clerk should get an increase, and what increase they should give. I think the Lord Ordinary arrived at a right decision in holding that there is no relevant case stated here to entitle the pursuer to succeed.

I will only say this further, and it is a matter that should be dealt with, that I could quite well conceive a case where corruptly the municipality might do what they were not entitled to do in a matter of this kind. If it could be averred sufficiently that they acted, not in the exercise and discharge of their duty, but in the exercise of a malignant desire to injure, then possibly that would open a case which this Court would deal with, but we could only deal with it in the sense of setting aside something that had been done and calling upon the Town-Council to do their duty. But it is very difficult to conceive that such a case could arise in which the Court could be called upon to interfere. I do not think the Court can be called upon to interfere, and consider and fix what salary shall be paid by the Provost, Magistrates, and Town-Council of Wick to their town-clerk. I therefore move your Lordships that we adhere to the Lord Ordinary's decision.

LORD YOUNG.—I concur. I assent to all the observations which your Lordship has made.

LORD KYLLACHY.—I also concur. Extreme cases could be figured, but these must be dealt with when they arise. I agree with the Lord Ordinary and your Lordships that the pursuer here has stated no case relevant and sufficient to justify the interference of the Court.

LORD MONCREIFF was absent.

THE COURT adhered.

S. F. SUTHERLAND, S.S.C.—MELVILLE & LINDESAY, W.S.—Agents.

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Jan. 12, 1905. Greenlees v. Royal Hotel, Dundee, Limited.

MRS GREENLEES, Pursuer (Reclaimer).—*Watt, K.C.—Ingram.*
THE ROYAL HOTEL, DUNDEE, LIMITED, Defenders (Respondents).—*Campbell, K.C.—Younger.*

*Reparation—Relevancy—Contributory Negligence—Lift in Hotel—Want of light.*—In an action of damages by a mother, against hotelkeepers for the death of her son, a commercial traveller, who was killed by stepping into and falling down the well of a lift in the hotel on the night of his arrival, the pursuer averred that the lift was not provided with the usual appliances to prevent persons from entering the well when the lift was not in position, that it was "the universal practice in all lifts to guard the entrance to them by a collapsible lattice door, which can be opened only when the cage is in position to receive passengers." "Thus the deceased on the door being opened was entitled to rely on the cage being in position for him to step into with safety"; that the entrance to the lift was not sufficiently lighted; that there was no light in the lift itself; that no warning was given by the waiter when he opened the door of the lift that the lift was not in position; that the deceased stepped through the door and fell into the well.

*Held* (1) that the action contained relevant averments of negligence on the part of the defenders, and (2) (*rev.* judgment of Lord Low), that the pursuer's averments did not necessarily infer negligence on the part of the deceased, and that the pursuer was entitled to an issue.

1ST DIVISION. Lord Low.

ON 16th June 1904, Mrs Flora Clark or Greenlees raised an action against the Royal Hotel, Dundee, Limited, in which she claimed £1000 damages for the death of her son, William Greenlees, commercial traveller, 1055 Sauchiehall Street, Glasgow, who died of injuries received from falling into the well of a lift in the defenders' hotel.

The pursuer averred that the lift, which was worked by hydraulic pressure, was intended for the use of visitors to the hotel. (Cond. 2) "Access to the lift is obtained through collapsible doors on each landing, which are kept locked, and which in order to be opened require to be slid from the right hand side of the lift (looking towards it) to the left. When not in use the cage sinks to or is left at the bottom of the well on the basement, and has to be brought up to the floor at which it is required. This is done by pulling a rope running within the lift on the left hand side as one enters it, this bringing the hydraulic pressure into play. Before the said rope can be reached by an attendant standing on any of the landings the said collapsible door must be thrown wide open. There is no light in the said well, and an electric light which is provided inside the cage can only be switched on by the attendant after he has entered the cage." (Cond. 3) "The defenders do not employ a regular attendant to remain in and work the lift. It is attended to by the boots and by the waiters in the hotel. The servants who are deputed from time to time to attend to the lift have other duties to perform in the service of the hotel, and are unskilled in the working of lifts, and incompetent to have charge of a lift." (Cond. 4) "The said deceased William Greenlees arrived at the defenders' hotel on the evening of Friday, 8th April 1904, and engaged a bedroom for the night. He had not previously resided in the hotel, and was not acquainted with the premises." (Cond. 5) "About midnight, or shortly thereafter, the said deceased William Greenlees proceeded to the entrance to the lift on the first floor in

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order that he might be taken up to his bedroom in one of the upper storeys. At his request to be taken up, a waiter named William Spill, who had a key for the lift, attended to him. Spill unlocked and slid open the collapsible door, and pulled the rope with the intention of raising the cage from the basement to the level of the floor on which they were standing. There was no light in the well, and to one standing at the entrance to the lift the well was obscure. Greenlees received no warning from Spill that the cage was not in position to receive passengers, and seeing the gate thrown back he assumed, as he was entitled to do, that it had been opened to admit him to the cage. He accordingly stepped forward, and fell downwards into the well, until he met the roof of the cage, which was but a few feet below the level of the floor on which he had been standing." [The pursuer than set forth the way in which her son received the injuries from which he died.] (Cond. 6) "The said accident, and the consequent death of the said William Greenlees, were solely due to the culpable fault and negligence of the defenders, or of those in their employment, and for whom they are responsible . . . in respect that the said entrance to the lift was not sufficiently lighted. No light of any kind was provided in the interior of the lift, and the lighting of the hall near it was not sufficient to allow anyone, and specially one to whom the arrangements of the hotel were entirely novel and unknown, to observe that the lift was not in its place when he stepped into the well. It was absolutely necessary for the safety of guests and members of the public having occasion to use the lift to have light either in the well or in the hall sufficient to reveal the said danger, but this the defenders failed to have, with the result foresaid." (Cond. 7) "Further, the rope in the well by which the lift was worked was on the left hand side of the attendant as he stood facing the lift, and could not be reached by him without opening the gate, the effect of which was that before touching the rope he had to throw the gate wide open. It is the universal practice in all lifts to guard the entrance to them by a collapsible lattice door, which can be opened only when the cage is in position to receive passengers. Further, it is the universal practice in the construction of such lifts to place the elevating rope at the side from which the door opens so that the door may be kept so far closed as entirely to prevent the entrance of passengers until the cage is in place. Thus the deceased on the door being opened was entitled to rely on the cage being in position for him to step into with safety. If the rope had been, as it ought to have been, on the other side of the well (unless a regular attendant was to be employed, whose duty it was to remain inside when working the lift), or if the said door had been made to open in the other direction, the attendant could have raised the cage to the level on which he was standing by merely throwing open the door a few inches, and it would then not have been possible for any visitor intending to use the lift to step through the entrance to the lift before the cage was in its proper position." (Cond. 8) "Further, it was the defenders' duty to have employed an attendant skilled in the working of lifts and the care of passengers travelling in them to work the said lift. Had the defenders employed a proper lift attendant the gate would not on the occasion in question have been left unguarded by him until the cage was in a position to receive passengers. It was gross carelessness on the part of the said attendant to open the gate when the light was insufficient as aforesaid without warning the

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deceased that the lift was not in position, and his said carelessness caused the said William Greenlees' death. The said William Spill was a waiter in the defenders' employment, and not a lift attendant sufficiently skilled in working a lift and in the duty of looking after the safety of lift passengers." (Cond. 9) "The said William Spill, for whom the defenders are responsible, was in fault (*a*) in opening the gate of the lift in such a manner as to leave the shaft unguarded, and (*b*) in failing to give the deceased warning when he opened said gate that the cage was not in its proper position. He gave no warning of any kind to the deceased. But for his negligence in not giving warning the accident would not have occurred."

The defenders denied that they were in fault, and pleaded, *inter alia*;—(1) The pursuer's statements are irrelevant. (2) The death of the pursuer's son having been caused or materially contributed to by his own fault, the defenders should be assoilzied.

The issue proposed was in ordinary form.

On 17th November 1904 the Lord Ordinary (Low) disallowed the issue proposed for the pursuer, and dismissed the action.

The pursuer reclaimed, and argued;—The Lord Ordinary had dismissed the action on the ground that the pursuer's averments disclosed a case of contributory negligence on the part of the deceased. It was for the jury to say whether there had been contributory negligence, and at anyrate it could not here be inferred from the pursuer's averments. Various grounds of fault were alleged against the defenders, and the pursuer's averments when read together were relevant.

Argued for the defenders;—The construction of the lift was quite usual, and there was no duty on the defenders to light the well of the lift or to warn the deceased. The pursuer's averments were not relevant, and they shewed that the deceased had stepped into the well of the lift without exercising ordinary care.[1]

Lord Adam.—This is a reclaiming note against an interlocutor of Lord Low, in which he has found, in a case of damages for death caused by an accident, that the pursuer has set forth no issuable matter, and has dismissed the action. The action is brought by the mother of a Mr Greenlees, a commercial traveller, who was a guest at the Royal Hotel, Dundee, on 8th April 1904. He arrived at the hotel in the evening, and had never been there before. He was given a bedroom in the upper part of the house, and on returning to the hotel about midnight desired to go up in the lift. It appears that there is no regular lift attendant, but the work is shared by several servants, but no point is made by the pursuer of this fact. It appears that there was no light in the well of the lift, and as the lift itself was not in constant use there was no permanent light in the cage, but after the lift had been brought to the floor, where it was required, the attendant in order to switch on the light in the cage had to throw the door of the opening to the lift wide open. It is also said that the light in the hall was

[1] Cairns v. Boyd, June 5, 1879, 6 R. 1004; Forsyth v. Ramage & Ferguson, Oct. 25, 1890, 18 R. 21; Jamieson v. Russell & Co., June 18, 1892, 19 R. 898; Fleming v. Eadie & Sons, Jan. 29, 1898, 25 R. 500; Driscoll v. Commissioners of Partick, Jan. 10, 1900, 2 F. 368.

not sufficient to allow Mr Greenlees to see clearly the entrance to the lift. On the occasion in question one of the hotel servants, named Spill, accompanied Mr Greenlees to the lift, and threw the door wide open in order to reach the rope to bring up the lift, and when the lift was within a few feet of the floor level Mr Greenlees stepped forward and fell down on to the top of the cage which was then in motion, and was so injured between the cage and the walls of the well that he died.

The question is whether these averments infer any negligence on the part of the defenders. Perhaps the most material averment is in cond. 5, where it is stated,—"Spill unlocked and slid open the collapsible door, and pulled the rope with the intention of raising the cage from the basement to the level of the floor on which they were standing. There was no light in the well, and to one standing at the entrance to the lift the well was obscure. Greenlees received no warning from Spill that the cage was not in position to receive passengers, and seeing the gate thrown back he assumed, as he was entitled to do, that it had been opened to admit him to the cage." The case put forward is therefore one of a stranger who, wanting to use the lift, and seeing the door thrown open without any warning from the attendant, steps forward and falls down the well. That appears to me to be a case which should go to a jury. I think the interlocutor of the Lord Ordinary is wrong, and that we should allow an issue.

LORD M'LAREN.—I gathered from the arguments of counsel that the Lord Ordinary in disallowing an issue and dismissing the action proceeded upon the ground that facts were admitted on the part of the pursuer sufficient to shew that the deceased met his death through his own negligence or contributory negligence. The interlocutor of the Lord Ordinary has, however, been supported before us on the ground that no relevant averment of negligence on the part of the defenders is contained in the record. I need say no more on the first question, except that I think the pursuer's averments strongly suggest that this traveller had not taken the usual precautions for his safety, but I do not think they can be construed as an admission of negligence on the part of the deceased.

As to the relevancy of the averments of negligence on the part of the proprietors of the hotel, the case raised on record is alternative. Either the lift, which appears to have been of old-fashioned construction, should have been provided with automatic arrangements for the safety of visitors to the hotel, or it was the duty of the attendant to warn visitors when the lift cage was not in position, because people who are accustomed to automatic arrangements are very apt to trust to them. I think the averments made are sufficient to entitle the pursuer to have the question as to whether there was negligence on the part of the proprietors submitted to a jury.

LORD STORMONTH-DARLING.—I concur with your Lordships. The case may be a difficult one for the pursuer to prove, particularly in view of the fact that the poor man is dead, but I think her averments are relevant. They are founded partly on the want of lighting, partly on the peculiar construction of the lift, and partly on the absence of any warning by the

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LORD KINNEAR was absent.

THE COURT recalled the interlocutor of the Lord Ordinary, and approved of the issue.

GALLOWAY & DAVIDSON, S.S.C.—W. FULTON SPEIRS, W.S.—Agents.

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Moyes v. William Dixon, Limited.

LILY MOYES, Appellant.—*Watt, K.C.—W. Thomson.*
WILLIAM DIXON, LIMITED, Respondents.—*Salvesen, K.C.—Hunter.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *section* 7, *subsection* (2)—*Dependants.*—A workman's daughter, who had previously been earning wages, after her mother's death remained at home to keep her father's house, getting from him board, lodging, and clothing, but no wages. The workman was killed by accident in the course of his employment.

*Held* that the daughter was a dependant of the workman in the sense of the Workmen's Compensation Act, 1897.

1ST DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897, in the Sheriff Court of Lanarkshire, at Glasgow, Lily Moyes, 4 Govan Pit, Glasgow Road, Rutherglen, claimed compensation for the death of her father from William Dixon, Limited, iron and coal masters, Glasgow.

The Sheriff-substitute (Fyfe) found the following facts admitted or proved:

"(1) That James Moyes, the father of the appellant, was a waggoner in the employment of the respondents. (2) That the said James Moyes, while in the course of his employment, was accidentally killed on 11th August 1904. (3) That said employment was one to which the Workmen's Compensation Act, 1897, applies. (4) That for the three years prior to his death the earnings of the said James Moyes amounted to £149, 13s. 11d. in money, but he also got the use of a house valued at £4 per annum (making £12 for three years), thus bringing up his total earnings for the three years to £161, 13s. 11d. (5) That at the date of the death of the said James Moyes, the appellant, who was a daughter of the deceased, was a woman of about 25 years of age, in good health. (6) That for some time prior to November 1899 she had been employed at Cathkin Steam Laundry, earning 9s. a week, and lived with her father and mother. (7) That her mother having died in November 1899, the appellant ceased going to the laundry, and remained at home keeping house for her father. (8) That she received no money wage, but had board and lodging and clothing free."

On these facts the Sheriff-substitute found that the claimant not having been a dependant of the deceased James Moyes, at the date of his death, had no claim for compensation and dismissed the application.

The claimant appealed.

In a stated case, which set forth the above facts, the question of law was:—"Was the appellant a 'dependant' within the meaning of the Workmen's Compensation Act, 1897?"

Argued for the appellant;—The facts found by the Sheriff-substitute

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shewed that the appellant was in fact dependent on her father's earnings at the date of his death. She was therefore a "dependant," in the sense of the Act.[1] The question of the appellant's wage-earning capacity was not a relevant consideration in determining her right to compensation.

Argued for the respondents;—The question was one of fact, and had been determined by the Sheriff-substitute.[2] The claimant was really her father's servant, and received support as such. The claimant was quite capable of supporting herself, and the policy of the Act was to compensate only those who had been deprived of their means of support.[3]

LORD ADAM.—This is a stated case under the Workmen's Compensation Act. The facts found by the Sheriff disclose that James Moyes, a workman in the employment of the respondents, met with an accident and was killed while in their employment on 11th August 1904. His daughter is the claimant and appellant in this case. The facts found by the Sheriff are very short and very much to the point. [His Lordship quoted the facts as stated in the case.] The inference in law which the Sheriff has drawn from these facts is, that in the sense of the Workmen's Compensation Act the claimant was not dependent on her father, and is therefore not entitled to compensation under the Act.

The appellant was certainly capable of earning wages of 9s. a week, but in point of fact she ceased to seek out-door labour, and very naturally on her mother's death came back to her father to keep house for him, and continued till the time of his death three or four years afterwards to keep house for him, getting no wages from him, but getting, as in the common case, board and lodging. The question therefore is whether or not a woman in such circumstances was dependent on her father. I confess that it seems to me in point of fact—and it is a question of fact—she was dependent on her father at the date of his death. She was getting no assistance from any source, she was getting board, lodging, and clothing from her father, and in all respects was dependent on him.

It is said that this is not a correct view to take of the facts, because the appellant was capable of earning wages for her own aliment, and it is suggested that the true view of the case is that she was in the position of a servant and entitled to demand wages from her father, and therefore was not dependent on him, but dependent on her own earnings, which her father was due her. I think any consideration of that kind is quite irrelevant, because in my opinion the question is—was the appellant, or was she not, in point of fact dependent on her father at the time of his death? The only conclusion I can arrive at in this case is that she was dependent, and I think we should answer the question to the effect that the appellant was a dependant.

LORD M'LAREN.—Under the Schedule of the Workmen's Compensation

[1] Turners, Limited, v. Whitefield, June 17, 1904, 6 F. 822; Main Colliery Company v. Davies, [1900], A. C. 358; Howell v. Vivian & Sons, 1901, 18 T. L. R. 36.

[2] Rees v. Penrikyber Navigation Colliery Company, [1903], 1 K. B. 259.

[3] Addie & Sons' Collieries, Limited, v. Trainer, Nov. 22, 1904, *supra*, p. 115.

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Act it is the function of the Court of Appeal to deal with questions of law determined by the arbitrator and stated in a case. It appears to me that in this case the Sheriff-substitute, the arbitrator, has determined a question of law, because from the findings 1 to 8, which are set forth very clearly in the case, he draws the conclusion that the appellant was not dependent on her father, the deceased James Moyes, in the sense of the Workmen's Compensation Act. In accordance with our settled practice, wherever there is a substantial question of the construction or application of a clause in the statute, this constitutes matter of law that may properly form the subject of a case to us. I infer from the report of a leading case in the House of Lords, *Main Colliery Company* v. *Davies*,[1] that the Lords who heard the case had taken the same view of their functions, because while their Lordships in disposing of the case spoke of the question as a question of fact, whether the party there in question was or was not a dependant, yet they expressed their views fully on various questions that go to establish the relationship of dependence, and came to the conclusion that the relation of dependence did exist in the case. I have therefore no doubt at all that the question whether this young woman was or was not dependent on her father is competently before us under the statute. Now, in considering whether she was dependent I find that under the definition clause of the Act, which is substantially the same for Scotland as for England, the right of compensation is limited to such persons as are entitled to sue for damages "as were wholly or in part dependent upon the earnings of the workman at the time of his death." If it had been meant that the right was to be limited to those who were in the position to sue an action for aliment it would have been very easy to say so, or if it had been meant to exclude those who were earning wages for themselves, that again could have been very shortly and definitely expressed in the statute. The right to aliment is a much more limited right than is apparently given under this statute, because a father is not bound to support an able-bodied son who might be earning wages for himself. It is only in cases of sickness or inability to earn a living, it may be from mental inability or want of instruction, that a parent becomes liable in aliment. But the analogy of an alimentary claim is not suggested by anything in the statute—the condition of total or partial dependence upon a man at the time of his death introduces an idea wholly foreign to the common law.

I can see no other construction for this provision except that the ground of liability is, whether the wages of the workman at the time of his death were in fact applied to the maintenance of the person who is making the claim. Now, if that be the true construction of the Act, the appellant in this case has established her claim, and I am unable to see any other criterion, consistent with the language of the statute. I do not say that there may not be exceptional cases, but in the present case, although the woman was no doubt able to earn, and had been in the habit of earning, a small subsistence by doing out-door work, she had come to her father's house to keep his house for him, and that seems to be one of the normal cases where a grown-up child may be dependent on the father. The statute

[1] [1900], A. C. 358.

does not limit the case of "dependant" to those who are either minors or infirm, or otherwise incapable—it is a general right with a qualification, and the qualification, in my judgment, is that the deceased person at the time of his death had recognised the claim upon him by giving support out of his earnings.

LORD ARDWALL.—I concur. The question here is whether or not, in the words of the Act, the appellant was "wholly or in part dependent on the earnings of the workman at the time of his death." Primarily that is a question of fact, and I think it is to be solved by putting it thus—how was this appellant supported? The answer to that question, which is given in the findings of the Sheriff-substitute, is that she was supported by the earnings of the workman, and in no other way at the time of his death. She had no other source of income whatever. She was dependent for her board, clothing, and lodging entirely on the wages of the workman, her father, with whom she resided, and that being so, I cannot see how it can be said in fact or in law that she was not dependent on the wages of the workman at the time of his death.

I consider it quite irrelevant to inquire whether she could have supported herself. If instead of doing what it was I think her duty to do in the circumstances—staying at home and keeping house for her father—she had gone outside and earned money by her labour, and compelled her father to get a strange woman for his housekeeper, she might have laid past some savings out of her earnings to provide for the future, and I think it would be establishing a very hard precedent, and a precedent that might work very badly in practice, to say that a daughter, who acts as the appellant did here, shall not only lose the opportunity of saving money, but shall have no claim under this Act in respect of her father's death. Mr Hunter seemed to fear that in deciding this case as your Lordships propose to do, a dangerous precedent would be established for holding that any able-bodied son or daughter residing with his or her father, and doing no work whatever, should be entitled to the benefits of this statute. I should say such a case would have to be dealt with in a very special way if it came up for decision, but as matter of actual fact I do not think there is much fear of any such question arising, for I should think it would be a most unusual occurrence for a working man to allow an able-bodied son or daughter to live at home without any good reason for doing so, such as the appellant had, and to sorn on their father for a living. I think the fear expressed on behalf of the respondents here is entirely illusory, and on the facts and the law I entirely agree with your Lordships.

LORD KINNEAR was absent.

THE COURT answered the question in the affirmative.

J. DOUGLAS GARDINER & MILL, S.S.C.—W. & J. BURNESS, W.S.—Agents.

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Howling's Trustees v. Smith.

ABRAM EDWARD HOWLING AND OTHERS (Howling's Trustees), Complainers (Reclaimers).—*Hunter—Grainger Stewart.*
A. DAVIDSON SMITH, Respondent.—*Cooper, K.C.—Welsh.*

*Company—Liquidation—Voluntary Liquidation—Title to object—Contributories but not Members of Company—Trustees of deceased shareholder—Companies Act*, 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 76.—Testamentary trustees were, under sec. 76 of the Companies Act, 1862, contributories but not members of a company in which the deceased held shares at the time of his death.

*Held* that the trustees had a good title to challenge the validity, on the ground of non-compliance with the articles of association, of a special resolution of the Company for voluntary liquidation and the appointment of a liquidator.

*Company—Liquidation—Resolution to wind up voluntarily—Validity—Articles of Association—Construction.*—Art. 61 of the articles of association of a company incorporated under the Companies Acts provided:—"No business shall be transacted at any general meeting, except the declaration of a dividend, unless there shall be personally present at the commencement of the business ten or more members."

Art. 130 provided:—"On the dissolution of the Company the affairs of the Company shall be wound up in terms of the Acts of Parliament under which the Company is incorporated."

*Held* that at a meeting for the passing of a special resolution for the voluntary winding-up of the Company, there must be at least ten members personally present in terms of art. 61 of the articles of association, and that it was not sufficient that the meeting satisfied the provisions of the Companies Acts as to the passing of special resolutions.

*Company—Liquidation—Interdict—Competency.—Question, per* Lord Kyllachy, whether a note of suspension and interdict to have the respondent interdicted from acting as liquidator of a company under an *ex facie* valid special resolution of the Company for voluntary liquidation, and the appointment of the respondent as liquidator, was competent.

2D DIVISION. Lord Pearson.

IN May 1904 the trustees of the late Abram Howling, master mariner, Leith, presented a note of suspension and interdict against A. Davidson Smith, C.A., Edinburgh, and also against the North British Property Investment Company, Limited, incorporated under the Companies Acts, 1862 and 1867, for any interest they might have, praying to have the respondent Smith interdicted from acting in any way as liquidator, or representing himself to be liquidator, of the North British Property Investment Company, under an alleged resolution of the Company, dated 31st March 1904.

The following narrative is taken from the opinion of the Lord Ordinary:—"The complainers are the trustees and executors of the late Captain Howling, who died in April 1902. He was, at his death, the registered owner of 140 shares, of the nominal value of £10 each, in the North British Property Investment Company, Limited. The executors gave up these shares in their inventory. They also executed a transfer of them in favour of a third party, and sent it in for registration in October 1902; but, after some delay, the directors, acting under a power conferred on them by the articles, declined to accept the transferee. Thus the executors were and remained liable only in their representative capacity under sec. 76 * of the statute, and did not become members of the Company.

* The following sections of the Companies Act, 1862 (25 and 26 Vict. cap. 89), were referred to by the parties:—

Sec. 51. "A resolution passed by a company under this Act shall be

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"The directors had, for some time before Captain Howling's death, been realising the investments with a view to the ultimate winding-up of the Company. The realisation evidently proved much worse than was expected; and ultimately a final call of £1 per share was made, which was duly paid by the executors early in 1903.

"In February 1904 the Company intimated that the surplus funds, after discharging the whole debts and obligations of the Company, admitted of a return of 4s. 3d. per share. This was tendered to the executors, and a formal receipt for £29, 15s. was sent them for signature. They explain that as the receipt bore to discharge the Company of all claims, they declined to sign it until there had been a final meeting of shareholders and a satisfactory accounting made.

"Thereupon the Company issued notices for a meeting to be held on 31st March 1904, to pass a special resolution that the Company be wound up voluntarily, and that Mr Davidson Smith, C.A., be appointed liquidator."

The meeting was held on 31st March 1904 when the special resolution was declared to have been carried, and at a subsequent meeting held on 15th April 1904 the resolution was declared to have been confirmed.

The complainers, founding on art. 61 of the Company's articles of association,* averred;—(Stat. 5) "At neither of the meetings held in

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deemed to be special whenever a resolution has been passed by a majority of not less than three-fourths of such members of the Company for the time being entitled, according to the regulations of the Company, to vote as may be present, in person or by proxy (in cases where by the regulations of the Company proxies are allowed), at any general meeting of which notice specifying the intention to propose such resolution has been duly given, and such resolution has been confirmed by a majority of such members for the time being entitled, according to the regulations of the Company, to vote as may be present, in person or by proxy, at a subsequent general meeting, of which notice has been duly given, and held at an interval of not less than fourteen days, nor more than one month from the date of the meeting at which such resolution was first passed. . . ."

Sec. 76. "If any contributory dies either before or after he has been placed on the list of contributories hereinafter mentioned, his personal representatives, heirs, and devisees shall be liable in a due course of administration to contribute to the assets of the company in discharge of the liability of such deceased contributory, and such personal representatives, heirs, and devisees shall be deemed to be contributories accordingly."

Sec. 82. "Any application to the Court for the winding up of a company under this Act shall be by petition; it may be presented by the Company, or by any one or more creditor or creditors, contributory or contributories of the Company, or by all or any of the above parties, together or separately. . . ."

Sec. 129. "A company under this Act may be wound up voluntarily—" *inter alia.*

(2) "Whenever the Company has passed a special resolution requiring the Company to be wound up voluntarily."

* The following articles were referred to by the parties:—

"XI. PROCEEDINGS AT GENERAL MEETINGS.

"Art. 61." After a provision as to the signing of notices of meetings—"No business shall be transacted at any general meeting, except the declaration of a dividend, unless there shall be personally present at the com-

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connection with the liquidation of the Company and the appointment of a liquidator were ten members present. Notwithstanding this the resolution was declared passed and confirmed, and the respondent is acting and claiming to act as liquidator. The said resolution and confirmation are inept, and the respondent has no right to act as liquidator."

The respondent did not deny that ten members were not personally present at either meeting, but he maintained that art. 61 did not apply to any general meeting which had to do with liquidation, and that such meetings were governed by art. 130, which prescribed that the affairs of the Company should on dissolution be wound up in terms of the Acts of Parliament, *i.e.*, in terms of secs. 51 and 129 of the Companies Act, 1862, the provisions of which, the respondent averred, had been observed.

The complainers pleaded, *inter alia*;—(1) The respondent not having been validly appointed liquidator ought to be interdicted as craved. (2) A quorum of members not having been present when the said resolution was passed and confirmed, the respondent is not entitled to found thereon.

The respondent pleaded, *inter alia*;—(1) No title to sue. (2) No relevant case. (3) The note being incompetent should be dismissed. (5) The appointment of the respondent having been made in accordance with the statutory requirements, and being in every way regular and valid, interdict should be refused, with expenses.

On 6th December 1904 the Lord Ordinary (Pearson) pronounced

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mencement of the business ten or more members, and it is declared that ten members shall at all times form a quorum of the Company.

"XXI. DISSOLUTION OF THE COMPANY.

"Art. 128. It shall be in the power of members holding a fifth part of the subscribed capital of the Company, or of five of the directors, to require an extraordinary general meeting of the Company to be called for considering any proposition for the dissolution of the Company, and if members holding three-fourths of the subscribed capital of the Company, personally present at such meeting, or by proxy, shall agree to such dissolution, the Company shall be dissolved, but not otherwise: Provided that such meeting shall be called by public advertisement in two Edinburgh newspapers, once each week for two months at least before such meeting, in which advertisement the intention of proposing such dissolution shall be expressly notified; and a minute in the books of the Company declaratory of their resolution to this purpose shall be binding on the Company without any other form.

"Art. 129. No dissolution, however, of the Company, other than by order of the Court, under the Companies Acts, 1862 and 1867, shall take place, if, at or before or within fourteen days after the extraordinary general meeting to be held in terms of the 128th article, any of the members enter into a sufficient and binding contract to purchase, on such terms as shall be mutually agreed on, the shares of all those members who wish to retire from the Company, and to indemnify them against any further liability arising therefrom.

"Art. 130. On the dissolution of the Company, the affairs of the Company shall be wound up in terms of the Acts of Parliament under which the Company is incorporated.

"XXII. INTERPRETATION.

"Art. 131. . . . 'Member' means a duly registered holder of a share or shares of the Company, in accordance with the statute. . . ."

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the following interlocutor:—"Sustains the first plea in law for the respondent: Recalls the interim interdict formerly granted, dismisses the note of suspension and interdict, and decerns: Finds the respondent entitled to expenses," &c.*

The complainers reclaimed, and argued;—(1) The complainers although not members of the company were contributories, and as such had a title to see that a liquidation of the company was properly and regularly initiated and carried out.[1] A contributory had a title to petition for the compulsory liquidation of the company.[2] The Lord Ordinary was wrong therefore in sustaining the respondent's plea of no title to sue. (2) The special resolution of 31st March 1904 was invalid in respect that ten members of the company were not personally present at the meeting in terms of article 61 of the articles of association; and for the same reason the confirmatory resolution of 15th April 1904 was also invalid. The respondent averred that these resolutions had been passed in compliance with sections 51 and 126

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* "OPINION.—(After the narrative given above)—The sole ground alleged for interdict is, that by article 61 of the Company's articles of association, it is provided that 'no business shall be transacted at any general meeting, except the declaration of a dividend, unless there shall be personally present at the commencement of the business ten or more members, and it is declared that ten members shall at all times form a quorum of the Company,' and it is averred, and not denied, that ten members were not personally present at either of the meetings I have mentioned. The reply made by the respondents is, that article 61 does not apply to any general meeting which has to do with liquidation; that such meetings are governed by article 130, which prescribes that the affairs of the Company shall on dissolution be wound up in terms of the Acts of Parliament—that is, in terms of sections 129 and 51 of the Act of 1862, the provisions of which (it is said) were observed. Looking to the collocation of article 130, with articles 128 and 129, I doubt if it has any application to the present case. But even if it has, the question remains whether article 61 does not also apply to make more stringent the provisions of section 51 of the statute as to the requirements for passing a special resolution. In my opinion it does, and I therefore take the case on the footing that the special resolution was not legally passed.

"The question then comes to be whether the complainers are entitled to state this objection in a process of interdict, in which the bare legal objection is the sole ground of action, and in which, on the one hand, no misfeasance is alleged against any one, and on the other, no loss or damage is said to have accrued to the executry estate held by the complainers. I do not doubt that, if such averments had been made, the complainers would have a sufficient title to sue the wrong-doer, and to obtain redress upon making a relevant averment of breach of duty to them, and of loss accruing from it. They might even have a title to call for an accounting with a view to pecuniary redress. But I am unable to find any good ground in law for sustaining a claim at the instance of persons who are neither members of the Company nor outside creditors to have the liquidation virtually declared null, without any averment whatever of loss or damage. In a case of urgency they might even have been entitled to apply to have the liquidation proceedings stopped until they had an opportunity of constituting their claim. But I have heard no suggestion of that here, and I am of opinion that the complainers' statement discloses no title or interest on their part to demand the remedy which they ask."

[1] Norwich Yarn Co., 1850, 12 Beav. 366.

[2] Lindley on Companies, 6th ed. pp. 732, 733.

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of the Companies Act, 1862, and he argued that the resolutions were therefore valid, looking to the terms of article 130 of the articles of association. Article 130 had not that effect. What the result might have been had what was called the "dissolution" of the Company taken place in terms of article 128 it was unnecessary to inquire, because there had never been any extraordinary general meeting of the Company in terms of article 128, and consequently there had not been any "dissolution" of the Company in terms of that article. Article 130 therefore was out of the case. The Company not having proceeded by way of "dissolution" in terms of articles 128, 129, and 130, the liquidation was invalid on that ground; or otherwise these articles were to be treated as if they did not exist, and the question was to be determined in accordance with the ordinary rules of company law. According to these rules it was not enough that the provisions of the Companies Act in regard to meetings had been complied with; there must also be compliance with the provisions of the particular company's articles.[1] (3) It was competent to raise this question by way of interdict; a reduction was not necessary.[2]

Argued for the respondent;—The complainers had no title to raise this question, as they were contributories merely, and not members of the company. A contributory had a title to petition for compulsory liquidation, but that was because section 82 of the Companies Act, 1862, expressly gave contributories such a title. But in the case of voluntary liquidation the Act did not give a corresponding right to contributories merely as such; it was only members of the company who were entitled to vote at meetings for the consideration of resolutions for voluntary liquidation. If indeed a contributory alleged that he had suffered prejudice by illegalities in a voluntary liquidation, he probably would have a title to apply to the Court for redress. But the complainers did not aver that they had suffered any prejudice whatever; they merely averred a bare illegality in the meetings of the Company. That was a matter for the members of the Company, and these alone. (2) These resolutions of 31st March and 15th April had been validly passed. On a sound construction of the articles of association, article 130 had the effect of superseding article 61 *quoad* liquidation, and of making sections 51 and 126 alone applicable to meetings for the purposes of considering as to liquidation. (3) It was incompetent to interdict a liquidator from proceeding to act under an *ex facie* valid resolution to wind up voluntarily, but the respondent was willing that the question should be tried in the present process.

Lord Young.—I am clearly of opinion that the Lord Ordinary is wrong. He has sustained the first plea in law for the respondent, viz., no title to sue. He has determined the case simply on the ground that the complainers have no title to be heard. The point that they desire to make is that the special resolution that the Company should be wound up and a certain gentleman appointed liquidator was not legally passed owing to the fact that a quorum of members was not present. The Lord Ordinary apparently thinks the objection a sound one, but is of opinion he cannot

[1] *Re* Cambrian Real Fuel and Charcoal Co., De La Mott and Turner's case, 1875, 31 L. T. 773.

[2] Henderson v. Louttet & Co., Limited, March 15, 1894, 21 R. 674.

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hear it from these complainers. I am clearly of opinion that they have a good title to be heard as proprietors of the shares, although not members of the Company. This is the only question we require to determine, although I agree with the Lord Ordinary that the resolution was illegal.

LORD KYLLACHY.—I concur. I should have been glad to have seen my way to support the judgment of the Lord Ordinary, because I think we see sufficiently behind the scenes to realise that the complainers' interest to raise this question is not of a very substantial character; but the question having to be decided, I am unable to hold otherwise than that these persons being contributories of this Company have a sufficient title to complain that the proceedings which resulted in the appointment of this liquidator were irregular and therefore illegal. That being so, the only question is whether the respondent has succeeded in shewing that, assuming the complainers' title (contrary to the Lord Ordinary's opinion), their objection to the regularity of the proceedings is well founded. As to that I am afraid that the terms of the Company's articles of association are conclusive in the complainers' favour. I do not, I confess, see how, having regard to those articles, any meeting of the Company capable of passing a special resolution for winding up could be legally constituted without the personal presence of at least ten members of the Company.

As to the competency of trying such a question by a process of interdict, I should, if the point had been raised, have had some difficulty. But the respondent's counsel I think very properly stated that they did not take any objection, and were quite willing that the question should be decided in the present process.

The LORD JUSTICE-CLERK concurred.

LORD MONCREIFF was absent.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor reclaimed against: . . . Sustain the first and second pleas in law for the complainers: Interdict, prohibit, and discharge the respondent from acting in any way as liquidator, or representing himself as liquidator, of the North British Property Investment Company, Limited, under an alleged resolution of said Company, dated 31st March 1904, and decern."

WILLIAM GREEN, S.S.C.—WELSH & FORBES, W.S.—Agents.

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Church of Scotland v. Watson.

THE CHURCH OF SCOTLAND AND THE GENERAL ASSEMBLY THEREOF, First Parties.—*Wilson, K.C.—Chree.*
ALEXANDER WATSON AND ANOTHER, Second Parties.—*Campbell, K.C.—D. Anderson.*
JOHN CHARLES GRIEVE, Third Party.—*Campbell, K.C.—D. Anderson.*

*Superior and Vassal—Entry—Casualty—Implied Entry—Duplicand on entry of each heir and singular successor—Last vassal entered still alive—Conveyancing (Scotland) Act*, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4.—By

* Decided Dec. 24, 1904.

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the *tenendas* clause of a feu-charter, dated in 1825, the vassal and his heirs and assignees whomsoever were taken bound to pay a certain feu-duty, "doubling the said feu-duty at the entry of each heir and singular successor." Subinfeudation and holding otherwise than of the granters and their successors were prohibited, and it was provided that all disponees of the vassals after the grantee taking infeftment should be obliged to enter within six months of the dispositions in their favour, and to pay the duplicand for such entry although their author might be then in life, "and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees . . . shall be held and considered still to remain with the former vassals, and the said area . . . shall be subject and liable to his debts and deeds notwithstanding the dispositions . . . granted by him."

*Held* that the superiors had a contractual right to recover a duplicand from a singular successor of the vassal holding under and in terms of the feu-charter, and impliedly entered under a disposition recorded in 1903, although the last vassal who had paid a duplicand was still alive.

A feu-disposition, dated in 1831, provided that the lands were to be holden of and under the superior and his heirs and successors for the yearly payment of a certain feu-duty, "paying two years' feu-duty for the entry of each heir and singular successor (or one year's feu-duty in the event of the vassal last entered with the superior being then alive), over and above the duty for the year." It was declared that the vassal and his heirs and assignees should not be entitled to sell, let, or dispose of the subjects "to be held of themselves or of any interjected superior, but only of and under the superior and his foresaids," and that if the vassal or his heirs and assignees should "act contrary to any of the conditions above expressed," an irritancy should be incurred.

*Held* that the superiors were entitled to recover a duplicand from a singular successor of the vassal holding under and in terms of the feu-charter, and impliedly entered under a disposition recorded in 1895, although the last vassal who had paid a casualty was still alive.

*Process—Particular Actions—Special Case—Two distinct litigations combined in one special case.*—A special case was presented for the determination of questions between the first parties as superiors and two different vassals, the second and third parties, who held separate and distinct estates under different titles. *Observed* that this method of combining two distinct litigations in one special case was irregular, in respect that each of the vassals was made a party to statements of fact affecting the other with which he had no concern, and his concurrence in which was nevertheless made the basis of a judgment *inter alios*.

1st Division.

THIS was a special case presented for the opinion of the Court upon questions between the superiors and the respective vassals of (first) certain heritable subjects at 1 West Claremont Street, Edinburgh, and (second) certain heritable subjects at 4 Middleby Street, Edinburgh.

The parties to the special case were (1) the Church of Scotland and the General Assembly thereof, acting through its Chapels of Ease Endowment Committee, with consent of Sir John Cheyne and others, and of the Right Honourable James Alexander Campbell, LL.D., M.P., and others, as trustees, the superiors of both properties (first parties); (2) Alexander Watson, baker, Edinburgh, and his wife, proprietors of the West Claremont Street subjects (second parties); and (3) John Charles Grieve, teacher of music, Edinburgh, proprietor of the Middleby Street subjects (third party).

I. *West Claremont Street subjects.*—These subjects were acquired by the second parties by disposition by the said Alexander Watson

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in their favour, dated 31st July, and recorded in the Register of Sasines 8th August 1903, and were held by them under and in terms of feu-charter granted by Charles Ross, advocate, and others, trust disponees of the deceased James Rose, with consents, in favour of James Sutherland, builder, Edinburgh, dated 23d July, 31st August, and 11th November 1825. This feu-charter also related to other subjects. The superiors' interest in this feu-charter was at the date of the case duly vested in the said Sir John Cheyne and others as trustees.

The clauses in this feu-charter relating to the manner of holding of the subjects were as follows:—"To be holden and to hold All and Whole the said lot or area of ground and tenements to be erected thereon . . . of and under us the said trust disponees, and our heirs and successors, immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever. . . . Paying therefor yearly the said James Sutherland, and his foresaids" (viz., his heirs and assignees), "to us and our foresaids, the sum of £90, 4s. sterling in name of feu-duty. . . . And doubling the said feu-duty at the entry of each heir and singular successor to the premises. And providing always, as it is hereby provided and declared, that it shall not be competent to nor in the power of the said James Sutherland and his foresaids to subfeu, sell, or dispose of all or any part of the foresaid area of ground or tenements to be erected thereon, to be held of them or of any other interjected superior, but to be held allenarly of and under us the said trust disponees and our foresaids, as superiors in all time coming. [Then followed a clause providing that though Sutherland might assign the precept of sasine to a purchaser, yet such purchaser should be bound under pain of nullity to take infeftment thereupon within three months from the date of the disposition in his favour, and that in like manner the heir-at-law of Sutherland, in the event of his dying before himself taking infeftment on or assigning the said precept of sasine, should not be at liberty to assign or convey the same, but should be strictly bound to exhaust the same by taking infeftment thereupon within three months after the death of the said James Sutherland, or otherwise any sasine to be afterwards passed upon the said precept should be null and void.] And it is hereby also provided and declared that all purchasers from or disponees of the vassals in the area before disponed, or any part thereof, after the said James Sutherland and his heir taking infeftment as aforesaid, shall be obliged to enter with us or our foresaids as superiors by charter of resignation, and be infeft therein within six months after the date of the sale or dispositions in their favour, and to pay the composition before stipulated for such entry, and that although their author may be then in life, any law or practice to the contrary notwithstanding, and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees of the said subjects shall be held and considered still to remain with the former vassal, and the said area and tenements shall be subject and liable to his debts and deeds notwithstanding the dispositions or other conveyances granted by him. . . . Which whole provisions, conditions, declarations, and conditions contained in these presents are hereby appointed to be engrossed in the instrument or the instruments of sasine to follow hereon, and in all the future transmissions and investitures of the said area or tenements to be erected thereon, or any part thereof, and if the same shall not be inserted therein, such instruments

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of sasine and transmission shall be *ipso facto* void and null, as if the said writing had never been made or granted. . . ."

The parties were agreed that the proportion of the said feu-duty of £90, 4s., and relative duplicand, affecting the subjects No. 1 West Claremont Street was £3, 10s.

The vassal in the subjects 1 West Claremont Street who last paid a duplicand was Robert Dods. The said Robert Dods made payment of £3, 10s. of duplicand on 27th February 1883. The second parties acquired right to the said subjects 1 West Claremont Street from the said Robert Dods by the following writs:—(1) Disposition by the said Robert Dods in favour of the said Alexander Watson, dated 16th April, and recorded in the Register of Sasines 15th May 1903; and (2) the disposition above mentioned by the said Alexander Watson in favour of the second parties. The said Robert Dods was still alive.

The first parties claimed a composition of £3, 10s. from the second parties as due by them in respect of the change of ownership, and their entry to the subjects 1 West Claremont Street.

The second parties maintained that no casualty was at present due, in respect that the vassal who last paid a duplicand was still in life.*

The question of law in the case of the West Claremont Street subjects was:—"(1) Are the first parties, through the said Sir John Cheyne and others, as trustees foresaid, entitled now to recover from the second parties a composition of £3, 10s. although the said Robert Dods remains in life?"

2. *Middleby Street subjects.*—These subjects were acquired by the third party by disposition by William Richardson, in his favour, dated 14th, and recorded in the Register of Sasines, 28th May 1895, and were held by him under and in terms of feu-right and disposition granted by Robert Bell, advocate, commissioner for George Bell, surgeon in Edinburgh, with consent, in favour of William Bell, W.S., Edinburgh, dated 21st May 1831. This feu-right and disposition also

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* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), by section 4, subsection (1), abolishes renewal of investiture, and by section 4, subsection (2), enacts that infeftment shall imply entry, as at the date of the registration of such infeftment in the Register of Sasines, "with the nearest superior whose estate of superiority in such lands would according to the law existing prior to the commencement of this Act have not been defeasible at the will of the proprietor so infeft, to the same effect as if such superior had granted a writ of confirmation."

Sec. 4, subsec. (3), provides as follows:—"Such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties, which may be due or exigible in respect of the lands, at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering."

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related to other subjects. The superiors' interest in the said feu-right and disposition was at the date of the case duly vested in the said James Alexander Campbell and others as trustees.

The clauses in this feu-right and disposition relating to the manner of holding of the subjects were as follows:—"In which several subjects hereby disponed, under the declarations and reservations above and after mentioned, I, as commissioner foresaid, with consent foresaid, bind and oblige the said George Bell and his heirs and successors to infeft and seise the said William Bell and his foresaids" (vizt. his heirs and assignees whomsoever) "upon their own charges and expenses, to be holden of and under the said George Bell and his foresaids, immediate lawful superiors thereof, . . . for the yearly payment of the sum of £37, 6s. 6d. of feu-duty, . . . and paying two years' feu-duty for the entry of each heir and singular successor in name of entry-money (or one year's feu-duty in the event of the vassal last entered with the superior being then alive), over and above the duty for the year wherein the entry is made, and interest of the said sum of feu-duty from and after the date of its becoming due and until payment, and a fifth part more in case of not due and punctual payment thereof. . . . And in regard the entry of heirs and singular successors is taxed as above, the said William Bell and his foresaids shall be bound and obliged to infeft himself on these presents within three months of the date hereof. . . . Declaring also that the said William Bell and his foresaids shall not . . . be entitled to sell, let, or dispose of the said subjects . . . to be held of themselves or of any interjected superior, but only of and under the said George Bell and his foresaids in time coming. . . . Declaring always, as it is hereby expressly provided and declared, that if the said William Bell or his foresaids shall act contrary to any of the conditions above expressed, not only shall this feu-right and disposition, with all that may have followed hereon, become void and null, but the person or persons so contravening shall amit and forfeit all right and interest in the foresaid subjects, which shall revert to the said George Bell and his foresaids in like manner as if this feu-right had never been granted; all which conditions, with this irritant and resolutive clause, are hereby appointed to be inserted in the instrument of sasine to follow hereon, and in all the future renovations and investitures of the said subjects in favour of heirs and disponees."

The parties were agreed that the proportion of the said feu-duty of £37, 6s. 6d. affecting the subjects 4 Middleby Street was £8, 15s. 6d., and that if any composition was due it amounted to £8, 15s. 6d.

The last vassal in the subjects 4 Middleby Street who paid a casualty was James Dallas. The third party acquired right to the subjects 4 Middleby Street from the said James Dallas by the following writs, viz.:—(1) Factory and commission by the said James Dallas in favour of Mrs Jane Fordyce Rose or Dallas, his mother; (2) disposition by the said Mrs Jane Fordyce Rose or Dallas, as factor and commissioner foresaid, in favour of the said William Richardson, dated 9th, and recorded in the General Register of Sasines, 13th May 1885; and (3) the said disposition by the said William Richardson in favour of the third party, dated and recorded as aforesaid. The said James Dallas was still alive.

The first parties claimed a composition of £8, 15s. 6d. from the

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third party. Their ground of claim and the contention of the third party in answer were the same as those put forward by the parties in the case of the Claremont Street subjects.

The question of law in the case of the Middleby Street subjects was:—"(2) Are the first parties, through the said James Alexander Campbell and others, as trustees foresaid, entitled now to recover from the third party a composition of £8, 15s. 6d., although the said James Dallas remains in life?"

Argued for the first parties;—1. *West Claremont Street subjects.*—There was here a clear prohibition against subinfeudation, and an obligation imposed upon singular successors to enter within six months, and to pay a duplicand. There was no express clause of irritancy, but the provision that in case of failure to enter the right should remain with the disponers was equivalent to a clause of irritancy, as it rendered a disponee's title nugatory without entry. The case was therefore ruled by *Dick Lauder* v. *Thornton*.[1] The only difference between that case and the present was that in that case there was an express irritancy clause, and here there was not. But an irritancy clause was not essential if there was a clear obligation to enter.[2] *Dick Lauder*[1] was an example and not the measure of the rule. Apart from that case, however, this case fell under the principles which received effect in *Morrison's Trustees* v. *Webster*,[3] and *Stewart* v. *Gibson's Trustee*.[4] The obligation to enter and to pay a duplicand was a condition of the holding. It was part of the *reddendo*, and being a payment of fixed amount it was payable just like a duplicand at a fixed interval, and it was recoverable by a petitory action. The second parties being entered by force of the statute had rendered themselves liable for all the obligations imposed on the vassal by the feu-charter. The superior's right under the law prior to 1874, in such a case as the present, was either (1) to bring an action of reduction improbation, and so compel the proprietor to shew his title and enter or to have decree *contra non producta* pronounced against him; or (2) to bring a petitory action against the proprietor for payment of the duplicand as part of the *reddendo*. The superior could, prior to 1874, have compelled payment of the stipulated duplicand, although the last vassal who had paid a duplicand was still in life, and the proviso in section 4 (3) of the Act of 1874 did not apply.[5] The case of *Hamilton* v. *Chassels*[6] was distinguishable. There was there no express prohibition of subinfeudation, no irritancy clause, and no clause under the provisions of which entry could have been enforced.

2. *Middleby Street subjects.*—In this case there was a clear prohibition against subinfeudation, and there was also a clause of irritancy. It was therefore *a fortiori* of case 1, and in terms fell under the rule laid down in Bell's Commentaries.[7] The case of *Dick Lauder*[1] directly applied, and under that case or under *Morrison's Trustees*[3] and *Stewart*,[4] the question should be answered in accordance with the

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[1] Jan. 23, 1890, 17 R. 320.
[2] Dick Lauder, 17 R. 320, *per* Lord Adam, at p. 332.
[3] May 16, 1878, 5 R. 800.
[4] Dec. 10, 1880, 8 R. 270.
[5] Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 4 (3).
[6] Jan. 30, 1902, 4 F. 494.
[7] (Ed. M'L.), p. 29.

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superiors' contention. The provision that one year's feu-duty should be payable instead of two if the last entered vassal was still alive shewed that the right to demand the duplicand was not dependent upon there being no entered vassal in life. The proviso in section 4 (3) of the 1874 Act[1] did not apply in this case either, and the duplicand was consequently payable now, although the last vassal who had paid a casualty was still alive.

Argued for the second parties;—*West Claremont Street subjects.*—The first parties were not entitled to recover payment of a duplicand from the second parties while the last vassal who had paid was still in life. The proviso in section 4 (3) of the 1874 Act applied.[1] The duplicand here was not payable "irrespective of entry."[1] It was only payable for an entry. The superior could not have brought a declarator of non-entry, for the fee was full. He had no means of compelling a disponee to enter while the last vassal who had paid a duplicand was alive. There was no irritancy clause. The clause founded on by the first parties was not equivalent to an irritancy clause. It merely expressed the effect in law of an *a me* disposition prior to confirmation. This case was consequently ruled by *Hamilton* v. *Chassels*,[2] and *Dick Lauder* v. *Thornton*[3] did not apply. In the absence of an irritancy clause *Dick Lauder*[3] would have been decided in the opposite way. Under this charter even if a vassal had granted a subfeu the superiors in the absence of an irritancy clause would have been powerless so long as the granter of the subfeu was alive.[4] If the disponee under an *a me* disposition failed to enter the only thing which under this charter the superior could have done would have been to bring a declarator that the feu belonged to the disponer and not to the disponee. If the disponee chose to be content with a right which was liable to defeat in the event of the disponer's bankruptcy, the superior had no means known to the law by which he could compel the disponee to perfect his right by entry. If the superior had brought a reduction improbation the disponee could have produced the title of the last entered vassal if still in life, and it would have been *jus tertii* for the superior to object to the disponee occupying the lands without a title if he was there by permission of the last entered vassal if still in life.

Argued for the third parties;—*Middleby Street subjects.*—The proviso in section 4 (3) of the 1874 Act[1] also applied here, and the duplicand was not payable while the last vassal who had paid was alive. In this case likewise nothing was due till entry. The meaning of the clause providing for payment of one year's feu-duty instead of two if the last entered vassal was still alive was, that if a disponee chose to enter while the last entered vassal was alive he was to get entry on easier terms than if he waited, as he was entitled to do, until the fee ceased to be full. The feu-charter did not stipulate that singular successors should enter with the superior at once or within any specified time. No doubt here there was a clause of irritancy. But there had been no contravention. There had been no subinfeudation and no conveyance with a *de me* or an *a me vel de me* holding. Where subinfeudation was pro-

[1] Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 4 (3).
[2] 4 F. 494.
[3] 17 R. 320.
[4] Bell's Comm. (Ed. M'L.) vol. i. 28.

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hibited, and the manner of holding was not expressed, the manner of holding must be assumed to be *a me*. But even if the disposition had been to hold *a me vel de me* that would not have been a contravention.[1] Even if there had been a contravention and an irritancy had been incurred, the superior's only remedy would have been a declarator of irritancy.[1]

At advising,—

LORD KINNEAR.—This special case is brought for the determination of questions between the first parties as superiors and two different vassals holding separate and distinct estates, and in this respect it is in my opinion irregular in point of form. For by this method of combining two distinct litigations in one special case, each of the vassals is made a party to statements of fact affecting the other with which he himself has no concern, and his concurrence in which is nevertheless made the basis of a judgment *inter alios*. The two cases may however be separated without difficulty for the purpose of consideration, and as each party is undoubtedly bound by the statements affecting his own case, I think there is no fatal objection to the competency of the proceedings, although it is proper to advert to the irregularity, lest it should be supposed to have been overlooked or to be sanctioned by the Court.

It is necessary, however, to consider the two cases separately. To begin with the first, it is stated that the first parties are the superiors of certain subjects in West Claremont Street, and the second parties are the vassals infeft in these subjects. The vassals' right is constituted by a feu-charter granted in 1825; and they hold by virtue of a disposition granted by a singular successor of the original vassal, dated and recorded in the Register of Sasines in 1903. By the terms of this charter the lands are to be holden of and under the granters and their heirs and successors, immediate lawful superiors thereof, in feu-farm, the grantee and his heirs and assignees paying therefor yearly a certain sum of money in name of feu-duty, with legal interest from the term the same falls due during the not-payment, and doubling the said feu-duty at the entry of each heir and singular successor to the premises, and providing that it shall not be competent to nor in the power of the said grantee and his foresaids to subfeu, sell, or dispose of all or any part of the subjects to be held of them or of any other interjected superiors, but to be held allenarly of and under the granters and their foresaids; and it is also provided that all purchasers from or disponees of the vassals shall be obliged to enter with the superiors by charter of resignation, and be infeft therein within six months after the date of the sale or disposition in their favour, and to pay the composition before stipulated for such entry, and that although their authors may be then in life, any law or practice to the contrary notwithstanding, and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees shall be held and considered "still to remain with the former vassal, and the said area and tenements shall be subject and liable to his debts and deeds notwithstanding the dispositions or other conveyances granted by him." There is a corresponding provision providing for the

[1] Colquhoun v. Walker, May 17, 1867, 5 Macph. 773, 39 Scot. Jur. 392.

case of the grantee assigning his right before infeftment. But as no question can now arise as to that, it is unnecessary to quote it. The question depends upon the provisions I have quoted, which were to be engrossed in all future transmissions and investitures, and their meaning and effect is perfectly clear and distinct. Subinfeudation is absolutely prohibited, and the grantee and his heirs and successors have no power to dispone the subjects to be holden otherwise than from the disponer and his heirs and successors of and under their immediate lawful superiors in the same manner as the disponer himself. It follows that the only way in which any disponee or singular successor can obtain a real right in the subjects without violating the conditions of the charter is by taking infeftment immediately of and under the superior, or in other words, by entering with the superior and paying the fine exigible on such entry. Under this charter, then, the second parties now hold the subjects by virtue of a disposition by Robert Dods in favour of Alexander Watson, dated 16th April, and recorded in the Register of Sasines on 15th May 1903, and (2) disposition by Alexander Watson in their favour recorded in August of the same year, and it is stated that the last singular successor who paid a duplicand on entry was Robert Dods, who is still alive. The two dispositions are not before us, but we must assume, because it was assumed in argument, as it is in the special case, that they are regular and correct in point of form, and effectual to carry the lands, subject to the conditions of the original charter; and that by recording them in the Register of Sasines the respective disponees were duly infeft. It is part of the stated case, indeed, on which judgment is invited, that the subjects are held by the second parties "under and in terms of the feu-charter."

In these circumstances the question which has arisen for decision between the parties is whether the superiors are entitled to receive from the second parties the duplicand payable under the charter on the entry of singular successors, the parties being agreed as to the amount of such duplicand if it is payable at all.

At first sight it would seem to me hopeless for the second parties to deny their liability in the face of their admission that they are singular successors, that they are entered with the superior, and that they hold in terms of the charter. The terms of the charter are as plain as words can make them, that the vassals are to pay a certain annual feu-duty, and to pay double that sum on the entry of singular successors. It is beyond all question that they are liable for the feu-duty, because they have taken infeftment in the lands in terms of the charter, and by the same reasoning they must be liable for the duplicand also. The ground of liability is that no one can take benefit under a contract or grant and at the same time refuse to perform the stipulated conditions on which the benefit is given.

But then it is said that the condition on which the duplicand is payable has not emerged, because the second parties have not come forward to demand an entry according to the law in force when the charter was granted, but are only entered by implication of the Statute of 1874. The implied entry must be subject to all the qualifications which the statute has created; and one of these qualifications is that an implied entry "shall not entitle any superior to demand a casualty sooner than he could by the

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law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering." Now, it is said that Robert Dods, the last vassal who paid a duplicand, is still in life, and that so long as he lives the superior could not under the old law have brought a declarator of non-entry, because the fee was full, and therefore could not have demanded a casualty. But in the actual state of the titles the life of Robert Dods is altogether irrelevant to the question. The superior has nothing whatever to do with him, and is not concerned to inquire whether he is still in life or not. For Robert Dods is no longer the vassal in the feu. He is absolutely and entirely divested of all right and title in the lands, and the second parties are invested in his room and place. It is true that the fee is full, but only in consequence of the infeftment of the second parties as vassals. The infeftment of the former vassal is evacuated by the infeftment of his disponees, and there is no other infeftment in existence establishing the relation of superior and vassal except that which created that relation between the first and second parties. I agree that the superiors are not in a position to raise a declarator of non-entry, or the statutory action that comes in its place, because the vassals are infeft in the fee, but for the very same reason the vassals are bound to pay the duties stipulated by the feu-charter. It must be kept in view that the constitution of a feu is matter of contract whether the conditions are embodied in a mutual deed or in a unilateral charter; and by the law of contract the vassals cannot be allowed to take the land and refuse to perform the conditions on which it is given. It need hardly be said that the law of tenure coincides in this respect with the law of contract.

The question, however, is whether the right to immediate payment of a duplicand is displaced by the third subsection of the fourth section of the statute. It appeared to me that some confusion was introduced into the argument by an indiscriminate application of the language of this section to very different forms of title. If the word "infeftment" were to be construed in its ordinary technical sense, it would be difficult to apply any part of the enactment to the case of a conveyance with an *a me* holding. For the main enactment is that every proprietor who is at the commencement of the Act, or thereafter shall be, duly infeft shall be deemed to be entered as at the date of such infeftment; and in the case of an *a me* holding, infeftment and entry are only two different words for one and the same thing. In such a case therefore the statute would mean that every proprietor duly infeft shall be deemed to be duly infeft, which would be futile. There can, I think, be no question that the form of title primarily contemplated by the fourth section was the *a me vel de me* holding. The purpose was to simplify the completion of such a title by entering a disponee at once without the intervention of the superior; and at the same time to leave the pecuniary rights of parties undisturbed, by saving on the one hand the superior's right to a casualty on entry, and on the other hand allowing the disponees of an entered vassal to postpone payment, in the same way as if they had taken infeftment for a time under the disponer. The statute therefore postulates the infeftment of the disponee as the condition on which the new regulations for entry are to take effect, and it assumes that the disponee may at will defeat the estate of the superior,

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under whom he is infeft. This is directly applicable to the case of a proprietor infeft by virtue of a conveyance with a double manner of holding and an indefinite precept. But nobody else can be infeft in lands, and yet be in a position to extinguish the estate of his superior, and come to hold directly of an over-superior. If infeftment therefore is to receive its ordinary signification the enactment has no meaning with reference to an *a me* holding. A proprietor so infeft is entered already, and no farther entry can be either necessary or possible. But the difficulty seems to be removed, so far as regards the main enactment, by the special meaning assigned to the word by the interpretation clause. For the purposes of the Act, as I read the clause, "infeftment" is made to "include every title to an estate requiring and admitting of infeftment which is duly recorded in the Register of Sasines," irrespective altogether of the condition by which the corresponding definition in the Titles Act of 1868 is qualified, that such registration shall have constituted a real right to lands. If before 1874, therefore, a conveyance were recorded which either expressed, or in terms of the Act of 1868 implied, that the manner of holding should be *a me*, that would not by the law then in force have been complete infeftment, but only a step towards infeftment which might be perfected by obtaining a writ of confirmation from the superior. But then by the 1874 Act charters and writs of confirmation and other writs by progress are abolished, registration of the conveyance is called infeftment, and the proprietor so described as infeft is entered with the superior. It seems to follow that the only way in which such a title can now be completed is by recording the conveyance in the Register of Sasines, whereupon the disponee will be duly infeft, for entry in the case supposed is just infeftment and nothing more.

But if the positive enactment of section 4 is thus satisfied, the language of the negative proviso at the end of the subsection (3) is still inapposite, because it assumes that a proprietor has been duly infeft under the prior law, but without as yet having entered with the superior, and on that assumption prescribes the conditions on which he is to be entered by force of the statute itself. In applying the proviso, therefore, to a case where infeftment and entry are one and the same thing, we must be careful to see that we do not force language which is certainly inexact, so far as to go beyond the true intent and meaning of the statute, to the prejudice of either superior or vassal. The true purpose of the enactment is not doubtful. It is intended to secure that a superior with whom a vassal has been entered by implication shall not get payment sooner than he would have done so under the prior law. But that is a risk to which a disponee with an *a me* holding is in no way exposed. If he takes infeftment by registration of his conveyance under the new law, he must pay a casualty, because that is a condition of the title he has chosen to complete. If he had applied for infeftment by writ of confirmation under the old law, he would have been required to pay a casualty as a condition of granting the writ for which he asked. But it is said that under the old law the superior could not have required the vassal to enter so soon, because a former vassal is still in life. Now, it seems to me to be obvious that in order to ascertain the time which is intended by the phrase, "not sooner than he could have required the vassal

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to enter," the condition must be related to some hypothetical position of the vassal's right, with reference to which the statutory question is to be proposed. And I think the position which the statute itself postulates is that the vassal has a real right. In reading the negative proviso which refers us to the prior law, we must discard the new artificial meaning which the statute gives to "infeftment," and keep in view that by that law the real right which the statute now attaches to the registration of a conveyance could only be obtained by the intervention of the superior. But apart from that consideration, the only hypothesis on which it is reasonable to inquire whether a casualty would have been exigible is that the disponee desires to obtain a substantial right to the land which he has purchased. What is contemplated by the enactment, as I understand it, is the completion of a purchaser's title in accordance with the recognised practice and in the ordinary course of business. And this is in accordance with the view taken by the Court in the cases which have been decided with reference to entry on an alternative holding. In that view the question to be determined is at what time could the superior have required a disponee to enter, who had obtained a conveyance from a vassal infeft, and desired to obtain a real right in the subjects conveyed? And in answering that question, the first thing to be observed is that by "required" the statute cannot mean "compelled by action." For the superior could never at any time in the history of the law have brought an action to have a man ordained to enter as vassal. All that he could do was to resume possession of the land and hold it for his own use, to the exclusion of any one alleging a proprietary right, who did not choose to come forward and enter on the terms fixed by the charter or by the general law. There is no known practice therefore to which the word could refer, if it meant "compel by an action at law." But it is a word of ordinary English, and it does not mean compel. It means demand as of right. And what the superior could have demanded as of right in the case I am supposing does not seem to me to be open to doubt. I think it must be conceded that he could have made no demand at all, so long as a purchaser did nothing to obtain a substantial right to the lands. He had nothing to do with the personal contracts of his vassal, and had no right to see them. But it is not to be supposed that the purchaser would leave the land he had bought open to the debts and deeds of the vendor, and would take no step to make good his own right to it. The reasonable assumption is that he would desire to obtain a real right which would protect him against fraud and against the diligence of the vendor's creditors; and what the superior could require as a condition for giving such a right is fixed and determined by the terms of the charter. In the first place it is required by the charter that the purchaser shall obtain a conveyance which will enable him to take infeftment directly of and under the superior, and will not enable him to infeft himself under the disponer, either by a permanent or by a temporary title; in the second place, that he shall carry out his right by taking infeftment of the superior within six months of the purchase, and shall pay the stipulated entry money whether the last entered vassal is still in life, or not; and lastly, that if he fails to perform these conditions his title shall be treated by the superior as if it were non-existent, and his author shall be considered as the

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undivested owner of the land, which shall still be subject, notwithstanding the sale, to his debts and deeds. These are the conditions under which alone a disponee could make his title effectual under the old law, as well as under the new law; and it is "under and in terms of" a title expressing these conditions that the second parties assert that they now hold the lands of the superior. It cannot be assumed that if the Act of 1874 had not passed they would not have completed a title which subjected them to such conditions, because no other course was open to them if they were to have any valid title. The disponee of a conveyance to be holden *a me vel de me* had alternative titles; and when the Legislature interposed to choose for him the alternative which accelerated the superior's claim for a casualty, it was thought reasonable to provide that nevertheless he should not be called upon to pay sooner than if he had been left to take the alternative which, in ordinary circumstances, a disponee in his position would choose for himself. But a disponee with a conveyance in terms of the present charter had no such alternative. His only option was to choose between making up a valid title under the superior and running the risk of losing his land because he had no title whatever. And exactly the same option was open to the second parties under the Act of 1874. It is not open to them to say that they would not have exercised that option in the same way before 1874, because the considerations to determine their option were exactly the same at the earlier as they are now at the later date. There is no change in the title or in the law operating upon the title. The only change is in the form by which the title is completed. I see no reason why the substitution of a new method for completing the feudal relation without altering its legal effect, or the conditions upon which the mutual rights and liabilities come into force, should entitle the vassal to possess and occupy the land without performing the conditions of the investiture by which he holds, and of the contract which he has chosen to make. The superior demands nothing as a consequence of the infeftment which he could not have insisted upon as a condition precedent to his giving infeftment if the methods of the prior law had been still in operation. It appears to me to be irrelevant that the last vassal is still in life, because by the charter under and in terms of which the second parties aver that they hold, a casualty would have become exigible, under the prior law, six months after the purchase just as if the lands had fallen into non-entry by the death of the last vassal.

But if it were necessary, which in my opinion it is not, to establish that the claim could have been enforced by action, I am not disposed to think that under the prior law superiors were so helpless as the vassal's argument supposes. A superior has always been entitled by virtue of his own right in the lands to resume the fief and exclude any occupier who could not shew that he was in possession mediately or immediately by virtue of a grant from the superior himself. This is, as Mr Erskine[1] puts it, "a fixed right of superiority," and for making it effectual the superior may bring an action for having the deeds which are alleged to constitute a right of property judicially exhibited, that their validity and import may be ascer-

[1] Ersk. ii. 5, 3.

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tained. The most ancient form of this action, which was called the action for shewing the holding "hath now," says Mr Erskine, "been long laid aside." But he adds that its purposes are fully answered by the more modern action of reduction improbation, by which the superior, setting out his own right to the land, compelled all persons claiming to have a good right under him to produce their titles on pain of nullity. If a title were produced its conditions must be performed. If none were produced the superior had decree of reduction *contra non producta*.

It may be more material, however, to inquire whether the first parties have a good action for payment, notwithstanding or by virtue of the Act of 1874; and as to that, I see no difficulty. It is true that they cannot make use of the statutory action provided by subsection 4, because it is available only when the lands would have been in non-entry but for the Act, and the second parties are entered because they have taken infeftment. But just because they are infeft, the first parties have a good action to enforce payment of the duplicand, which is part of the reddendo, in terms of the feu-charter. This was decided in *Dick Lauder* v. *Thornton*.[1] The superior in that case brought an action with alternative conclusions, the first for decree in terms of the statutory action in room of the declarator of non-entry, and the second for payment of a certain sum in terms of the feu-right. The first was dismissed by the Lord Ordinary, for the reason I have given, but decree for payment was pronounced under the second. I do not find that the Judges in the Inner-House make any observations upon this point, but they adhered without qualification to the Lord Ordinary's interlocutor; and in the later case of *Heriot's Hospital* v. *The Drumsheugh Baths*[2] the Lord President said that where a superior has contracted in the feu-charter or feu-contract that a casualty shall be due on change of ownership, that is matter of contract by which the parties are bound, and to give effect to it does not require recourse to subsection 4. "Of this," says his Lordship, "we had recently an instructive example in the case of *Dick Lauder*,[1] where the action was a common law action to enforce such a contract, and where a casualty of the nature of composition was held to be due, though no legal investiture was required and the fee was full." I am therefore of opinion that the first parties would have had a perfectly good action at common law to enforce payment of the duplicand due to them as matter of contract, if they had not preferred to try the question by means of a special case.

It was maintained that *Dick Lauder* v. *Thornton*[1] is in favour of the second parties because the superior's claim there could not have been supported but for a clause of irritancy in the feu-contract. I do not think that case creates any difficulty. It is true that the ground of judgment in the Inner-House was that if the Conveyancing Act of 1874 had not been passed, the superior might have brought a declarator of irritancy and so compelled the vassal to enter or forfeit his right, and that was quite enough for the decision of the case, because it shewed that the superior was not attempting to get payment of a casualty sooner than he could have done so by the prior law. But it does not follow that there is no other way by which that can

[1] 17 R. 320.

[2] June 13, 1890, 17 R. 937, at p. 942.

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be shewn; and as I have already pointed out, the importance which the Lord President attached in that case to the element of contract is brought out very clearly in the case of *Heriot's Hospital*.[1]

The case of *Hamilton* v. *Chassels*[2] is not in point, because there was no prohibition of subinfeudation, and that is the ground of judgment explained in the opinion of Lord Adam.

The second parties relied most upon *Colquhoun* v. *Walker*,[3] maintaining on the authority of that decision that a purchaser from a vassal who is prohibited from subfeuing or disponing the lands to be held of himself is nevertheless, for the purpose of entering by implication of the statute, exactly in the same position as if his author had been free to subfeu. In that case the feuar sold his land and, notwithstanding the prohibition, gave his purchaser a disposition in the usual form of a conveyance on sale containing an obligation to infeft by two manners of holding—a procuratory of resignation and a precept of sasine. It was held, in an action at the superior's instance, that he was not entitled to reduce both the original feu-contract and the disposition, but without deciding whether he might have reduced the disposition alone. So far as this decision goes, I do not see that the vassal's argument derives any support from it. But the learned Judges held that inasmuch as the conveyance was not intended to create a permanent base right it was not a contravention; and this is said to be in accordance with the doctrine stated by Mr Bell,[4] that when subinfeudation is prohibited, a subfeu-right will be effectual while the right of the vassal stands, although it will fail when it becomes necessary to come to the superior for an entry, which he may refuse and destroy the right by a declarator of non-entry. The Lord President M'Neill goes further, and says that there was no objection to the precept of sasine because there could be "no question that the disponee could have gone to the superior and compelled him to grant a charter of confirmation." This was not necessary for the judgment. But it is the *dictum* of a very high authority, and its inconsistency with Mr Bell's doctrine may probably be explained by the passing of the Lands Transference Act of 1847 between the date of Mr Bell's work and the date of the decision. Assuming it, however, to be sound law in reference to the case then in hand, I think the present case clearly distinguishable. The charter now before us, as I read it, contains an absolute prohibition not only of subinfeudation, but also of alternative holdings, and for making the latter stipulation more effectual the disponee is required to enter by resignation within six months, and to pay a duplicand although the disponer may be still in life. It may be very probable that after the Lands Transference Act the superior might, notwithstanding the stipulation for entry by resignation, have been required to confirm an infeftment on a precept to be held *a me* only, because that would, in the words of the statute, have been a more convenient form of entry without being of prejudice to the interests of the superior. But the statute did not compel him to confirm if he could shew cause for refusing to do so; and it would, in my opinion, have been sufficient cause if he could shew that the

[1] 17 R. 937, at p. 942.
[2] 4 F. 494.
[3] 5 Macph. 773, 39 Scot. Jur. 392.
[4] Comm. (7th ed.), p. 28.

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infeftment was in contravention of the terms of the investiture, and that its recognition would be in the highest degree prejudicial to his interests, inasmuch as it would enable disponees to postpone or evade the payments for which the charter stipulated. Moreover, the prohibition must be repeated in every instrument of sasine; and a superior could not, on any sound principle of law, have been required to confirm an infeftment which bore in terms to have been taken in contravention of the very warrants on which it had proceeded. It appears to me therefore that the first parties and their authors could not have been compelled to confirm an infeftment on an indefinite precept; and it would have been nothing to the purpose to say that the conveyance was not intended to create a permanent base right, because the object of the prohibiting clause was to prevent the creation of temporary rights, and so to compel purchasers and disponees to come forward and pay the stipulated casualty on entry within a certain limited time. I do not know, however, that it is necessary to decide this question, because it is not stated that the second parties or their authors ever held upon an alternative title. The dispositions mentioned in the statement are all subsequent to 1874, and if the manner of holding were expressed, which would be superfluous, it may be assumed to have been *a me*, because there can be no holding otherwise since the date of the statute. With regard to previous conveyances by the original vassal and his disponees, it must be assumed, since nothing is stated to the contrary in the special case, that they were in accordance with the charter, and therefore must have expressed or, by virtue of the Titles Acts, implied that the holding was directly of and under the superior. But it is said that the question is not what was actually done, but what might have been done if the Act of 1874 had not intervened, and that the case of *Colquhoun*[1] shews that a purchaser might have obtained a conveyance with an indefinite precept and taken infeftment of the disponer. It is possible that this might have been done if the disponer had agreed to it and the disponee had chosen to run the risk of losing his land by the superior's refusal to enter him when the time came. But I do not think the statute requires us to speculate as to any possible devices for evading the conditions of the feu-right, or as to the chances of their success or failure if they were followed. We are to consider what would have been required to carry out the rights of parties in the ordinary course of conveyancing; and for the reasons already given I am of opinion that a disponee before 1874 must have completed his title by infeftment of and under the superior. I am therefore of opinion that the first question must be answered in the affirmative.

The question between the first and the third parties depends upon the same principles. I do not think it necessary to examine the title of the third parties in detail, because the points of distinction between it and that which we have just considered may be stated in a sentence. The prohibition against subfeuing is substantially the same, and the contingency of entry money becoming payable during the life of the last entered vassal is expressly provided for, but although the original feuar is bound to enter within three months of the date of the feu-right, there is no corresponding

[1] 5 Macph. 773, 39 Scot. Jur. 392.

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condition expressed with reference to his disponees; but, on the other hand, the prohibition is fortified by a clause of irritancy by force of which the disponee may be compelled to enter or to forfeit his right. The clause of irritancy brings this case directly within the authority of *Dick Lauder* v. *Thornton*,[1] and that is enough for the decision. I am therefore of opinion that the second question also must be answered in the affirmative.

LORD ADAM and LORD M'LAREN concurred.

LORD ADAM intimated that the LORD PRESIDENT, who was absent, also concurred.

THE COURT answered both questions in the affirmative.

MENZIES, BLACK, & MENZIES, W.S—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 70.
Jan. 14, 1905.*
Angus v Assessor for Lanarkshire.

WILLIAM S. ANGUS, Appellant.—*Haldane.*
ASSESSOR FOR LANARKSHIRE, Respondent.—*Welsh.*

*Valuation Acts—Value—Consideration other than the rent—Obligation by tenant of public-house to carry out at his own expense alterations required by licensing authority.*—The lease of a public-house took the tenant bound "to carry out any alterations or improvements which the licensing authority may from time to time require to be made upon the premises" at his own expense.

*Held* that this obligation constituted a consideration other than the rent incapable of being estimated in money value; and consequently that the Valuation Committee were justified in disregarding the rent stipulated in the lease altogether, and in fixing the annual value according to their personal knowledge of the lettable value of such property in the locality.

Lands Valuation Appeal Court. LdStormonth-Darling Lord Low.

AT a meeting of the Valuation Committee for the Middle Ward District of the county of Lanark, held at Hamilton on 13th September 1904, for the purpose of hearing and determining appeals under the Valuation of Lands (Scotland) Acts for the year ending Whitsunday 1905, William S. Angus, spirit-merchant, Auchinraith, Blantyre, appealed against the entry in the Valuation-roll of "public-house, Auchinraith," of which Thomas H. Bennett & Company, Limited, spirit-merchants, Glasgow, were entered as proprietors, and the appellant was entered as tenant, at the yearly rent or value of £80.

The appellant craved that the valuation should be reduced to £45, being the rent stipulated in a lease, dated 5th and 7th September 1903, under which the subjects were let by T. H. Bennett & Company, Limited, to the appellant.

The lease, *inter alia*, bound the appellant "to accept of said subjects as in good tenantable condition and repair, and to maintain them during the currency of this lease, and to leave them at the termination thereof in the like good condition and repair, ordinary tear and wear excepted, and to carry out any alterations or improvements which the licensing authority may from time to time require to be made upon the premises, the proprietors not being in any way bound to execute any improvements or additions to the premises during the currency of this lease, or to contribute towards the cost of any such alterations, improvements or additions, but the proprietors being bound to keep the premises wind and water tight."

[1] 17 R. 320.

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The appellant contended that the lease was a *bona fide* one, and, having been examined on oath, deponed that he was manager for the firm of T. H. Bennett & Company until September 1903; that he had now no connection with that firm, and was not tied to them in any way; and that there was no consideration other than what appeared in the lease.

The Assessor contended that the stipulation in the lease above quoted imported a consideration other than the rent, and that he was therefore entitled to disregard the lease; that the subjects being let as licensed premises, the obligation upon the appellant to carry out, at his own expense, any improvements ordered by the licensing authority imported an onerous burden upon him, and to that extent relieved his landlords.

The Committee found (first) that the Assessor was entitled to disregard the lease in respect that it contained a consideration other than rent, and (second) that from their own personal knowledge of the lettable value of similar public-houses in the same locality, £60 was the amount at which said subjects might reasonably be expected to let from year to year.

The appellant appealed to the Judges on a case. The case set forth the foregoing facts.

Argued for the appellant;—The stipulations here founded on by the Assessor did not import a consideration other than the rent; they were simply an expression of the tenant's obligation at common law. In considering whether the rent stipulated in the lease was a fair rent for the subjects, the Court would not inquire minutely whether the obligations in the lease exceeded or fell short of the exact obligations of the parties at common law.[1] In any view the proper course was for the Assessor to wait until the alterations had actually been ordered by the licensing authority. It was impossible to say beforehand what the cost of the alterations, if any were ordered, would be.

The Assessor was not called upon.

Lord Stormonth-Darling.—Mr Haldane has stated everything possible in favour of this appeal, but I am of opinion that it must be dismissed. The question is whether the Committee are right in disregarding the rent in the actual lease under which the premises are let, and in saying, from their own knowledge of the lettable value of similar public-houses in the same locality, that £60 represents the fair value of the premises. They have thus not adopted the value suggested by the Assessor, which is £80, but have applied their own judgment to the matter. If they are entitled to disregard the lease, there is nothing to be said against the way in which they have exercised their judgment, and therefore the only question for this Court is whether they are entitled to disregard the lease. They have done so because of a stipulation binding the tenant to carry out any alterations or improvements which the licensing authority may from time to time require to be made upon the premises, the proprietors not being in any way bound to execute any improvements or additions to the premises during the currency of the lease, or to contribute towards the cost of any such alterations, improvements, or additions. It is impossible to say that such a stipulation is not of an altogether exceptional kind, and, furthermore, it is

[1] Shiel v. Assessor for Hawick, Feb. 18, 1898, 25 R. 592.

altogether indeterminate in amount. If the amount had been determined or determinable the committee would have been justified in spreading the sum so found over the remaining years of the lease, but since the obligation is incapable of being ascertained in money, there is nothing for it but to disregard the lease altogether and to arrive at the value by some other and different means. In this case I think, therefore, that the decision of the Committee should be sustained.

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LORD LOW concurred.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

ALEX. MORISON & CO.—ROSS SMITH & DYKES, S.S.C.—Agents.

CADZOW COAL COMPANY, LIMITED, Appellants.—*Clark.*
ASSESSOR FOR HAMILTON, Respondent.

No. 71.

Jan. 14, 1905.*
Cadzow Coal Co., Limited, v. Assessor for Hamilton.

*Valuation Acts—Value—Houses in occupation of owner's workmen—Criterion of value—Rent of similar house belonging to same owner let to a tenant—Local knowledge of Valuation Committee.*—In 1903 a coal company were the owners of six houses in a burgh, which were in the occupation of workmen in the employment of the company, and were entered in the Valuation-roll for the year ending Whitsunday 1904 at the yearly value of £20 each. At Whitsunday 1904 one of the houses had come to be unoccupied, and was in July 1904 advertised to be let at the rent of £14 a year. It was let at that rent to S, a workman who was not in the service of the company, with entry on 18th July 1904. The other five houses which had remained in the occupation of employees of the company, having been entered in the Valuation-roll for the year ending Whitsunday 1905 at the yearly value of £20 each, the company appealed, and maintained that the value ought to be £14, on the ground that the let of the house to S at £14 a year, being a *bona fide* let, formed a good basis of valuation for the houses in the occupation of the company's employees. The six houses were in the same locality and were of the same size. The Magistrates, on a consideration of the facts, and from their own knowledge of the fair letting value of such houses, reduced the valuation from £20 to £17.

*Held*, in an appeal by the company, that the Magistrates were right, the rent of the house let to S not being a fair criterion of the yearly value of the houses, in respect that the house was let between terms and not after open competition.

*Observed* that the Court will not disturb valuations reached by a Valuation Court in the light of their own local knowledge, unless there has been an error in principle on their part.

Lands Valuation Appeal Court. Ld Stormonth-Darling. Lord Low.

AT a meeting of the Provost, Magistrates, and Councillors of the Burgh of Hamilton, held at Hamilton on 10th September 1904, for the purpose of hearing and determining appeals under the Valuation of Lands (Scotland) Acts for the year ending Whitsunday 1905, the Cadzow Coal Company, Limited, appealed against entries in the Valuation-roll of five houses, of which the Company were entered as proprietors and tenants, at the yearly rent or value of £20 each. Case 234.

The Company craved that the yearly rent or value of these houses should be reduced to £14 each.

The following facts appeared from the case on appeal after mentioned:—"The five houses in question, along with a sixth, were

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built in 1902, and were entered in the Valuation-roll for the year ending Whitsunday 1903 at £15 each. In the Roll for the year ending Whitsunday 1904 they were entered at £20 each, all six being occupied by workmen employed in the collieries belonging to the Company. At Whitsunday 1904 five of the houses (being the five in question) remained in the occupation of employees of the Company, and were entered at £20 for the year ending Whitsunday 1905. The sixth house was unoccupied at Whitsunday 1904. On 9th July 1904 the Company advertised it to let in a local newspaper at a rent of £14. William Smellie, joiner, who was not an employee of the Company, was chosen tenant at £14 per annum, and he got the keys on 18th July. The house let to Smellie consisted of three rooms and kitchen with bathroom; the other five houses were similar and in the same part of the burgh. The men occupying five houses paid the Company 10s. 9d. per fortnight, being a total of £13, 19s. 6d. to cover rent and taxes. This sum was retained from their wages. When men left the service of the Company they quitted the houses.

The Company maintained that the let to Smellie, being a *bona fide* let, formed a good basis of valuation for the other houses occupied by their workmen.

The Assessor maintained that the house let to Smellie could not form the basis of valuation for the other houses, as it was let during the currency of the year and after the usual letting term; that the house was not put into the open market, as the Company had stipulated that the rental would be £14; and that £20 was a fair rental, having regard to the letting value of houses of similar accommodation in the burgh.

The case on appeal set forth that the Magistrates "having heard the agent for the appellants, and also the Assessor, and considered the facts above narrated, and from their own knowledge of the fair letting value of such houses, agreed by a majority to restrict the valuation of the five houses to £17 each, as a fair rent at which the houses might be let, taking one year with another."

The Company appealed on a case.

LORD STORMONTH-DARLING.—The question here relates to houses in Hamilton occupied by workmen of the appellants. Six houses belonging to the appellants have been in some recent years entered at £20 a house, but in the present year one house was unoccupied by a workman and was let to an ordinary tenant. The rent got by the appellants was £14, and they now say that the sum of £14 represents a fair criterion of the value of the five houses which are occupied by their workmen. The houses require to be valued on the principle of what they might reasonably be expected to let for from year to year. The Magistrates have not adopted the £20 proposed by the Assessor, but have held that the valuation should be £17 for each house, and they say they have done so from their own knowledge of the letting value of these houses. For that reason, I am not inclined to disturb this valuation. This Court is unwilling to disturb valuations of the Court below which have been come to in the light of their own local knowledge, and only does so where there has been an error in principle on the part of the Magistrates. Here there is no such error. The rent of the house proposed as a test was not the subject of competition in the open market. The appellants advertised the house to let, between terms, at a

rent fixed by themselves. Accordingly, the Magistrates have held that the rent obtained from Smellie is not a true criterion of the lettable value of the houses, and I am of opinion that their determination should stand.

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LORD LOW.—I concur.

THE JUDGES were of opinion that the determination of the Provost, Magistrates, and Councillors was right.

DRUMMOND & REID, W.S., Agents.

LIVERPOOL, CHINA, AND INDIA TEA COMPANY, LIMITED, AND ANOTHER, Appellants.—*Blackburn—G. G. Grierson.*
ASSESSOR FOR EDINBURGH, Respondent.—*Spens.*

No. 72.
Jan. 14, 1905.*
Liverpool, China, and India Tea Co., Limited, v. Assessor for Edinburgh.

*Valuation Acts—Value—Consideration other than the rent—Alterations by tenant.*—A shop was let at a specified rent under a lease for twenty-one years. The lease provided that the tenants should fit up the subjects as a café at their own expense without having any claim against the landlord, and that the alterations should become the property of the landlord at the termination of the lease.

*Held* (1) on a construction of the lease that it was matter of stipulation between the landlord and the tenants that the tenants should make the alterations specified in the lease, and consequently that this stipulation was "a consideration other than the rent" within the meaning of sec. 6 of the Valuation of Lands (Scotland) Act, 1854; and (2) that the yearly value had rightly been entered in the roll by dividing the cost of the alterations by the number of years of the lease, and adding the sum so brought out to the rent specified in the lease.

Lands Valuation Appeal Court. LdStormonth-Darling. Lord Low.

AT a meeting of the Magistrates of Edinburgh, held on 12th September 1904, to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1905, under the Valuation of Lands (Scotland) Acts, The Liverpool, China, and India Tea Company, Limited, and William John Norbray Liddall, advocate, appealed against an entry of "Shop 111 Princes Street," of which Mr Liddall and the Company were entered as proprietor and tenants respectively, at the yearly rent or value of £1036, 12s. Case 233.

The appellants craved that the yearly rent or value should be entered at £902, 10s., of which £900 was the rent stipulated in the lease between the appellants, and £2, 10s. was one-half of the premium of a policy of fire insurance over the subjects which the tenants were taken bound to repay to the landlord.

The Magistrates having refused the appeal, Mr Liddall and the Company took a case.

The case set forth that the following facts were admitted by the parties or held by the Magistrates to be proved:—

By lease, dated 29th May and 2d June 1903, Mr Liddall, "in consideration of the rent and other prestations after specified," let to the Company the shop and saloon No. 111 Princes Street, Edinburgh, with the premises below the same, and also the premises in Rose Street Lane, above the back part of the saloon, for the period of twenty-one years from and after the term of Whitsunday 1903, with breaks in the option of the tenants at Whitsunday 1910 and Whitsunday 1917. The yearly rent stipulated to be paid in the lease was:

* Decided March 6, 1905.

No. 72 —For the first seven years (from Whitsunday 1903 to Whitsunday 1910), £900 per annum; during the next seven years (from Whitsunday 1910 to Whitsunday 1917), £1000 per annum; and during the remaining seven years (from Whitsunday 1917 to Whitsunday 1924), £1100 per annum.

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The lease, *inter alia*, provided:—"And it is hereby specially provided and declared that the tenants shall at their own expense fit up the premises hereby let for the purpose of the trade or business of a café or tea rooms to be carried on by them therein and without their having any claim against the landlord for repayment of any part of their outlays either at the termination of this lease or otherwise, and the plans and specifications of the works to be executed by the tenants in altering and fitting up the premises for the purposes of the said trade or business shall be submitted to and approved of in writing by the landlord before any part of the said works shall be proceeded with. But it is hereby agreed that notwithstanding the landlord's approval of the said plans and specifications as aforesaid, the tenants shall take full and sole responsibility for all damage, if any, which their operations in altering the premises to suit their said purposes may cause, and shall compensate the landlord for any such damages as may be done or occasioned to the rest of his property, and shall keep the landlord free of claims for such damages, if any, as may be thereby done or occasioned to adjoining properties belonging to others; and at the termination of this lease the alterations so made by the tenants, including all fixtures, except counters, buffets, counter fittings, screens, electric light fittings, and other tenants' fittings, shall become the property of the landlord."

The tenants were further taken bound at their own expense to keep the inside of the premises in repair, and to paint the same every five years. They were also to keep the roofs and gutters of the saloon, and of the premises in Rose Street Lane, in repair, and to maintain and uphold and renew, if necessary, the glass of the windows of the premises. They were also taken bound to repay to the landlord annually one-half of the premium of a policy of insurance against fire, effected by him over the premises, and that for such sum as he might consider the same to be worth. One-half of the premium amounted to £2, 10s. It was further provided by the lease that in the event of the tenants going into liquidation, or possessing the premises by a manager for creditors, or carrying on in the premises any business other than that before set forth, or assigning the lease, or subletting the premises without the landlord's consent in writing, or leaving any part of the half year's rent unpaid when the next half year's rent should have become due, the lease should, in the option of the landlord, become *ipso facto* null and void.

By letter of undertaking, dated 30th May 1903, by the Company to Mr Liddall, on the narrative, *inter alia*, "that on account of opposition the petition to the Dean of Guild Court has had to be amended to the effect of the warrant for the alterations on the premises being granted in your name," and on the further narrative "that the alterations for which warrant has been granted may, in your opinion, render the premises unsuitable for other parties at the termination of our tenancy," the Company bound themselves, *inter alia*, "at the termination of our tenancy to restore to its present level the ground floor of the front buildings which is being raised 18

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inches, if required by you to do so, or to bear the expense of so replacing said floor should we prefer to do so."

The alterations, with a view to fitting up the premises as a café or tea-rooms (including the raising of part of the main street floor), for which warrant had been obtained in the Dean of Guild Court, were thereafter executed by the Company at a cost, exclusive of the cost of moveables, of £2816, 3s.

The Assessor's valuation was made up as follows:—

| | | | |
|---|---|---|---|
| Amount of rent as stated in the lease, . . | £900 | 0 | 0 |
| Cost of the alterations, spread over the full period of the lease, viz., £2816, 3s. over twenty-one years, . . . . . | 134 | 2 | 0 |
| One-half of the insurance premium, . . | 2 | 10 | 0 |
| | £1036 | 12 | 0 |

The Magistrates were of opinion—"(1) That if upon a true construction of the lease, and in the circumstances of the case, the tenants were bound to execute the works on which the expenditure of £2816, 3s. had been laid out, which works in the opinion of the Magistrates are of the nature of erections and structural improvements, then such expenditure was a consideration other than rent, and falls to be added to the rent stipulated to be paid under the lease and entered in the Valuation-roll under the provisions of section 6 of the Lands Valuation (Scotland) Act, 1854[1] (as has been done by the Assessor); or, alternatively, that if upon a true construction of the lease, and in the circumstances, the tenants were not bound to make the said erections and structural improvements, then the yearly value thereof, which would not be less than the sum of £134, 2s., will fall to be entered in the Valuation-roll as a separate entry under the provisions of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895;[2] (2) that the tenants were bound under the provisions of the lease, and in the circumstances of the case, to make the said erections or structural improvements, and that the making of these erections or structural improvements was a consideration other than rent, and accordingly that the first of said alternatives should be adopted; and (3) that the Assessor had acted correctly in dividing the cost of the said erections or structural improvements by the number of years which the lease had to run, and adding the sum so ascertained to the rent stipulated to be paid under the lease, under the provisions of section 6 of the Lands Valuation (Scotland) Act, 1854. They therefore refused the appeal."

Argued for the appellants;—Under the Valuation Act of 1854, sec. 6, where a tenant, without being under any obligation to do so in his lease, put up additional buildings on the subjects let, such buildings were not to enter into computation in calculating the annual value of the subjects for the purpose of entry in the Valuation-roll during the currency of the lease, provided that the lease was a *bona fide* lease.[3] No doubt, in order that the buildings put up by the tenant should be taken into computation, it was not essential that the

[1] 17 and 18 Vict. cap. 91. [2] 58 and 59 Vict. cap. 41.

[3] Coltness Iron Co., Limited, v. Assessor for Linlithgowshire, March 1, 1882, 10 R. 21; Gosnell v. Assessor for Edinburgh, Feb. 24, 1883, 10 R. 665.

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tenant should in terms be taken bound in the lease to erect them; a "power" to erect the buildings might, looking to the whole tenor of the lease, really mean an obligation.[1] That principle did not apply here. The alterations made by the tenants did not enhance the value of the subject to the landlord; on the contrary they were a positive disadvantage. They were for the benefit of the tenants only. The Valuation Act of 1895, sec. 4, did not apply to such alterations as those now in question.[2]

The Assessor founded on the undernoted authorities,[3] and maintained that the tenants were truly under an obligation to their landlord to make these alterations; but that if they were not, the Act of 1895, sec. 4, applied.

At advising,—

LORD STORMONTH-DARLING.—This appeal relates to premises in Princes Street, Edinburgh, which were formerly occupied as a shop and saloon, but which in 1903 came to be let under the lease which is now before us. The intention of the parties undoubtedly was that the premises should be converted into a café and tea-rooms, and it was also within the contemplation of the parties that these would require considerable structural alteration. Accordingly the purpose for which the lease was granted is set forth very clearly in the lease itself. The leading clause is, "And it is hereby specially provided and declared that the tenants shall at their own expense fit up the premises hereby let for the purpose of the trade or business of a café or tea-rooms to be carried on by them therein, and without their having any claim against the landlord for repayment of any part of their outlays either at the termination of this lease or otherwise." It is also provided that all the alterations made by the tenants, except certain counters and buffets, screens, and electric-light fittings, were to become the property of the landlord at the termination of the lease. The question is whether it was made matter of stipulation between the landlord and the tenants that these alterations were to be made, and I answer that question in the affirmative. If that is the state of the contract between the parties, it is quite settled in Valuation law that the rent stipulated in a lease of that kind cannot be considered as the full and fair rent, because it is clear that a landlord so stipulating would be content to accept a lower rent than he would be disposed to take if he executed the alterations himself. In the present case the Magistrates, following the Assessor, have thought it proper to divide the cost of the alterations over the remaining years of this twenty-one years' lease. I see no objection to that course, and accordingly it seems to me, on the whole matter, that we must affirm the decision of the Magistrates and approve of the Assessor's entry.

[1] Dundee Harbour Trustees v. Assessor for Dundee, March 19, 1886, 13 R. 829; Prestongrange Coal and Firebrick Co., Limited, v. Assessor for Haddingtonshire, March 9, 1887, 14 R. 589.

[2] Peggie v. Assessor for Kirkcaldy, Feb. 13, 1901, 3 F. 462.

[3] Gosnell v. Assessor for Edinburgh, Jan. 27, 1885, 12 R. 571; Dundee Harbour Trustees v. Assessor for Dundee, 13 R. 829; Prestongrange Coal and Firebrick Co., Limited, v. Assessor for Haddingtonshire, 14 R. 589; Martin v. Assessor for Leith, June 14, 1889, 16 R. 799; Shiel v. Assessor for Hawick, Feb. 18, 1898, 25 R. 592; Clark v. Assessor for Middle Ward of Lanarkshire, Feb. 13, 1901, 3 F. 455.

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LORD LOW.—I confess that at first I felt considerable difficulty in this case, but after hearing all that has been said on both sides, I have come to be of opinion that it was a matter of obligation that the tenants should make the alterations specified, and if that is so, then there is a consideration other than the rent, which must be given effect to in fixing the value. I agree that the method adopted by the Assessor is not only a perfectly fair one, but is one for which there is ample authority.

THE JUDGES were of opinion that the determination of the Magistrates was right.

SOMERVILLE & WATSON, S.S.C.—WISHART & SANDERSON, W.S.—Agents.

No. 73.

Jan. 14, 1905.*
Nordrach-on-Dee Sanatorium, Limited, v. Assessor for Kincardineshire.

NORDRACH-ON-DEE SANATORIUM, LIMITED, Appellants.—*Mackenzie, K.C.—T. B. Morison.*
ASSESSOR FOR KINCARDINESHIRE, Respondent.—*Cullen.*

*Valuation Acts—Value—Principle of valuation—Sanatorium.*—A sanatorium for the treatment of pulmonary diseases was erected in 1901, and was sold to a company for £53,000. The Assessor entered the sanatorium at the yearly value of £1300, proceeding either on the principle of taking a percentage on the cost of construction, or on the principle of taking the profits earned by the company, as the basis of valuation—the two methods in the particular case bringing out substantially the same result. The company appealed, and maintained that the value should be reached by comparison with other sanatoria and with hydropathics, and should be £500.

The Judges *held* that, having regard to all the circumstances, the valuation should be reduced to £800.

Lands Valuation Appeal Court.
LdStormonth-Darling.
Lord Low.

Case 235.

AT a meeting of the Valuation Committee of the county of Kincardine held at Stonehaven, on 15th September 1904, for the purpose of disposing of appeals under the Valuation of Lands (Scotland) Acts, for the year 1904-5, the Nordrach-on-Dee Sanatorium, Limited, Banchory, Kincardineshire, appealed against an entry of "Sanatorium and grounds," of which the appellants were entered as proprietors and occupiers at the yearly rent or value of £1300.

The appellants maintained that the valuation should be reduced to £500.

The case for appeal after mentioned set forth that the following facts were admitted:—"In 1900 David Lawson, M.D., Edinburgh, a specialist in pulmonary diseases, who had interested himself in the new open-air treatment of tuberculosis, feued 25 acres of fir-wood from Sir Thomas Burnett of Crathes. A grassum of £5000 was paid, and the annual feu-duty is £8, 15s. With the assistance of his father and brothers Dr Lawson erected on this piece of ground the sanatorium, now the property of the appellants. The sanatorium was completed and ready for occupation in the month of March 1901. In 1902 Dr Lawson sold the sanatorium grounds and goodwill to the appellants for £53,000, payable in cash, but three-fourths of the shares are still held by Dr Lawson and his friends. The subjects taken over by the appellants consisted of buildings valued in the prospectus at £24,219, grounds 'all laid out,' valued at £9298, and furniture and utensils at £4590. Dr Lawson had spent about three years in preparing for the opening of the sanatorium and the superintendence of its erection. He had also bound himself to continue as

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medical superintendent of the sanatorium for five years, at a salary of £600 a year, after the flotation of the Company, and accordingly £15,000 was paid to him by the appellants in name of goodwill. The total subscribed capital was £55,000. The buildings were specially constructed as a sanatorium on the new Continental principles. The main hospital is one room broad, and is of wood on a two-feet stone foundation. The 25 acres originally feued have been, where the building is erected, cleared and laid out to the extent of about 1½ acres. Through the remainder of the wood belonging to the appellants several paths have been made. Wooden shelters for the use of the patients have been placed at various places in the woods. There are in the sanatorium dining-room, drawing-room, reading-room, dental, throat, and X-Ray rooms, laboratory, two doctors' rooms, staff room, matron's business room, and housekeeper's room, porter's room, and waiting-room, and fifty lettable bedrooms. Each patient has a separate bedroom. The charge is £5, 5s. per week for board, lodging, and medical attendance. Three duly qualified physicians and nine nurses are employed in the sanatorium, and the whole staff, inclusive of these, numbers fifty-two."

The case further stated,—"No evidence was led by either party, but in addition to the facts above set forth the following papers were placed before the Committee, and admitted by the parties as evidence in the appeal:—(1) The prospectus of the appellants; (2) and (3) the balance-sheets of the appellants for the years ending 28th February 1903 and 28th February 1904; (4) a statement prepared by the appellants shewing the situation, number of lettable rooms, and valuation of eight other sanatoria in the United Kingdom carried on with the same methods and objects as the appellants' sanatorium, and of Murtle Hydropathic, Aberdeenshire; (5) the *British Medical Journal* of 13th August 1904, containing advertisements and descriptions of each of the sanatoria mentioned in the statement."

The appellants contended that the annual value of the sanatorium and grounds should be ascertained by comparison with the valuations placed on other sanatoria and hydropathics throughout the country, the Assessor to keep in view in making the comparison (first) the number of lettable rooms in each, and also (second) the special circumstances of each sanatorium or hydropathic. On this basis the appellants maintained that the valuation should not exceed £500.

The Assessor maintained that a sanatorium could not fairly be compared with a hydropathic, and further, that the comparative method of valuation could not here be applied to any extent, there being no similar institutions in the neighbourhood of Banchory. The Assessor maintained that he was entitled to apply either what is known as the "contractors" principle of valuation, *i.e.*, a percentage on the cost of construction, or the "profits" principle, and that either on being worked out shewed the valuation of £1300 to be reasonable.

The Valuation Committee "sustained the Assessor's contentions, confirmed his valuation, and dismissed the appeal."

The appellants took a case for appeal.

Argued for the appellants;—The valuation was to be fixed at the rent which a tenant might be expected to give if the buildings were put into the market unfurnished, and not at the rent at which their owner could afford to let them. The percentage or contractors principle therefore was inapplicable. The proprietors of buildings of an exceptional character, if they let their buildings, might be obliged to

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take a rent which would not give anything like an adequate return on the money spent in the erection of the buildings. The buildings here if put into the market would not realise anything like the cost of erecting them. A percentage on the cost of construction was to be taken as the basis of valuation "only where no other or better means of arriving at value exists."[1] Nor was the profits principle of valuation applicable here. The valuation was of lands and heritages only, and the profit earned here bore scarcely any relation to the heritable subjects. The profits of a company such as the present depended solely on the scientific skill, care, and attention shewn in the management of the sanatorium. The profits method of valuation was applicable only in a certain limited class of cases where there was a monopoly or quasi-monopoly attached to the business carried on in the subjects.[2] The appellants had no monopoly. Any other person or company could open a sanatorium close to their doors. The profit of the sanatorium depended on the personal factor, and could not be said to shed any real light on the question, what would a tenant give in the open market for the premises unfurnished? The true method of valuation—that which secured equality in the imposition of taxation—was by comparison with the value of other similar subjects, keeping in view the number of lettable bedrooms in each. That method had been adopted in the case of hydropathics,[3] and sanatoria and hydropathics were in the same category, for comparative purposes. Each had its lettable bedrooms as the only source of pecuniary profit to the tenant. The charges at sanatoria averaged about five guineas per week, at hydropathics three guineas. The difference had no connection with the value of the respective heritages, but arose from the medical attendance and nursing required at sanatoria and the greater care and scientific skill which had to be bestowed on residents in a sanatorium.

Argued for the Assessor;—Comparison with other similar subjects was an unsatisfactory method of valuation,[4] and in any case was inapplicable here. The statement prepared by the appellants regarding other sanatoria contained details regarding three sanatoria in Scotland, but the special circumstances of each of these made them useless for the purposes of comparison. The other sanatoria in the statement were in England or Wales, but the system of valuation there was different from that in Scotland, and in England and Wales there was an entire lack of uniformity in valuation; therefore no reliance could be placed on these valuations for purposes of comparison. Hydropathics were essentially different from sanatoria, inasmuch as the former were practically private hotels, and were very largely influenced by seasons, trade depression, and counter attractions elsewhere, which could not affect sanatoria. The proper method of valuation was either by taking a percentage on the cost of construction, or on the basis of the profits earned by the proprietor.[5] It was immaterial in the present case

[1] M'Vitie v. Assessor for Edinburgh, Feb. 18, 1898, 25 R. 601, *per* Lord Stormonth-Darling, at p. 602.

[2] Oakbank Oil Co., Limited, v. Assessor for Midlothian, Feb. 4, 1902, 4 F. 520, *per* Lord Kyllachy, at p. 524.

[3] Philp v. Assessor for Rothesay, March 20, 1888, 15 R. 627.

[4] Philp v. Assessor for Rothesay, 15 R. 627, *per* Lord Fraser, at p. 628.

[5] Philp v. Assessor for Rothesay, 15 R. 627; Assessor for Falkirk v. Falkirk Gas Co., Limited, Feb. 24, 1883, 10 R. 651; St Cuthbert's Co-operative Association, Limited, v. Assessor for Edinburgh, March 20, 1896, 23

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which method was adopted, as the two methods brought out practically the same result, and justified the Assessor's valuation.

LORD STORMONTH-DARLING.—We are of opinion that, taking all the considerations into account, the proper valuation is £800.

THE JUDGES were of opinion that the determination of the Valuation Committee was wrong, and that the valuation should be reduced to £800.

MACKAY & YOUNG, W.S.—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

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Jan. 14, 1905.*

Davidson v. Assessor for Peeblesshire.

ALEXANDER DAVIDSON, Appellant.—*Watt, K.C.—Mercer.*
ASSESSOR FOR PEEBLESSHIRE, Respondent.—*Hunter.*

*Valuation Acts—Value—Consideration other than the rent—Agreement by tenant of farm to erect farmhouse.*—The tenant under the lease of a farm, dated in 1897, for nineteen years, with a break at Whitsunday 1904 erected, in terms of the lease, at his own expense a farmhouse and offices, which the landlord bound himself to take over at a valuation on the termination of the lease. The lease was broken at Whitsunday 1904, and the parties entered into a new lease for nineteen years at a rent of £250. The landlord did not pay compensation for the buildings erected by the tenant, and by the new lease was taken bound to take them over at a valuation on the termination of the lease. The Assessor entered the farm and house in the Valuation-roll at the yearly value of £300. The tenant appealed, and contended that the yearly value should be £250—the rent in the lease. The Valuation Committee held that the rent in the lease fell to be disregarded, and proceeding on their local knowledge determined that £290 was the fair yearly value.

*Held* that the Valuation Committee were right.

Lands Valuation Appeal Court. LdStormonth-Darling. Lord Low.

Case 232.

AT a meeting of the Valuation Committee of the county of Peebles, held at Peebles, on 12th September 1904, for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts, for the year ending Whitsunday 1905, Alexander Davidson, farmer, Ladyurd, appealed against the entry in the Valuation-roll of "farm and house, Ladyurd," of which Sir Thomas David Gibson Carmichael, Baronet, of Skirling, was entered as proprietor, and the appellant as tenant and occupier, at the yearly rent or value of £300.

The appellant maintained that the value should be reduced to £250, being the rent stipulated in the lease, dated June 1904, then current, between Sir Thomas Gibson Carmichael and the appellant.

The facts as appearing from the case on appeal after mentioned were as follows:—

Under an earlier lease, dated May 1897, the farm of Ladyurd and certain neighbouring lands were let by Sir Thomas Gibson Carmichael and another (in respect of the neighbouring lands), first parties, to the appellant, second party, for nineteen years from Whitsunday 1897 with a break at Whitsunday 1904.

This earlier lease contained, *inter alia*, the following provision:—

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R. 681; Andrew Lowson, Limited, v. Assessor for Arbroath, Feb. 13, 1901, 3 F. 466; Francis Webster & Sons, Limited, v. Assessor for Arbroath, Feb. 11, 1902, 4 F. 539; M'Vitie v. Assessor for Edinburgh, 25 R. 601; Oakbank Oil Co., Limited, v. Assessor for Midlothian, 4 F. 520.

* Decided March 6, 1905.

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"And whereas it has been arranged between the said Sir Thomas David Gibson Carmichael and the second party that a dwelling-house and offices should be erected by the second party at his own expense on the farm of Ladyurd, on a site and according to plans and elevations to be approved of by the said Sir Thomas David Gibson Carmichael, the stones and sand for the said house and offices being obtained as far as possible from the quarries on the lands of the said Sir Thomas David Gibson Carmichael free of charge, . . . it is hereby declared that at the termination of this lease, whether at its natural or any other ish, the said Sir Thomas David Gibson Carmichael shall be bound, as he hereby binds and obliges himself and his successors, to take over the said house and offices from the second party or his foresaids, and the said sheds," at a valuation.

A dwelling-house and offices were thereafter, in 1897, erected by the appellant at a cost of between £1000 and £1100.

The earlier lease was broken as at Whitsunday 1904, and a new lease of the farm of Ladyurd, dated June 1904, was entered into between Sir Thomas Gibson Carmichael, first party, and the appellant, second party, for nineteen years from Whitsunday 1904, at the rent of £250 per annum.

Sir Thomas Gibson Carmichael did not take over the farmhouse and offices erected by the tenant, and the new lease contained the following provision:—"And whereas, considering that the second party has at his own expense in the year 1897, in accordance with the terms of agreement thereanent contained in lease of" 1897, "erected a dwelling-house and offices, the first party hereby binds and obliges himself and his successors, at the end of this lease, whether at its natural or any other ish, to take over the said house and offices from the second party or his foresaids" at a valuation.

Under this lease the appellant was taken bound to pay the insurance premiums on the house erected by him, and he was also taken bound to reside on the farm and not to sublet.

On 16th August 1904, as for the year ending Whitsunday 1905, the Assessor issued to the appellant two Lands Valuation notices, viz.:—

(1) "Farm and House, Ladyurd—*Proprietor*, Sir T. D. Gibson Carmichael; *tenant*, Alexr. Davidson; *occupier*, same; *rent or yearly value*, £250."

(2) "House, Ladyurd Farm—*Proprietor*, Alexr. Davidson; *occupier*, proprietor; *rent or yearly value*, £30."

On the appellant intimating an appeal against the second of these notices, the Assessor withdrew them, and sent an amended notice giving the details as set forth in the entry in the Valuation-roll.

The appellant contended;—The first of the two original notices issued by the Assessor entering the farm and house at the value of £250, the rent under the lease, was correct, and the only proper entry. The second of the two original notices was in direct violation of proviso (1) of section 4 of the Lands Valuation (Scotland) Amendment Act, 1895, which exempted "erections or structural improvements made or acquired for agricultural purposes by the lessee of subjects wholly or mainly agricultural." The farmhouse erected by the appellant was necessary for the occupation of the farm, and as such had been occupied by him under the leases, and he was debarred by both leases from subletting it. The raising of the valuation of the farm by £50, after challenge of the legality of the separate entry of

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the house at £30, was an attempt to evade the exemption in favour of agricultural buildings given by the Act of 1895, and was in itself nimious and oppressive.

The Assessor contended;—The rent of £250 payable under the lease was not a rent of the subjects "conditioned as the fair annual value thereof without grassum or consideration other than the rent," within the meaning of the 6th section of the Lands Valuation Act of 1854. £300 was a fair valuation of the subjects.

The Valuation Committee were of opinion that the Assessor's contention as to the rent in the lease was right. They were further of opinion from their local knowledge that the rent at which the farm and the dwelling-house erected thereupon might, one year with another, in their actual state be reasonably expected to let from year to year, after taking into account the insurance premiums on the buildings, was £290. They accordingly sustained the appeal to the extent of £10, thus reducing the Assessor's valuation to £290.

The Assessor took a case for appeal.[1]

LORD LOW.—I am of opinion that the Committee are clearly right. There is no question that when the tenant erected the farmhouse it became part of the farm, and the property of the landlord. Under the lease of 1897, when that lease came to an end, the landlord's obligation was to repay the tenant the sums which he had expended in building the house. If he had implemented that obligation, then he would have been in a position to offer the incoming tenant the farm with a competent farmhouse, and, of course, the rent would have been fixed upon that footing. But apparently it was not convenient at that time for the landlord to repay the tenant the capital he had expended in building the house, and the arrangement was that payment should be postponed till the end of another lease. The Committee have fixed £290 as a fair rent, and I do not think we should interfere with that decision.

LORD STORMONTH-DARLING.—I concur, and would only add that the Assessor's first proposal to treat the farm and house separately, and to enter the house as the property of the tenant, was clearly a mistake,—a mistake which the Assessor corrected before he made the entry appealed against.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

BUCHAN & BUCHAN, W.S.—TRAQUAIR, DICKSON, & MACLAREN, W.S.—Agents.

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Jan. 14, 1905.*
Assessor for Elginshire v. Duke of Richmond and Gordon.

ASSESSOR FOR ELGINSHIRE, Appellant.—*Cullen.*
THE DUKE OF RICHMOND AND GORDON, Respondent.—*Mackenzie, K.C.—W. Mitchell.*

*Valuation Acts—Subjects—Salmon-Fishings—Sum paid by upper proprietors to lower proprietor for abstention from netting.*—The Duke of Richmond and Gordon was the proprietor of salmon-fishings on certain reaches of the River Spey. Prior to the year 1904 he was in the habit of netting

[1] *Cited at the hearing*:—Shiel v. Assessor for Hawick, Feb. 18, 1898, 25 R. 592; Duke of Fife v. Assessor for Elgin, June 13, 1891, 18 R. 941.

* Decided March 10, 1905.

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these reaches, and the fishings were entered in the Valuation-roll at a yearly rent or value which varied according to the number of salmon caught in the particular year. In 1904 the Duke entered into an agreement with certain upper riparian proprietors under which, in consideration of a yearly payment of £782, he agreed to abstain from netting these reaches of the river for a period of ten years, reserving his full right to fish therein by rod. For the year 1904-5 the Duke retained the rod-fishing of certain of the reaches in his own hands, and he let the remaining reaches for the purpose of rod-fishing. In the Valuation-roll for 1904-5 the "rod-fishings" were entered in so far as let at the rents stipulated in the leases, and in so far as in the Duke's own hands, at an estimated yearly value. There was also an entry in the roll of "right of net-fishing," of which the Duke was entered as proprietor and as occupier "for tenants" (no tenants' names being entered) at the yearly rent or value of £782—being the amount of the sum paid by the upper proprietors under the agreement. The Duke appealed against the latter entry and maintained that it ought to be deleted. It was not disputed that the value, as entered in the roll, of the rod-fishings, was the fair annual value of these rod fishings. That value was considerably in excess of the values entered in former years when netting was in use.

*Held* that the entry of "right of net-fishing" fell to be deleted, it being for the proprietor to determine in what manner his right of salmon-fishing was to be exercised, and it not being disputed that the value entered in the roll of the rod-fishings represented the fair annual value of that manner of exercising the right of fishing for salmon.

Lands Valuation Appeal Court.
Ld Stormonth-Darling.
Lord Low.

Case 236.

AT a meeting of the Valuation Committee of the county of Elgin, held at Elgin on 13th September 1904, for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts, His Grace the Duke of Richmond and Gordon appealed against four entries in the Valuation-roll for the year ending Whitsunday 1905.

One of these entries was in the following terms:—

| No. | Description and Situation of Subject. | | Proprietor. | Tenant. | Occupier. | Yearly Rent or Value. |
|---|---|---|---|---|---|---|
| | Description. | Situation. | | | | |
| | *Parish of Bellie*— | | | | | |
| 4 | Right of net-fishing | Spey | His Grace the Duke of Richmond and Gordon, K.G., *per* George Muirhead, Commissioner, Fochabers | ... | Proprietor for tenants | £328 |

The other three entries were, *mutatis mutandis*, identical with the foregoing, being under the heads of the parishes of Boharm, Rothes, and Speymouth respectively. The aggregate yearly rent or value entered in the four entries was £782.

His Grace maintained that the entries ought to be deleted from the roll.

The Valuation Committee having sustained the appeal and deleted the entries from the roll, the Assessor took a case.

No. 75.

Jan. 14, 1905.
Assessor for Elginshire v. Duke of Richmond and Gordon.

The case set forth that the following facts were found proved or held as admitted:—

The Duke of Richmond and Gordon was the proprietor of salmon-fishings on certain reaches of the River Spey, including, *inter alia*, the reaches to which the entries in question referred. Until 1894 His Grace was in the habit of netting the waters in the reaches in question, and former assessments and valuations were fixed as a result of the netting, and they varied from year to year according to the number of salmon caught. During the years in which the netting took place on the portions of the river to which the entries referred, the rod-fishings were unlet, and were entered in the roll at a total valuation of £88, whereof about £70 applied to the reaches of water in question. This £70 was the valuation in respect of rod-fishing in the months of September and October yearly, exercised by His Grace after he had ceased fishing for the season by net.

Prior to the commencement of the salmon fishing in the year 1904, His Grace entered into a minute of agreement between himself, as heir of entail in possession, and his son the Earl of March and Darnley, on the first part, and certain upper riparian proprietors on the Spey, on the second part.

The minute of agreement, which was to continue in force for ten years from 11th February 1904, proceeded on the narrative that the first parties had been requested by the second parties, with a view to improving their rod-fishings on the River Spey, to abstain from netting for salmon and other fish of the salmon kind within the portion of the river therein defined, and that the first parties were willing, in consideration of the yearly payment, and subject to the conditions therein expressed, to refrain for the period mentioned from netting that water.

The first article of the agreement set forth that "the first parties agree and bind themselves respectively, and their heirs and successors in the said Gordon-Richmond estates, to refrain so long as this agreement shall continue in force from netting for salmon and other fish of the salmon kind, in any manner of way, in that portion of the said Duke of Richmond and Gordon's fishings in the River Spey," [being the portion to which the entries in question related], "which extends from Cumberland Ford (which is about a mile below the bridge across the river at Fochabers) upwards to the Boat o' Brig: But without prejudice to the first parties respectively exercising by themselves or others having their authority, and letting to tenants at pleasure, the right of rod-fishing and angling for salmon and other fish of the salmon kind, or for other fish, in the portion of the said river before defined, and all other rights and privileges over the same belonging or competent to them: Declaring that all rights and privileges belonging or competent to the first parties, severally or jointly, are hereby expressly reserved to the first parties respectively, and shall not be affected in any way by this agreement, except only that netting for salmon and other fish of the salmon kind in the portion of the said river before defined shall cease during the subsistence of this agreement." By the third article, the second parties bound themselves to make payment to the Duke and his heirs and successors of the yearly sum of £883 during the continuance of the agreement. By the fourth article, it was provided,—"(Fourth) In respect of the foresaid payment of £883 per annum, the first parties and their foresaids shall pay and relieve the second parties of all taxes and

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assessments leviable in respect of the fishings in the portion of the said river defined in Article First hereof, whether in respect of ownership or occupancy, as well as all expenses in connection with the watching thereof." The first parties further bound themselves not to increase their netting in the reaches of the river below the portion in question.

The yearly payment provided for in the third article of the minute of agreement (less a deduction of £101 for occupiers' taxes and assessments in accordance with the fourth article) formed the basis of the Assessor's entries—amounting altogether to £782—appealed against.

The case further set forth:—"As a result of the said agreement the appellant has this year refrained from netting the portions of the river in question, but instead of netting, he is exercising his right of salmon-fishing in these portions of the river by rod-fishing. Some of these portions of the river he has retained in his own hands for rod-fishing, other portions he has let to" Lord Berkeley Paget and Mr Wharton Duff, under leases which were produced. "It was admitted by the parties that the rentals fixed in said leases have been fairly and properly entered in the Valuation-roll." The aggregate rents paid by Lord Berkeley Paget and Mr Wharton Duff and entered in the roll as the yearly rents or values of the "rod-fishings" held by these tenants, amounted to £1870. The portions of the reaches in question retained by the Duke for rod-fishing were entered at yearly rents or values amounting *in cumulo* to £314. "These entries for rod-fishings . . . are in respect of the same waters to which the entries for net-fishing appealed against relate. No net-fishing takes place in the waters in question. It was explained to the Court, and it is within the knowledge of the Court, that although fishing for salmon can be exercised by both methods—rod and net—it is impossible to exercise both to the full extent at the same time in the same reach of water, and that had the net-fishings in this reach of water been continued to be exercised by the appellant, it would have been impossible to let the rod-fishings for anything like the rents now procured and appearing in the Valuation-roll, and being the entries above mentioned for the rod-fishing." The aggregate valuation of the Duke's fishings on the Spey, including the portion nearer the mouth where netting still continued under the agreement as appearing in the Valuation-roll for 1903-4, was £2534, and for 1904-5 as inserted by the Assessor, it was £4209, an increase of £1675. "The said increase was obtained partly as a result of the appellant being able to let the rod-fishings to better advantage in consequence of his cessation from fishing the same portions of the river by net, and partly by the Assessor entering the said sum of £782 in respect of the net-fishings not exercised. . . . If this sum of £782 is deducted from the total increase of £1675, it still leaves an increase for the year as the result of the rod-fishing of £893 on the valuation for 1904-5, as against 1903-4."

The Committee "sustained the appeal, and deleted the entries relating to net-fishing appealed against, in respect that there has been no net-fishing carried on this year in the portion of the river to which the entries in question relate, and further, in respect that the annual value of the fishing subjects in the reach of the river in question is fairly and fully stated at the amounts entered in the roll this year as rod-fishing."

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Argued for the Assessor;—Section 3 of the Valuation Act, 1854,[1] required the Assessor to ascertain and assess the yearly rent or value of the lands and heritages in the county. Fishings were within the definition of lands and heritages.[2] The fishings on the reaches of water in question comprised both rod-fishings and net-fishings. The former were duly assessed at their yearly value; and unless a very important heritage was to escape, the net-fishings must also be assessed. The right of net-fishing the Duke covenanted not to exercise, and in consideration received from various riparian owners of the higher waters of the Spey an annual payment of £883, which must be taken to be the yearly value of these fishings to the proprietor. Instead of receiving a rent of £883 from a tenant fishing the river by nets, or by actual net-fishing taking out this value himself, the proprietor preserved these fishings from interference, and allowed the fish which would otherwise be intercepted by the nets to ascend the river. The ground on which he asked and received an annual payment for so doing was that he was entitled to a rent for this portion of his lands and heritages. Under the agreement between the parties the proprietor undertook to relieve the other parties of all liability to rates and taxes in respect of the stipulated annual payment of £883, and also of all expense of preserving the fishings in question and watching the river. This agreement was to all intents and purposes a lease, and the annual payment a rent. It was not necessary that actual fishing operations should be carried on to make the heritage the subject of valuation. Mines and quarries were specially exempted when not worked within the year;[2] yet it was decided in the *Blantyre Parochial Board* case[3] that the Assessor had wrongly omitted from the Valuation-roll the rent paid for minerals unworked. There was not a special exemption in favour of fishing rights not exercised within the year, and it had long been established[4] that salmon-fishings were to be entered in the Valuation-roll at their yearly value though no revenue was derived from them. If minerals rented, though not worked, were within the scope of the Valuation Act, notwithstanding the special exemption in favour of mines and quarries, much more were fishing rights, of which there was no special exemption, also within the scope of the Act, when producing a considerable yearly revenue indistinguishable from rent. The case was ruled by *Ross* v. *Assessor for Lanarkshire*.[5]

Argued for the Duke of Richmond and Gordon;—The decision of the Committee was right. The rent of the rod-fishings was the full rent at which, one year with another, the whole salmon-fishings belonging to the respondent might, in their natural state be reasonably expected to let from year to year. There were no net-fishings, and therefore no right of net-fishings could be entered in the roll. To assess the proprietor cumulatively on the basis of the rent at present received from rod-fishings and an imaginary rent from net-fishings would be unjust and contrary to law, inasmuch as the present high rent was obtained only by reason of the complete cessation of the net-fishing, and was a larger rent than could be got were both rod and net-fishings let. Net-fishing was not an estate or subject separate and distinguishable from the other modes and uses

[1] 17 and 18 Vict. cap. 91. [2] Valuation Act, 1854, sec. 42.
[3] March 15, 1883, 10 R. 773. [4] Baird, Nov. 26, 1861, 24 D. 1456.
[5] Feb. 13, 1901, 3 F. 461.

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of salmon-fishing. Salmon-fishings were to be valued as one undivided subject, on the basis laid down by the Valuation of Lands Act, 1854, sec. 6. The annual payment of £883 was not "lands and heritages" in the sense of the Act, and was not assessable. It was the price paid for abstaining from netting. It was not rent, or an equivalent for or consideration other than rent. The Valuation of Lands Acts did not impose any duty on proprietors to utilise their property in any particular way, but left it to them to determine how they should use it. The fair annual rent of the subjects in their "actual state" was the proper basis of valuation. The case was ruled by the cases of *Renfrew* [1] and the *Assessor for Fife* v. *Curror*.[2]

At advising,—

LORD STORMONTH-DARLING.—Down to the current year of assessment the Duke of Richmond and Gordon was in the habit of netting for salmon certain reaches of the River Spey about 6 miles in length, and the valuations were fixed at fluctuating sums, according to the results of the netting. At that time the rod-fishings were unlet, but his Grace himself exercised the right of rod-fishing in the months of September and October in each year after the nets were off, and for this a sum of £70 was entered in the roll in addition to the value of the net-fishings.

This year the system has been entirely altered. The right of fishing is now exercised by the use of the rod alone, partly by the proprietor himself, but to a much larger extent by two tenants, Lord Berkeley Paget and Mr Wharton Duff, who pay rents amounting in all to £1870. These rents are admitted to be "fairly and properly entered in the Valuation-roll," which also contains an entry of £314, admittedly sufficient, for the portion of the river retained by the Duke. Together, these entries represent a large increase over the valuation of 1903-04, when the old system was still in force.

The Assessor, however, is not satisfied with these entries as representing the full value of the heritable right of salmon-fishing, which is the heritage in question. He says, and it is the fact, that the Duke derives another yearly payment in respect of the heritage. In January and February 1904 his Grace entered into an agreement with certain upper proprietors of salmon-fishing in the river, whereby he bound himself, for ten years from 11th February 1904, to abstain from netting for salmon within this portion of the river, and also bound himself not to increase his netting nearer the mouth, all his rights of rod-fishing by himself or his tenants being expressly reserved. For this abstention he is to receive an annual payment from these upper proprietors, which the Assessor proposes to enter in the roll (after making certain deductions) at £782, distributed over four parishes.

I do not wonder at the Assessor having raised this question, which is a novel and interesting one. But I am of opinion that the Committee acted rightly in rejecting his contention. The proposed entries are open to criticism as to their form, because the subject is described as "right of net-fishing," which assumes that net-fishing is a heritage separate and distinguishable from the other modes and uses of salmon-fishing, and because

[1] Feb. 8, 1868, 11 Macph. 979. [2] March 20, 1888, 15 R. 632.

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the occupier is described as "proprietor for tenants," which assumes that the upper proprietors are tenants of the right of net-fishing. Neither of these things can properly be predicated as the result of a contract which gives no right to the upper proprietors to net, but merely imposes on the Duke the obligation not to net.

But, apart from the form of the entries, it seems to me that the solution of the question is to be found in the 6th section of the Valuation Act of 1854, which provides that where lands or heritages "are *bona fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act." Now, it is not suggested that the leases to the angling tenants are not *bona fide*, or that the rents which they pay represent less than the fair annual value of the right of salmon-fishing with the rod. On the contrary, it is found as a fact that "had the net-fishings in this reach of water been continued to be exercised by the appellant, it would have been impossible to let the rod-fishings for anything like the rents now procured and appearing in the Valuation-roll." There is no suggestion that the same consideration does not apply to the value put upon the right of rod-fishing so far as it is retained by the Duke. The situation, therefore, is that he, having the undoubted right to determine by what legal methods his right of salmon-fishing is to be exercised, and having selected the method of rod-fishing, is receiving a full rent for that right so far as he lets it to others, and is putting on it a fair value so far as he retains it in his own hands. No doubt he has been fortunate enough to secure an additional payment from the upper proprietors, with the view of increasing the value of their own fishings in other parts of the river. But we must take it that this circumstance does not, in point of fact, diminish the rent which he receives from his actual tenants in this part of the river, and, if the rent or valuation (as the case may be) is fair and full, the requirements of the Act, I think, are satisfied, and nothing more can enter the roll.

I therefore propose that we should sustain the deliverance of the Committee.

LORD LOW.—I entirely concur.

THE JUDGES were of opinion that the decision of the Valuation Committee was right.

GORDON, FALCONER, & FAIRWEATHER, W.S.—JOHN CLERK BRODIE & SONS, W.S.—Agents.

No. 76.

Jan. 14, 1905.*
Kirkcaldy Gas Light Co., Limited, v. Assessor for Kirkcaldy.

KIRKCALDY GAS LIGHT COMPANY, LIMITED, Appellants.—*J. B. Young.*
ASSESSOR FOR KIRKCALDY, Respondent.—*Party.*

*Valuation Acts—Value—Gas works belonging to private company—Tenant's capital—Meters—Cooking Stoves—Deductions—Income-tax.*—Gas works belonging to and in the occupation of a private company were entered

* Decided March 10, 1905.

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in the Valuation-roll at an annual value brought out on the principle of taking the income of the company and deducting (1) the annual expenditure; (2) 5 per cent on a sum in name of tenant's capital for carrying on the business; and (3) a sum for tenant's profits, estimated at 20 per cent on the net income after deducting expenditure and the percentage on tenant's capital.

*Held* that the value of gas meters, owned by the company and hired out to customers, was to be regarded as tenant's capital, such meters being necessary for carrying on the business; but (2) that the value of cooking stoves, owned by the company and hired out to customers, was not to be regarded as tenant's capital, the hiring out of cooking stoves being a branch of business which a hypothetical tenant might or might not find it expedient to carry on.

*Held* further that a deduction from the net income did not fall to be made in respect of income-tax on tenant's profits.

Lands Valuation Appeal Court.

Ld Stormonth-Darling.

Lord Low.

Case 238.

At a meeting of the Magistrates of Kirkcaldy, held on 14th September 1904, for hearing appeals under the Valuation of Lands (Scotland) Acts, the Kirkcaldy Gas Light Company, Limited, appealed against entries in the Valuation-roll for the year ending at Whitsunday 1905, of gas works, gas pipes, tanks, and ground, of which they were entered as proprietors and tenants or occupiers at the aggregate yearly rent or value of £4544.

They craved that the valuations should be reduced to the extent of bringing out an aggregate yearly rent or value of £3537.

The Magistrates having dismissed the appeal and adhered to the Assessor's valuation, the Company took a case.

The case set forth that the following facts were admitted:—

"The appellants are a company incorporated under the Companies Acts, and they supply gas throughout the burgh of Kirkcaldy, and, to a small extent, in the adjoining burgh of Dysart. The appellants are the owners of a gas work situated on the Sands Road, Kirkcaldy, which is equipped with the ordinary plant of a gas work. They also are the owners of a piece of ground at Pathhead, Kirkcaldy, on which is situated a large gas tank. The Company also have pipes laid throughout the various streets of Kirkcaldy and through a small part of Dysart.

"For a considerable number of years the Assessor has been in the practice of making up the sum at which the Company are to be entered in the Valuation-roll on the basis of the Company's income in accordance with Lord Fraser's judgment in the case of the *Falkirk Gas Company*, 24th February 1883, 10 Rettie, 651.

"In connection with their business, the Company own, in addition to their gas works and pipes, a very large quantity of meters to measure the gas supplied to the consumers. For these meters the Company charge the consumers rent. The Company also own and hire out to consumers a large number of cooking stoves. The number of meters owned by the Company is about 9000, and they stand in the Company's books at the sum of £10,400. The cooking stoves stand in the Company's books at the sum of £1400. The Company derive from the rent of the meters the sum of £839, 7s. 4d., and from the rent of cooking stoves £124, 19s. 1d. On the other hand, the Company spent last year in repairing and renewing and refixing meters and stoves the sum of £967, 12s. 3d."

"For the current year the Assessor has entered the gas works and pipes at the sum of £4544, which sum is made up . . . in the following manner:—

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"*Revenue.*

| | | | |
|---|---|---|---|
| "1. Sale of gas, | £18,077 | 14 | 3 |
| "2. Sale of coke and tar, | 3,285 | 13 | 4 |
| "3. Miscellaneous revenue, | 9 | 1 | 10 |
| | £21,372 | 9 | 5 |

"*Expenditure.*

| | | | |
|---|---|---|---|
| "1. Coal, | £9,283 | 4 | 8 |
| "2. Lime, | 291 | 8 | 9 |
| "3. Wages applicable to manufacture of gas, | 2,466 | 17 | 6 |
| "4. Repairs and maintenance of works, | 1,337 | 7 | 6 |
| "5. Tenants' rates and taxes, | 584 | 6 | 0 |
| "6. Directors' fees, | 50 | 0 | 0 |
| "7. Wages applicable to distribution of gas, | 624 | 6 | 0 |
| "8. Stationery and printing, | 82 | 2 | 7 |
| "9. General establishment charges, | 380 | 4 | 10 |
| "10. Auditor, | 20 | 0 | 0 |
| "11. Interest paid by Company, | 152 | 13 | 0 |
| "12. Bad debts, | 70 | 19 | 8 |
| | £15,343 | 10 | 6 |

| | | | |
|---|---|---|---|
| "Revenue as above, | £21,372 | | |
| "Expenditure as above, | 15,343 | leaves | £6029 |
| | | *Add* fractions | 1 |
| | | | £6030 |
| "*Deduct*—5 per cent, interest on £7,000 allowed as tenants' capital for carrying on the concern, | | | 350 |
| | | | £5680 |
| "*Deduct*—For tenants' profits—20 per cent, | | | 1136 |
| | | | £4544 |

"The appellants accepted the whole of the statement made up by the Assessor with the exceptions:—

"(*a*) That they maintained that the amount which the Assessor had allowed for tenants' capital was inadequate—this amount being £7000—and the appellants maintained that they were entitled as hypothetical tenants to an allowance of £21,000 as tenants' capital. This sum of £21,000 they maintained should be made up as follows:—

"1. A sum sufficient to enable them to carry on their operations during the largest quarter of the year, viz., the second quarter, when they would be lying out of a sum of approximately £9200—that sum being the amount of said second quarter's collection.

"2. The value of the meters belonging to them, which stand in their books at the sum of £10,400.

"3. The value of the cooking stoves—£1400, making in all the sum of £21,000, which they maintained they were

entitled to have allowance for in accordance with the principles laid down by Lord Fraser in the *Falkirk* [1] case.

(*b*) That they maintained that in calculating the net revenue they were entitled to deduction of the income-tax and the owners' rates along with the other rates and taxes. The income-tax amounted to £259, and the owners' rates to £300.

"The Company accordingly maintained that the Assessor's calculations should be altered as follows:—

| | | | | | | |
|---|---|---|---|---|---|---|
| "Net revenue as brought out by the Assessor, . . | | | | £6030 | 0 | 0 |
| "*Deduct*— | | | | | | |
| "Income-tax, . . . . . | £259 | 0 | 0 | | | |
| "Owners' rates, . . . . . | 300 | 0 | 0 | | | |
| "5 per cent interest upon £21,000 of tenant's capital, . . . . | 1050 | 0 | 0 | | | |
| | | | | 1609 | 0 | 0 |
| | | | | £4421 | 0 | 0 |
| "Deduct for tenants' profits 20 per cent, . . . | | | | 884 | 0 | 0 |
| | | | | £3537 | 0 | 0" |

The Magistrates were of opinion—"(1) That the appellants were not entitled to any allowance for tenants' capital to cover cost of meters and stoves; and (2) that the appellants were not entitled to a larger allowance of tenants' capital to enable them to carry on the business than that proposed by the Assessor, viz., £7000; and (3) that income-tax and owners' rates should not be deducted along with the other rates and taxes in making up the amount to be entered in the Valuation-roll. The Magistrates accordingly dismissed the appeal and adhered to the Assessor's valuation."

Argued for the Company;—It was admitted that the principles of valuation laid down by Lord Fraser in the *Falkirk* case [1] applied here. In accordance with these principles 5 per cent on a sum in name of tenants' capital ought to be deducted from the net income. The value of the gas meters ought to be included in the tenants' capital. Gas meters were expressly mentioned by Lord Fraser, and both they and cooking stoves were a necessary part of the plant of such a business. An intending tenant, therefore, would require to find the capital for the purchase of such articles, and in determining the rent he could offer, would take account of the capital sunk in their purchase.[2] Income-tax on tenants' profits ought to be deducted from the net profits. The Company did not press the deduction in respects of owners' rates.

Argued for the Assessor;—The sum of £7000 allowed by the Assessor in name of tenants' capital was ample in the circumstances. In particular, an additional allowance ought not to be made in respect either of gas meters or of cooking stoves. Cooking stoves at all events were not a necessary part of the business of a Gas Company. No deduction ought to be made in respect of income-tax, which was a personal tax.

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[1] Assessor for Falkirk v. Falkirk Gas Co., Limited, Feb. 24, 1883, 10 R. 651.

[2] The Queen v. Lee, 1866, L. R., 1 Q. B. 241; Kinross and Milnathort Gas Light Co., Limited, May 30, 1890, 17 R. 850.

No. 76. At advising,—

Jan. 14, 1905. Kirkcaldy Gas Light Co., Limited, v. Assessor for Kirkcaldy.

LORD LOW.—The main question in this case is whether, in estimating the amount of floating capital which a tenant would require to enable him to carry on the gas works, the amount which it would be necessary for him to pay for meters and cooking stoves should be included?

I think that the cost of cooking stoves may at once be set aside, because it is not necessary for the carrying on of the business of making and supplying gas that the tenant should supply cooking stoves. That is a branch of business which he might or might not find it expedient to carry on.

The cost of meters is in a different position, because without meters the business could not be carried on at all. If, therefore, the gas works were let to a tenant, he would require, in order that he might be in a position to earn profit, to purchase the necessary supply of meters. It also appears that meters are not in themselves a source of profit, because the charges which are made to customers for the use of them are, as nearly as possible, balanced by the expenses of upkeep.

There is, therefore, a great deal to be said for the view that the cost of meters should be included in the tenant's capital. If, however, the question had been a new one, I should have had much difficulty in coming to the conclusion that the capital required to supply meters should be allowed, especially as it was stated by the Assessor that the practice has been not to include the cost of meters.

I do not think, however, that the question can be regarded as new. It is admitted that since 1883 the method of valuing gas works has been regarded as being settled by the opinion of Lord Fraser in the *Falkirk* case.[1] In that opinion, which was very well considered, Lord Fraser especially instanced the cost of meters as capital which a tenant would require to lay out in order that he might carry on the work, and upon which he was entitled to a percentage.

It seems to me that in the valuation of lands and heritages it is most desirable that when a rule has been once adopted by the Court it should not be departed from, unless very weighty reasons for doing so are adduced. I do not think that such reasons have been furnished in this case, and it seems to me that the view expressed by Lord Fraser in regard to the cost of meters was the logical result of the general principles laid down by him for valuing gas works which are being carried on for private profit.

Now, it is stated that the sum at which meters stand in the Company's books is £10,400, and it is not disputed that that sum fairly represents their present value. I therefore think that that sum must be included in the capital which the hypothetical tenant would require to find in order that he might commence business.

The sum which the Assessor has allowed for tenant's capital is £7000. If the cost of meters is to be included in the tenant's capital, that sum is too small; but, if upon the other hand, it is to be regarded as merely representing the amount of capital which the tenant would require to lay out upon coals and such like before he received any returns from the

[1] 10 R. 651.

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business, I think that it is much too large, assuming, as we are entitled to do, that the hypothetical tenant would be a man in reasonably good credit.

I think, therefore, that a fair sum to allow for tenant's capital would be £15,000. There being no dispute as to 5 per cent being the proper rate of interest to deduct, the result is to reduce the valuation from £4544 to £4224.

The appellants gave up in this Court their demand for a deduction on the head of owners' rates, but maintained their right to a deduction of a proportion of income-tax applicable to tenant's profits. I think the Magistrates were right in refusing to make the deduction. Any income-tax payable by the hypothetical tenant would be a personal tax chargeable on tenant's profits, and would not be deductible before estimating these.

LORD STORMONTH-DARLING concurred.

THE following was the opinion of the Judges:—"We are of opinion that the determination of the Magistrates is wrong, and that the valuation should be reduced to £4224."

MITCHELL & BAXTER, W.S.—Party—Agents.

No. 77.

Jan. 14, 1905.*
North British Railway Co. v. Assessor for Edinburgh.

NORTH BRITISH RAILWAY COMPANY, Appellants.—*D.-F. Asher, K.C.—Guthrie, K.C.—G. G. Grierson.*
ASSESSOR FOR EDINBURGH, Respondent.—*Clyde, K.C.—Cooper, K.C.—R. S. Horne.*

*Valuation Acts—Value—Railway Hotel.*—The North British Railway Company's Hotel in Edinburgh was entered in the Valuation-roll at the yearly rent or value of £11,950. The Assessor reached this sum by taking the floor space and applying thereto varying rates per square foot, and comparing the accommodation with that of other hotels in the city. The Railway Company maintained that the basis of valuation should be the profits of the hotel business, or alternatively the number of lettable bedrooms.

*Held* that no single method of valuation was reliable, and in the whole circumstances that the valuation should be reduced to £7000.

*Observed* that it was not legitimate to consider what rent might be obtained if the building were let for other than hotel purposes.

Lands Valuation Appeal Court. LdStormonth-Darling. Lord Low.

Case 239.

AT a meeting of the Magistrates of Edinburgh, held on 12th September 1904, to dispose of appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1905, under the Valuation of Lands (Scotland) Acts, the North British Railway Company appealed against the entry of "Hotel and Grill-room, North British Station Hotel," of which the appellants were entered as proprietors and occupiers at the yearly rent or value of £11,950.

The appellants in their written appeal asked that the value should be reduced to £7000, but in the proceedings before the Magistrates they submitted that it should be £6000.

The following were the facts as appearing from the case for appeal aftermentioned:—

The building in question was rectangular, and enclosed a hollow square. It had frontages to Princes Street on the north, to North Bridge Street on the east, overlooking the Waverley Station on the south, and to the public passage, known as Waverley Steps, giving access to the Waverley Station from Princes Street, on the west. It

* Decided March 10, 1905.

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consisted of thirteen floors, two of which were mezzanine. Five of the floors were situated below the level, one on the level, and seven above the level of Princes Street and North Bridge Street.

The site and building cost about £600,000. Parts of the building were let to tenants, as shops, offices, &c. The rental of the parts so let was £4354 per annum, and the proportion of the total cost applicable to them was about £100,000. The parts let were separately entered in the Valuation-roll, and no question was raised regarding these entries.

The subjects under appeal consisted of the remainder of the building, being the premises occupied by the appellants as a hotel and restaurant and grill-room. The hotel, restaurant, and grill-room were conducted by the appellants in conjunction with their railway system. The hotel premises contained, on the level of Princes Street, a very extensive suite of public rooms and grand entrance-hall and lounge, also parts of the hotel kitchens and the restaurant and grill-room; on the floors above Princes Street and North Bridge Street, bedrooms, sitting-rooms, bathrooms, and suites of apartments; and below the level of Princes Street and North Bridge Street, billiard and smoking-rooms, an entrance-hall for passengers from the railway station, kitchens, laundry, servants' bedrooms, stock-rooms, and extensive store-rooms. The number of separate rooms was over 420. The Assessor regarded 268 of these as lettable rooms, seventeen as public rooms, and the remainder as administrative rooms. The appellants stated the ordinary allocation as 213 bedrooms, twelve private sitting-rooms, and the remainder as public rooms and administrative rooms. The proportion of the total cost of the site and entire building applicable to the hotel and grill-room premises was about £500,000. The hotel was opened for business in October 1902.

The Assessor arrived at his valuation of £11,950 by taking the floor space, and applying thereto rates per square foot. These rates varied from 1d. or 2d. per square foot for a large part of the basement floors up to 5s. per square foot for a portion of the street floor.

The appellants contended that the Assessor had proceeded on a wrong principle in valuing the hotel on the basis of floorage area. In particular, the appellants adduced evidence to prove that large parts of the basement floors were useless for the purposes of the hotel and were a source of serious loss, in respect that much of the basement floorage, having no light from the outside, could only be lighted by artificial means, and could be used only for storage; that the total area of the four basement floors (about 76,000 square feet) was much in excess of the storage requirements of the hotel, and that large parts, although not used, involved a serious cost for light, cleaning, and upkeep generally.

The appellants stated that for the period from 1st January 1903 to 30th June 1904 the gross receipts for the hotel were £77,146, and the gross expenses (exclusive of manager's salary or any sum in name of rent) were £72,800, the receipts thus exceeding the expenses by the sum of £4346, equal to £2898 a year, and that the full season in the hotel lasted only for about ten weeks each year—in July, August, and September. The appellants did not contend for a valuation exclusively founded upon the figures of business done and profit and loss adduced by them. They suggested a sum of £6000 as being the maximum rent which any tenant could be expected to give for the hotel. Alternatively, the appellants contended that, if the valuation

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of the hotel was to be arrived at by comparison with other hotels in Edinburgh and elsewhere, the test of the number of lettable bedrooms was a sounder and safer basis of valuation than floor space. Upon that alternative basis the appellants contended that the valuation would not have amounted to £6000.

The Magistrates (as the case bore) "taking the whole circumstances into account, and giving due weight to the considerations affecting the peculiarities of the buildings, resolved to deduct £1950 from the Assessor's valuation, and to fix the rental in the Valuation-roll at £10,000." *

The appellants took a case for appeal.

At the hearing on the appeal it was stated that the parties were agreed that £750 should be taken as the value of the grill-room.

The undernoted authorities were cited.[1]

At advising,—

LORD LOW.—It is in my opinion plain, and indeed was not seriously disputed, that the cost of building the North British Station Hotel forms no guide as to the rent which might be obtained for it if it was let to a tenant. I am also of opinion that it is not legitimate to consider what rent might be obtained for the building if it were let for other purposes than that of a hotel. It was planned and built for the purpose of being used as a hotel; it is, in fact, used as a hotel; and the question is, what rent could be obtained for it as a hotel?

I am very much disposed to agree with Mr Clyde to this extent that, as a general rule, the safest guide in fixing the annual value of a hotel is to compare it with other hotels similar in character and situation, but I entirely

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* The case bore that the Magistrates took into consideration the following circumstances:—"(*a*) That the portion of the building actually let, which produces a rental of £4354, cost £100,000; and that the hotel premises which the appellants retain in their own occupation cost £500,000. (*b*) That the hotel premises are occupied by the appellants as a hotel in conjunction with their railway system; and that on this account the occupation for hotel purposes may be worth more to them than it would be as a hotel to a tenant or occupier who was not interested in the railway undertaking. (*c*) That the premises, in their nature and in their actual state, admit, in the opinion of the Magistrates, of being readily let to tenants for many different purposes; and the rentals obtained not merely for the surrounding portions let, but for other premises in the city, let for such purposes as the present premises might be used for, may be taken into consideration. The situation of the premises is one of the best in the city for many business purposes. (*d*) That for the purpose of ascertaining the proper rental under the Valuation Acts of these hotel premises, comparison should be made with the rentals of the various premises in Edinburgh which most nearly resemble them in situation, character, and accommodation, making due allowance for the points of difference, and especially keeping in view the peculiarities of the present premises, as, for example, the disadvantages of the extensive building below the street level."

[1] Assessor for Falkirk v. Falkirk Gas Co., Limited, Feb. 24, 1883, 10 R. 651; Cranston v. Assessor for Edinburgh, Feb. 5, 1885, No. 57 of Valuation Appeals, N. S.; Philp v. Assessor for Rothesay, March 20, 1888, 15 R. 627; Kinross and Milnathort Gas Co., Limited, v. Assessor for Kinrossshire, May 30, 1890, 17 R. 850; Cartwright v. Sculcoates Union, L. R. [1900], A. C. 150.

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demur to his conclusion that the way in which that principle is to be applied is by taking floor space alone. I do not say that a comparison of floor space should be excluded, but I do not think that it can be taken as the sole test. Thus, it is plain that, as compared with other hotels, a large part of the floor space in the North British Hotel is not only not a profit-yielding subject, but is a positive disadvantage, entailing a considerable amount of expense without any corresponding benefit.

In like manner a comparison of different hotels by the number of bedrooms, or the number of lettable rooms, although it may be very useful in aiding the Court to arrive at a just yearly value, is apt to be rather misleading unless taken along with other circumstances, because it excludes from calculation all the benefits directly and indirectly derived from the occupation of public rooms by others than the inmates of the hotel.

In regard to the evidence given by the appellants as to the profits actually earned, I would only say that it seems to me that the most that can be deduced therefrom is that a large volume of business may be done in the hotel, but that upon the other hand it is an exceptionally expensive hotel to work.

I cannot therefore regard any single method of ascertaining the value as being reliable. I think that the proper course is to take a broad view of the whole information which is given in the case, other than that in regard to the cost of the building, and the rent which might be obtained if it were devoted to other purposes. So regarding the matter, I am unable to come to any other conclusion than that the amount fixed by the Magistrates is greatly in excess of the rent at which, one year with another, the hotel might reasonably be expected to be let. In arriving at that conclusion, I have kept fully in view that it is a railway hotel, that is to say, that its situation and general arrangements enable it to command a large part of the custom of travellers arriving at the Waverley terminus.

I therefore propose that we should reduce the amount to £7000, including the grill-room, a sum which I am satisfied does not err upon the side of being too small.

LORD STORMONTH-DARLING.—I concur.

THE JUDGES were of opinion that the determination of the Magistrates was wrong, and that the valuation should be reduced to £7000.

JAMES WATSON, S.S.C.—WISHART & SANDERSON, W.S.—Agents.

No. 78.

Jan. 14, 1905.* Pumpherston Oil Co., Limited, v. Assessor for Linlithgowshire.

PUMPHERSTON OIL COMPANY, LIMITED, Appellants.—*Ure, K.C.—Younger.*

ASSESSOR FOR LINLITHGOWSHIRE, Respondent.—*Fleming, K.C.—Cullen.*

*Valuation Acts—Value—Oil works in occupation of owners—Former valuation fixed by the Judges—Necessity for revaluation—Depreciation—Additions to plant—Lands Valuation (Scotland) Amendment Act*, 1902 (2 *Edw. VII. cap.* 25), *sec.* 1.—Oil works for the distillation of shale oil, belonging to and in the occupation of an oil company, were for the year 1901-2 directed by the Valuation Appeal Judges to be entered at the yearly

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value of £4264. This sum was reached by taking 19½ per cent on the capital value of the works and adding thereto feu-duty, insurance, and landlord's taxes. The 10½ per cent consisted of 4½ per cent as reasonable interest on the capital value and 6 per cent as being the average sum which the owners, if the works were let, would require to spend annually in order to fulfil the landlord's obligation to keep the works in an efficient state of renewal, such works being subject to rapid deterioration.

In 1904 the Company added largely to the number of the retorts in their works, and the Assessor in consequence raised the valuation to £6700. The Assessor reached this sum by taking the value as fixed for 1901-2 by the Judges, and adding thereto a sum to cover the value of the new retorts.

The Company appealed, and maintained that the value should be £3000, in respect (*a*) that the original works having depreciated in value they ought to be revalued; (*b*) that the Assessor had much over-estimated the value of the new retorts; and (*c*) that portions of the plant included in the valuation fell to be excluded under the Lands Valuation (Scotland) Amendment Act, 1902.

The Valuation Committee adopted the principle on which the Assessor had proceeded, but reduced the valuation to £5800. The Committee found that the works had been kept in a not less efficient state than they were in 1901.

In an appeal by the Company the Judges *held* that the Valuation Committee were right, in respect that the original works having been kept in an efficient state of renewal, there was no necessity for a revaluation; that the sum fixed by the Committee as the value of the new retorts was reasonable; and that there was not sufficient evidence to shew what, if any, portions of the works fell to be excluded under the Act of 1902.

Lands Valuation Appeal Court. Ld Stormonth-Darling. Lord Low.

Case 237.

AT a meeting of the Valuation Committee of the county of Linlithgow, held at Linlithgow on 10th September 1904, for the purpose of determining appeals against the valuation of properties by the county Assessor for the year ending Whitsunday 1905, the Pumpherston Oil Company, Limited, appealed against entries of "Crude oil works and railway, Deans," and "Crude oil works, workshop, and offices, Seafield," of which the appellants were entered as proprietors and occupiers at the yearly rent or value of respectively £4000 and £2700.

The appellants craved that the values should be reduced, respectively, to £1750 and £1250.

The case for appeal aftermentioned set forth as follows:—

"The following facts were admitted or proved:—

"The appellants are the lessees of the shale and other minerals belonging to one proprietor in the parish of Bathgate, and of the shale and other minerals belonging to two proprietors in the parish of Livingston. In the parish of Bathgate, and adjacent to their mines, they have erected, on ground feued by them, works for the distillation of shale into crude oil and crude naphtha, and for the manufacture of sulphate of ammonia, which works are known as the 'Deans Works.' In the parish of Livingston, and also adjacent to their mines there, they have erected, on ground feued by them, similar works known as the 'Seafield Works.' . . . The appellants are also proprietors of certain works at Pumpherston, about 4½ miles by rail from Seafield, and 3 miles from Deans, including a refinery, whither the crude oil and naphtha from both Deans and Seafield Works are conveyed for treatment. . . . The three works are carried on as one concern, and no separate accounts are kept shewing the income derived from any of the mines or works separately." The Seafield Works and the Deans Works "include retorts for the distillation of

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shale, together with condensing plant, boilers, economisers, tanks, ammonia house, naphtha plant, and other appliances. . . . No instance is known of a crude oil work being let as an independent concern.

"The annual expenses of renewals or depreciation on the works is 6·4 per cent over all. The present values were estimated by witnesses called by the Pumpherston Oil Company to be as follows:—Deans Works, £18,735, and Seafield Works, £11,388, conform to detailed valuation produced by them and printed along with the evidence in the Appendix hereto,* which values were stated to be exclusive of subjects not assessable under the Lands Valuation (Scotland) Amendment Act, 1902. The Committee did not hold such values proved. . . .

"The Committee had before them the case in the appeal of the Pumpherston Oil Company for the opinion of the Judges, against the valuation of the Assessor for the county of Linlithgow of the same works for the year 1901-1902, together with the opinion of the Judges thereon.[1] In that appeal the valuation of the Deans Works was fixed at £2190, and of the Seafield Works at £2074. Since the date at which these valuations were fixed both works have been kept in a not less efficient state than at that time. For the year 1902-1903 the works were entered in the Valuation-roll at £2190 and £2074 respectively, and for 1903-1904 at £2300 and £2074 respectively.

"In the year 1901-1902 the number of retorts at each of Seafield and Deans Works was 104, but since then other 32 retorts were added at Seafield Works and 64 at Deans Works, the appellants having had the full use of these additional retorts during the current year. The 32 retorts added at Seafield Works were removed by the appellants from their works at Hermand, where they had been in use for some time. The 64 retorts added at Deans Works were new retorts. The retorts are an essential part of a crude oil work, such as those at Seafield and Deans, and the value of such a work is accordingly directly proportionate to the number of retorts.

"The appellants appealed against the valuations on the following grounds:—

"(1) That the method adopted by the Assessor in ascertaining the capital value of the subjects to which the percentage fixed by the Valuation Judges in 1901 should be applied, viz.:—taking an estimated cost of additions to the works based on figures supplied by other companies as the costs in their experience of such or similar additions, and adding these to the value of the subjects at the works in question in 1901, was not a sound one, in respect:—(*a*) That the costs in the experience of other companies were irrelevant and were not proved; (*b*) That the costs taken had no relation to the present actual value of the subjects in question; (*c*) That in adding the supposed cost of additions to the value of the subjects in question in 1901, the Assessor thereby (1) had not allowed for depreciation in the subjects since 1901, and (2) had not taken account of the effect

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* From the evidence it appeared that the valuation was made by Mr Munro, consulting engineer, Glasgow, who gave evidence in support of it, which was corroborated by other witnesses.

[1] This appeal was decided at the same time and on the same principles as the Oakbank Oil Co., Limited, v. Assessor for Midlothian, Feb. 4, 1902, 4 F. 520.

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on the subjects of section 1 of the Lands Valuation (Scotland) Amendment Act, 1902,[1] by which certain machinery or plant included in the valuation in 1901, *e.g.* gas mains, condensers, pumps, etc., are excluded from valuation; and (*d*) That there was no evidence to justify the Assessor in proceeding on cost instead of on the present actual value of the subjects.

"(2) That the Assessor had erred in applying a rate in excess of 10½ per cent to the value as ascertained by him, in respect (*a*) That the Valuation Judges had fixed that rate in 1901; and (*b*) That a rate of more than 10½ per cent was in excess of what was reasonable.

"(3) That the present actual value of the subjects which are now assessable, as proved by the appellants, was as follows, viz.:—Seafield Works £11,388, Deans Works £18,735, and that the valuation of these subjects should be arrived at by taking a rate of 10½ per cent thereon and adding thereto the amount of feu-duty, insurance, and landlord's taxes.

"The Assessor replied—

"(1) That he had asked the Company to furnish him with a written statement of the cost of the additions to the works, and they had not complied; (*a*) That the costs in the experience of other companies as furnished by them to him was a good guide in the absence of the information which the Company should have furnished; (*b*) That the actual cost of the additions made had not even yet been shewn by the appellants; (*c*) That he could not allow (1) a reduction to be made each year in name of depreciation, by which (unless additions were made) the valuation would ultimately disappear, and (2) he did not admit and it had not been shewn that any machinery or plant was included in the valuation which fell to be excluded under the Lands Valuation (Scotland) Amendment Act, 1902; (*d*) That, as explained previously, he had not been supplied either with 'cost or the actual value of the subjects,' and that he had therefore made his valuations after surveying all the oil works in West Lothian by comparing these works with the others. As to cost, he maintained that the original cost, and not the so-called present actual value, must be considered,—otherwise there would be a want of uniformity in the valuations.

"(2) That he had not applied a rate in excess of that fixed by the Valuation Judges to the value he placed on the works.

"(3) That he questioned the accuracy of and objected to the statements of 'the present actual value of the subjects' submitted to the Court."

The Valuation Committee found "that in view of the fact that the Court had fixed the valuation of the Deans Works and Seafield Works at £2190 and £2074 respectively for the year 1901-1902, that the works stood in the Valuation-roll at these figures respectively for the year 1902-1903, and at £2300 and £2074 for the year 1903-1904, and that the number of retorts at the Deans Works had been increased prior to the current year from 104 to 168, and at the Seafield Works from 104 to 136, that £3300 and £2500 represented the sums at which the subjects might reasonably be expected to let from year to year."

The appellants took a case.

The Assessor accepted the valuation of the Committee.

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[1] 2 Edw. VII., cap. 25.

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Pumpherston Oil Co., Limited, v. Assessor for Linlithgowshire.

LORD LOW.—In the judgment given by this Court in 1902 in the case of the *Oakbank Oil Company, Limited*,[1] certain things were settled in regard to the valuation of such works as those now in question. It was laid down (1) that the valuation was not to be on the basis of profits; (2) that the basis of valuation should be the present value of the works; (3) that no allowance should be made for ordinary repairs as distinguished from renewals; and (4) that 6 per cent on the present value was a fair sum to allow for renewals or depreciation, and 4½ per cent for interest on the capital represented by the present value. These two percentages (amounting together to 10½ per cent), plus feu-duty, insurance, and landlord's taxes, were held to be the annual value to be entered in the Valuation-roll.

That was a considered judgment, and must, in my opinion, be regarded as settling the principle according to which, as nearly as may be, the annual value in the present case must be ascertained. The question is, how in this case the present value of the works is to be ascertained?

The appellants contended that the result of the judgment of the Court in the *Oakbank*[1] case was that works of this description should be valued in each year. I do not so understand the judgment, and I think that it would be most unfortunate if it were necessary to have a fresh valuation in each year. The 6 per cent which was allowed was the sum which, it was calculated, would enable the proprietor to renew machinery or buildings which became worn out, or, in other words, to keep the works up to their original value. So long as the works are kept up by renewing what becomes worn out the value is maintained, and there is no necessity for a new valuation. If in any year there has been a failure to renew what has become worn out, that will be a circumstance to be taken into account; but here the Committee have found that since the date at which the previous valuations were fixed "both works have been kept in a not less efficient state than at that time." As regards the works, therefore, other than the new retorts which have been erected, I see no reason for altering the valuation.

In regard to the additional retorts, the appellants have not been able to state precisely what they actually cost, and therefore it was necessary to make an estimate. The Committee have done so upon the information before them, and I see no sufficient ground for interfering with the conclusion at which they have arrived.

A question was also raised whether the value of certain machinery should not be deducted, as falling within the provisions of the Lands Valuation (Scotland) Act, 1902. Mr Munro, who gave evidence for the appellants, said that part of the machinery was of that description, and he has deducted it in his valuation of the works. He does not, however, state what precisely is the value of the machinery which he deducted, so that it is impossible to say what, in his opinion, was the value of the whole works if the machinery did not fall to be deducted. It is for that reason, I apprehend, that the Committee found that the values of the works for which the appellants contended had not been proved. Further, there is not, in my

[1] 4 F. 520.

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judgment, sufficient information supplied to enable the Court to form an opinion whether the machinery to which Mr Munro refers is or is not of the description to which the Act applies. I confess that my impression is that it is not.

Upon the whole matter, I am of opinion that we ought not to interfere with the valuation at which the Committee have arrived.

LORD STORMONTH-DARLING.—I took part in the judgment of 1902 to which your Lordship has referred, and I entirely concur in your exposition, both of what the judgment laid down, and of what it did not lay down. While it decided that the works were to be valued in their actual condition, it was much more concerned with the percentage to be taken on the capital sum representing present value, than with the question how that capital sum was to be ascertained. My recollection is that there was very little controversy on that question between the Assessor and any of the oil companies which then appealed (including the present appellants), and certainly the report of the decision in the *Oakbank*[1] case (which was held to rule them all) bears no trace of it beyond the general finding that the works were to be valued in their actual condition.

I also agree that, so long as the works are kept up in a state of efficiency as great as that which existed when their capital value was last ascertained, there is no necessity for a fresh valuation, except to discover how far their capacity has been increased. That is the principle on which the Committee have proceeded, for the addition which they have made to the existing valuation is entirely accounted for by the appellants' increase in the number of retorts. It seems to me that in so acting the Committee were right.

THE JUDGES were of opinion that the determination of the Valuation Committee was right.

CAIRNS, M'INTOSH, & MORTON, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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Jan. 17, 1905.
Tough v. Macdonald.

CHARLES TOUGH AND OTHERS, Pursuers (Respondents).—*M'Lennan—Craigie.*
WILLIAM KID MACDONALD AND OTHERS, Defenders (Reclaimers).—*Mackenzie, K.C.—Macphail.*

*Superior and Vassal—Casualty—Composition—Lands held by trustees—Duplicand payable on each sale or transfer—Obligation of relief—Conveyancing (Scotland) Act*, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 5.—Under the provisions of section 5 of the Conveyancing Act, 1874, relating to the case where lands are held by trustees, if a taxed composition has been paid by them, the next composition becomes due and payable twenty-five years after the first payment, in the case where the composition is due "on the death of the vassal," and fifteen years after the first payment in the case where it is due, "on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal."

The title to certain lands provided that a duplicand of feu-duty should be payable to the superior, "the first year of the entry of every heir and singular successor," and contained clauses binding each heir and singular successor to enter and record his title within six months of his succession

[1] 4 F. 520.

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or purchase, with an irritancy, in the option of the superior, of all conveyances inconsistent with these provisions. In 1874 these lands were disponed to Gordon's trustees, who in 1885 paid a duplicand. In 1903 Macdonald's trustees, who were singular successors, with a title *ex facie* absolute, but in reality in security, disponed the lands to Tough's trustees, with an obligation to relieve them "of all feu-duties, casualties, and public burdens, due from or on account of the said subjects prior to the term of entry." No duplicand had been demanded since 1885, but in 1903 the superior demanded and received a duplicand from Tough's trustees.

In an action of relief by Tough's trustees against Macdonald's trustees founded on the above-quoted clause of relief, *held* that the pursuers were entitled to decree, in respect (1) that the title to the feu made a duplicand payable on the occasion of each sale or transfer as well as on the death of each vassal, within the meaning of section 5 of the Conveyancing Act, 1874; (2) that consequently the duplicand paid in 1903 had become payable in 1900, *i.e.*, fifteen years after the last payment in 1885, and fell within the terms of the obligation of relief; and (3) that as the action was laid on an express obligation of relief, it was immaterial that the duplicand, although due in 1900, had not actually been demanded.

2D DIVISION.
Ld. Kyllachy.

(SEE *Tough* v. *Macdonald, supra*, p. 324.)

By disposition, dated 5th August 1903, and duly recorded in the Register of Sasines, William Kid Macdonald and others, as trustees for the firm of J. & W. Macdonald, solicitors, Arbroath, disponed to Charles Tough and others, as trustees for the firm of Tough Brothers, rag-merchants, Dundee, a piece of ground in Dundee, with entry at 1st August 1903. The disposition contained, *inter alia*, the following clause:—"And we, as trustees foresaid, bind ourselves to free and relieve our said disponees and their foresaids of all feu-duties, casualties, and public burdens, due from or on account of the said subjects prior to the term of entry before mentioned, our said disponees being liable for and bound to free and relieve us of the same in all time coming."

In August 1903 the Earl of Home, superior of the said piece of ground, claimed a casualty of composition or duplicand of the feu-duty from Tough Brothers, and they, having paid it, brought the present action for relief against W. K. Macdonald and others, founding on the clause of relief quoted above, and on the fifth section of the Conveyancing Act, 1874.*

* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), enacts, section 5,—"Unless where it has been or shall be otherwise stipulated, corporations shall pay at the date at which the first composition would have been payable if this Act had not been passed, and every twenty-fifth year thereafter, a sum equal to what but for the passing of this Act would have been payable on entry by a singular successor; and where a composition payable on the death of the vassal shall become exigible from any trustee or body of trustees, another composition shall be payable at the end of every twenty-five years, so long as the lands shall be vested in such trustee or trustees; and where by the terms of the feu-rights of the lands a taxed composition is payable on the occasion of each sale or transfer of the property as well as on the occasion of the death of each vassal, and a composition shall in consequence of the acquisition of the property become exigible from any corporation or from any trustee or body of trustees, another composition, unless where it has been or shall be otherwise stipulated, shall be payable at the end of every fifteen years from the date of such acquisition by such corporation or trustee or trustees, so long as the land shall be vested in such corporation or trustee or trustees, with such

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The state of the title, as disclosed by the condescendence and answers, was as follows:—The original feu-charter of the said piece of ground was granted by the trustees under the Douglas Feuing Act, with consents therein mentioned in favour of John Gordon, merchant in Dundee, as trustee for the firm of John Gordon & Company, flax and jute spinners in Dundee, dated the 17th and 19th October, and recorded in the Register of Sasines the 4th December, 1874. The clauses in the feu-charter with reference to the payment of composition and entry of vassals, and the irritant and resolutive clauses therein, were as follows: "Giving therefor yearly the said John Gordon as trustee foresaid and his above written to the said Lucy Elizabeth Douglas of Douglas, Countess of Home, and the heirs succeeding to her, immediate lawful superiors of the same, the sum of £266, 7s. sterling, in name of feu-duty for the piece of ground above disponed . . . beginning the half-yearly payment of £133, 3s. 6d. at the term of Whitsunday 1890," &c. "and doubling the said feu-duty of £266, 7s. for the said subjects the first year of the entry of every heir and singular successor after that term, and these for all other burden, exaction, demand, or secular service whatsoever which can be anyways exacted or required for the said lot or piece of ground above disponed or any part thereof . . . and the heirs and singular successors of our said disponee in the foresaid piece of ground shall be bound to enter with the said Countess of Home or her foresaids, and to record the charter or writs so to be granted within six months after the date of their purchasing or succeeding to the said feu or any part thereof, . . . and it is hereby declared that all sales, dispositions, or other conveyances and transmissions, legal or voluntary, of the whole or any parts and portions of the said lot or piece of ground upon terms either in violation of or inconsistent with the conditions, declarations, and provisions herein contained, shall be, and the same are hereby declared to be, in the option of the said Countess of Home or her foresaids, absolutely null and void to the receivers, with all that shall follow or may follow thereon."

The transmissions of the said piece of ground since the granting of the said feu-charter were the following:—(1) Disposition by Henry Hoile Gordon, merchant in Dundee, as heir-at-law of the said John Gordon, and as heir of provision in special of the said John Gordon in the said piece of ground, in favour of John Lindsay Gordon, residing at Ashludie, near Monifieth, merchant in Dundee, and the said Henry Hoile Gordon, as trustees for behoof of the firm of J. & H.

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interest, if any, as may be stipulated for in the feu-rights during the not payment of casualties; provided always that in the event of such corporation, or of such trustee or trustees, ceasing to be proprietors of the lands after having paid a composition or compositions in terms of this section, the successor of such corporation, or of such trustee or trustees, who shall be duly infeft in the lands at the expiration of twenty-five years where a composition is payable on the death of the vassal, or at the expiration of fifteen years where a composition is payable on the occasion of each sale or transfer as well as on the occasion of each death, from the date of the last payment of composition as aforesaid, shall then pay a composition, and the casualties for and in respect of said lands shall thereafter become due and payable at the same time and in the same manner as if such lands had never been vested in such corporation or in such trustee or trustees . . ."

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Gordon, merchants, spinners, and manufacturers in Dundee, and individual partners thereof, dated the 25th, 26th, and 28th November, and recorded 26th December 1879. (2) Disposition by Henry Hoile Gordon, as sole remaining trustee for behoof of the firm of J. & H. Gordon, and as sole and only partner of the firm of J. & H. Gordon, in favour of the defenders, William Kid Macdonald and Frederick Fothringham Macdonald, as trustees for behoof of their firm of J. & W. Macdonald, dated 13th, and recorded 17th November 1897. (3) The disposition by the defenders, Macdonald's trustees, with consents foresaid, in favour of the pursuers, as trustees for Tough Brothers.

The defenders averred, and it was not disputed, that the disposition in their favour, though *ex facie* absolute, was in reality in security of a loan. They also averred that the Earl of Home, as superior, had claimed a duplicand or casualty from them in 1900, and had departed from his claim on being informed that their title was only in security.

The pursuers pleaded, *inter alia*;—(1) On a sound construction of the feu-charter, receipt for casualty, and disposition by the defenders with consents, in favour of the pursuers, condescended on, and in respect of the facts set forth, the pursuers are entitled to decree of declarator and payment as concluded for, with interest and expenses.

The defenders pleaded, *inter alia*;—(2) The pursuers' statements are irrelevant, and insufficient to support the conclusions of the summons. (3) The casualty libelled not having been due by the defenders, they are not bound to relieve the pursuers thereof.

On 8th June 1904 the Lord Ordinary (Kyllachy) pronounced an interlocutor, whereby he decerned in terms of the conclusions of the summons.*

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* "OPINION.—The pursuers in this case are persons who purchased in 1903 from the defenders certain subjects in Dundee which are held in feu from the Countess of Home. The disposition contains a clause by which the defenders undertook to relieve the pursuers of all casualties and public burdens due at or prior to the term of entry. The present action is brought to obtain implement of that obligation with respect particularly to a taxed composition claimed by the superior as having become due in 1900, and which composition the pursuers paid as proprietors of the feu. The defence, as I understand it, is that the composition in question was not due as alleged in 1900, but was, if due at all, due only in 1903, and due in respect of the pursuers' own purchase and implied entry.

"The question turns upon the construction of the 5th section of the Conveyancing Act of 1874. That section, as we know, regulates the payment of casualties by corporations and trustees under the new system of implied entries; and it is here applicable in respect that the defenders' predecessors in title were a body of trustees who in 1879 acquired the subjects and became impliedly entered with the superior, and in 1885 paid a composition in respect of that entry. The pursuers' case is that under the rules laid down by the said section the casualty which they paid in 1903 was due and exigible prior to their (the pursuers') entry, having become so on the expiry of fifteen years from 1885.

"I have come to the conclusion that, having regard to the terms of the feu-right and to the just construction of the 5th section of the Act of 1874, the pursuers are right, and that there is no good answer to their demand.

"In the first place, as to the facts, I assume—what is not disputed—that the trustees, who were the defenders' authors, and who, as I have said, acquired in 1879, remained vested in the feu at all events until 1897. They

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The defenders reclaimed.

Argued for the reclaimers;—(1) The duplicand paid was not one due in 1900, but one which the pursuers paid for their own entry. Even assuming a duplicand was due in 1900, it was not paid, and the pursuers could not recover, under a clause of relief, unless they could shew that they had paid a debt falling under that clause. A casualty was not due till it was demanded,[1] and therefore no casualty falling under the clause of relief had been paid. (2) No casualty could have been enforced either in 1900 or 1903. Section 5 of the Conveyancing Act, 1874, in providing for the case where lands come to be in the possession of trustees, contemplated two cases. One was the general rule, by which trustees were to be liable to a casualty every twenty-five years, the other was the exceptional case, where a taxed composition was payable on "each sale or transfer of the

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probably remained vested until 1903; for, although they disponed in 1897 to the defenders, who were, I suppose, their agents, it seems to be conceded that this was merely a disposition in security. The exact date, however, is immaterial. What is certain is that the trustees remained vested at all events until more than fifteen years after their acquisition of the subjects in 1879, and after they had paid a casualty, as they did, in 1885.

"In the next place, *as to the terms of the title.* I see no room to doubt that under the original feu-right (which was, it appears, dated in 1874, but for present purposes prior to the passing of the Act) there was, in the sense of the 5th section of the Act, 'a taxed composition payable on each sale or transfer of the property, as well as on the occasion of the death of each vassal.' The feu-charter declares expressly that the feu-duty shall be doubled the first year of the entry of each heir or singular successor, and it further provides that each heir or singular successor shall be bound to enter and record his charter or writ within six months after the date of his succession or purchase. It also declares that all sales, dispositions, or other conveyances or transmissions, in violation of or inconsistent with the foresaid provisions, shall be, in the option of the superior, null and void; and further, that the whole conditions, provisions, &c., expressed in the feu-charter, shall be verbatim engrossed or duly referred to, in terms of law, in all the after conveyances, transmissions, &c., of the feu.

"I confess I do not see what difficulty there can be either as to the construction of these provisions or even as to their enforcement. On the latter point some difficulties, which I am not sure that I quite appreciate, appear to have been suggested in the cases of *Dick Lauder* v. *Thornton*, 17 R. 320, and *Hamilton* v. *Chassels*, 4 F. 494. But, apart from the consideration that those difficulties could hardly, as far as I see, arise here, I apprehend that the question of enforcement is not here *hujus loci*. The point, I apprehend, here simply is, whether on the just construction of this feu-right a taxed composition was payable upon each transmission of the feu.

"Then, such being the terms of the title, what does the 5th section of the 1874 Act enact with respect to the pecuniary consequences of the statutory implied entry in the case of corporations and trustees? What in particular does it enact in the case (which is the case here) where, the feu-right providing for a casualty on every transmission, and not merely on the death of a vassal, the feu is acquired by trustees, and those trustees duly pay the composition due for their entry, and remain for fifteen years thereafter vested in the subjects?

"As I read the 5th section, it is quite express to the effect that another

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[1] Motherwell v. Manwell, March 6, 1903, 5 F. 619; Fisher's Executrix v. Fisher's Trustees, Dec. 8, 1903, 6 F. 196; Governors of Heriot's Trust v. Caledonian Insurance Co., Feb. 20, 1904, 6 F. 442.

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And this was three years before the pursuers' term of entry. The defenders being at the time in possession and entered, the sole question is whether the clause of relief quoted does not bind them, notwithstanding the defence they set up that they were only security-holders. I cannot hold otherwise than that it does. They undertook as if they were absolute proprietors to give the relief, and in a question with the pursuers I am of opinion with the Lord Ordinary that they have no defence. I am unable to see that the defenders can obtain any ground of law for their defence from the case of *Motherwell*,[1] which was quoted at the debate. They cannot, as I think, found as against the pursuers upon the fact that the superior had not made any demand for the casualty of composition before they granted the disposition. If the casualty was due and exigible, as it certainly was, then it is such a casualty against which relief is guaranteed. It is difficult to see what benefit the clause of relief would confer, if it did not apply here. For if the superior had demanded the casualty the defenders would have had to pay it, in which case a clause of relief to their disponees would have been unnecessary. It was due, and therefore the pursuers could not resist the superior's demand. It was paid, and the demand of relief was in my opinion unanswerable.

An argument was addressed to us for the purpose of shewing that the limit of twenty-five years under the 5th section of the Conveyancing Act of 1874 applied to this case. I confess I am quite unable to understand how it could, and I do not find in the Lord Ordinary's note anything to suggest that such an argument was raised before him.

As regards the suggestion that what the pursuers paid was not the casualty due and exigible before the time of their obtaining their disposition, but a casualty due by them in respect of their own purchase, I adopt in its entirety what is said by the Lord Ordinary, and which it is unnecessary to repeat.

I would move the Court to affirm the judgment reclaimed against.

Lord Moncreiff—(Read by the Lord Justice-Clerk).—I am of opinion that the Lord Ordinary's judgment should be affirmed, and that on the simple ground which he adopts. The defenders when they conveyed the subjects to the pursuers in 1903 were infeft, and entered with the superior under a disposition *ex facie* absolute. The disposition which they granted in favour of the pursuers contained the following clause of relief: "And we, as trustees foresaid" (that is, as trustees for the firm of J. & W. Macdonald), "bind ourselves to free and relieve our said disponees and their foresaids of all feu-duties, casualties, and public burdens due from or on account of the said subjects prior to the respective terms of entry before mentioned."

Now, in point of fact before the term of entry of the pursuers, and while the defenders were in possession of the subjects, and entered with the superior, a casualty, that is a composition, became due and payable "from or on account of the said subjects" on 13th October 1900, in terms of sec. 5 of the Conveyancing (Scotland) Act, 1874.

[1] 5 F. 619.

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The defenders plead that they were only security-holders, and that therefore the superior had no good claim against them, But assuming that this defence would be relevant in other circumstances, this is not a question between superior and vassal; it is a question between disponer and disponee under a clause of relief. And whether the defenders were merely security-holders or not they were *ex facie* absolute proprietors, and took upon themselves the obligations of absolute proprietors in granting the obligation to relieve their disponees of all casualties which were due and exigible at the date of the disposition. Again, founding on the case of *Motherwell*[1] and others, they plead that as the superior did not demand the composition from them before they disponed the subjects to the pursuers, no casualty was due at that date from them or their authors; and but for the clause of relief there might have been room for argument on this contention. But as I have pointed out, the clause of relief is unqualified; there was a casualty "due from or on account of the subjects," and the necessary consequence of the defenders not having paid that casualty which they were bound to pay was that the pursuers had no answer to the superior's demand, and were obliged to pay it themselves and fall back on the clause of relief.

I confess I am unable to understand the grounds on which the defenders maintain that the twenty-five years' limit mentioned in the 5th section of the 1874 Act (which is confined to the case of a casualty becoming due on the death of a vassal), applies. The original feu-charter in favour of John Gordon provided that the feu-duty should be doubled the first year of the entry of every heir or singular successor. John Gordon apparently died before 1879, because in that year his heir, Henry Hoyle Gordon, granted a disposition in favour of John Lindsay Gordon and himself as trustees for their firm of J. & H. Gordon, and on that disposition they were duly infeft and impliedly entered with the superior as they were bound to enter under the feu-charter in favour of John Gordon. Being so entered they became subject to the provisions of the 5th section of the Act of 1874, and as trustees and singular successors they were liable in a composition, which they paid on 13th October 1885. By payment of that composition they (to use the Lord Ordinary's felicitous expression), enfranchised the trust for fifteen years, which expired on 13th October 1900. Whether they retained the subjects or alienated them, a second composition became then due and payable. Before the expiry of that period Henry Hoyle Gordon as sole remaining trustee for behoof of the firm, conveyed the subjects in 1897 to the defenders, who were duly infeft and entered with the superior. In October 1900, while the defenders were still in possession and undivested another composition fell due in terms of the statute, fifteen years having expired from the date of the last payment of composition. Three years later the defenders conveyed the subjects to the pursuers with the clause of relief which I have mentioned.

On that narrative I do not see any escape from the conclusion that under the clause of relief the defenders were bound to relieve the pursuers of the second composition.

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[1] 5 F. 619.

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If the second composition had been paid on 13th October 1900 when it should have been paid, the pursuers would not have been called upon to pay a casualty until 1915. But owing to the defenders' refusal to pay the casualty the pursuers had to pay it to the superior, in a question with whom they had no answer.

I confess that I share the difficulty which the Lord Ordinary has felt in seeing how the cases of *Dick Lauder* v. *Thornton*,[1] and *Hamilton* v. *Chassels*,[2] can assist the defenders; and I still less appreciate the grounds of the defenders' contention that the twenty-five years' limit and not the fifteen years' limit applies to the case.

In what I have said I do not think I have gone back in any way on what was decided in the cases of *Motherwell*,[3] and *The Heriot's Hospital Trustees* v. *Caledonian Insurance Company*,[4] which were cases between superior and vassal, and which raised no question on a clause of relief. In the latter case, although it did not raise the same question, I had occasion very carefully to consider the terms and meaning of the 5th section of the statute.

On the other hand I think that the cases of *Straiton*,[5] and *Farquharson* v. *Caledonian Railway Company*,[6] assist the pursuers. I am accordingly prepared to dispose of the case as the Lord Ordinary has done, and on the same grounds.

As this is sufficient for the decision of the case, I have not found it necessary to examine more particularly the conditions of the original feu-charter in favour of John Gordon, upon the terms of which I think a separate and independent argument could be successfully rested by the pursuers.

LORD YOUNG concurred.

THE COURT adhered.

MILLER & MURRAY, S.S.C.—LINDSAY, HOWE, & Co., W.S.—Agents.

No. 80.
Jan. 18, 1905.
Edgar v. Kennedy and Hutton's Trustee.

PETER EDGAR, Minuter (Reclaimer).—*Mackenzie, K.C.—Macmillan.*
ANGUS KENNEDY, Pursuer (Respondent).—*Constable.*
JOHN DALL (Hutton's Trustee), Defender (Respondent).—*Findlay.*

*Bankruptcy—Sequestration—Compromise by Truster of Action against Bankrupt—Right of dissentient creditor to defend—Indemnity to Truster—Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 169 *and* 176.—A trustee in a sequestration, with consent of the commissioners, resolved to compromise on certain terms an action which had been brought against the bankrupt before his sequestration, and a joint minute by the trustee and the pursuer stating the terms of compromise was lodged in the action. Thereafter one of the creditors lodged a minute in which he submitted that he was entitled to take up the defence of the action in his own name on paying the trustee the sum due to him under the compromise, and granting a bond of indemnity with approved caution for £500 in security of any damages or expenses which might be awarded to the pursuer.

[1] 17 R. 320.
[2] 4 F. 494.
[3] 5 F. 619.
[4] 6 F. 442.
[5] 8 R. 299.
[6] 2 F. 141.

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Edgar v. Kennedy and Hutton's Trustee.

The Lord Ordinary refused the crave of the creditor's minute, and interponed authority to the joint minute by the pursuer and the defender's trustee settling the action.

The creditor reclaimed.

The Court *adhered*, on the grounds (1) that the resolution to compromise not having been appealed against by the dissentient creditor was final; and (2) that the limited guarantee offered was not an adequate sum to secure indemnity to the trustee and the trust-estate.

1ST DIVISION. Ld. Kyllachy.

ON 15th April 1904, Angus Kennedy, builder, Hillhead, Glasgow, brought an action against Robert Hodgson Hutton, house factor, Glasgow, concluding for reduction of a disposition of certain heritable property granted by the pursuer in favour of the defender, and for payment of £500 damages.

On 21st May 1904, Hutton's estates were sequestrated, and on 9th July 1904 his trustee, John Dall, accountant, Glasgow, was sisted as a party to the action.

By minute, dated 15th October 1905, the commissioners on the sequestrated estate approved of a compromise of the action which had been arranged by the trustee.*

The terms of the compromise were subsequently embodied in a joint minute for the pursuer and the trustee.

Peter Edgar, house factor, Glasgow, one of the commissioners, and the largest creditor, dissented from but did not appeal against the resolution of the commissioners.

On 9th November 1904, a joint minute embodying the terms of compromise was signed by counsel for the pursuer and the trustee.

On 22d November 1904, Edgar lodged a minute in which he stated, *inter alia*, "that the minuter is a creditor on the said sequestrated estates to the extent of £2300 or thereby. He is by far the largest creditor. That the minuter is entitled, on putting the trustee in as good a position as he would have been had the settlement been carried through, to take up the defence of said action and prosecute the same for his own behoof in the name of the trustee, subject to his accounting to the said trust-estate for any surplus of funds recovered after meeting all his own claims and expenses in full. That the minuter proposes to safeguard the trustee by (1) paying the sums of £30 and £20 and the legal expenses incurred by the trustee, all in terms of the joint minute adjusted between the pursuer and the trustee, and (2) granting a bond of indemnity for £500 with caution to the satisfaction of the Clerk of Court failing agreement, to indemnify the trustee and the trust-estate against all liability for (*a*) principal or expenses under said summons, and (*b*) the amount of a bill for £55 discounted by Hutton to accommodate the pursuer. That the minuter considers said bond of indemnity for £500 is amply sufficient to secure the trustee, as only a dividend would be due by him on the damages awarded, if any, and on said bill; but the minuter is willing that the trustee should reserve power to demand further security should there ever be any likelihood of the bond tendered being insufficient. That

* Section 176 of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), enacts:—"The trustee may, with the consent of the commissioners, compound, or transact, or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon, and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt."

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I confess that I share the difficulty which the Lord Ordinary has felt in seeing how the cases of *Dick Lauder* v. *Thornton*,[1] and *Hamilton* v. *Chassels*,[2] can assist the defenders; and I still less appreciate the grounds of the defenders' contention that the twenty-five years' limit and not the fifteen years' limit applies to the case.

In what I have said I do not think I have gone back in any way on what was decided in the cases of *Motherwell*,[3] and *The Heriot's Hospital Trustees* v. *Caledonian Insurance Company*,[4] which were cases between superior and vassal, and which raised no question on a clause of relief. In the latter case, although it did not raise the same question, I had occasion very carefully to consider the terms and meaning of the 5th section of the statute.

On the other hand I think that the cases of *Straiton*,[5] and *Farquharson* v. *Caledonian Railway Company*,[6] assist the pursuers. I am accordingly prepared to dispose of the case as the Lord Ordinary has done, and on the same grounds.

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LORD YOUNG concurred.

THE COURT adhered.

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No. 80.
Jan. 18, 1905.
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*Bankruptcy—Sequestration—Compromise by Truster of Action against Bankrupt—Right of dissentient creditor to defend—Indemnity to Truster—Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. cap.* 79), *secs.* 169 *and* 176.—A trustee in a sequestration, with consent of the commissioners, resolved to compromise on certain terms an action which had been brought against the bankrupt before his sequestration, and a joint minute by the trustee and the pursuer stating the terms of compromise was lodged in the action. Thereafter one of the creditors lodged a minute in which he submitted that he was entitled to take up the defence of the action in his own name on paying the trustee the sum due to him under the compromise, and granting a bond of indemnity with approved caution for £500 in security of any damages or expenses which might be awarded to the pursuer.

[1] 17 R. 320.
[2] 4 F. 494.
[3] 5 F. 619.
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Edgar v. Kennedy and Hutton's Trustee.

The Lord Ordinary refused the crave of the creditor's minute, and interponed authority to the joint minute by the pursuer and the defender's trustee settling the action.

The creditor reclaimed.

The Court *adhered*, on the grounds (1) that the resolution to compromise not having been appealed against by the dissentient creditor was final; and (2) that the limited guarantee offered was not an adequate sum to secure indemnity to the trustee and the trust-estate.

1ST DIVISION. Ld. Kyllachy.

ON 15th April 1904, Angus Kennedy, builder, Hillhead, Glasgow, brought an action against Robert Hodgson Hutton, house factor, Glasgow, concluding for reduction of a disposition of certain heritable property granted by the pursuer in favour of the defender, and for payment of £500 damages.

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By minute, dated 15th October 1905, the commissioners on the sequestrated estate approved of a compromise of the action which had been arranged by the trustee.*

The terms of the compromise were subsequently embodied in a joint minute for the pursuer and the trustee.

Peter Edgar, house factor, Glasgow, one of the commissioners, and the largest creditor, dissented from but did not appeal against the resolution of the commissioners.

On 9th November 1904, a joint minute embodying the terms of compromise was signed by counsel for the pursuer and the trustee.

On 22d November 1904, Edgar lodged a minute in which he stated, *inter alia*, "that the minuter is a creditor on the said sequestrated estates to the extent of £2300 or thereby. He is by far the largest creditor. That the minuter is entitled, on putting the trustee in as good a position as he would have been had the settlement been carried through, to take up the defence of said action and prosecute the same for his own behoof in the name of the trustee, subject to his accounting to the said trust-estate for any surplus of funds recovered after meeting all his own claims and expenses in full. That the minuter proposes to safeguard the trustee by (1) paying the sums of £30 and £20 and the legal expenses incurred by the trustee, all in terms of the joint minute adjusted between the pursuer and the trustee, and (2) granting a bond of indemnity for £500 with caution to the satisfaction of the Clerk of Court failing agreement, to indemnify the trustee and the trust-estate against all liability for (*a*) principal or expenses under said summons, and (*b*) the amount of a bill for £55 discounted by Hutton to accommodate the pursuer. That the minuter considers said bond of indemnity for £500 is amply sufficient to secure the trustee, as only a dividend would be due by him on the damages awarded, if any, and on said bill; but the minuter is willing that the trustee should reserve power to demand further security should there ever be any likelihood of the bond tendered being insufficient. That

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* Section 176 of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), enacts:—"The trustee may, with the consent of the commissioners, compound, or transact, or refer to arbitration any questions which may arise in the course of the sequestration regarding the estate, or any demand or claim made thereon, and the compromise, transaction, or decree-arbitral shall be binding on the creditors and the bankrupt."

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the minuter is entitled to an assignation by the trustee in his favour of all the rights and claims paid for by him, particularly of all claims outwith the scope of the foresaid action, but included in the terms of settlement."

On 23d November 1904, the Lord Ordinary (Kyllachy) refused the crave of Edgar's minute, and interponed authority to the joint minute for the pursuer and the trustee.

Edgar reclaimed, and argued;—(1) A dissentient creditor had a right at common law to take up an action which the trustee in a sequestration proposed to compromise, provided he put the trustee in as good a position as he would have had under the compromise, and indemnified the trustee and the trust-estate against any loss which might result from the continuance of the litigation.[1] This right did not depend on any appeal being taken under the Bankruptcy Act. A creditor might never hear of a resolution to compromise until the time for appeal had expired. Further, appeal was not here an appropriate remedy, because the reclaimer's object was not to challenge the resolution to compromise, but to take up the asset. (2) In the circumstances the indemnity offered by the reclaimer was sufficient.

Argued for the pursuer;—There was no doubt about the trustee's right to compromise under section 176 of the Bankruptcy Act, 1856.[2] The compromise was completed either when its terms were adjusted,[3] or when the joint minute was signed. In either case the settlement of the action had been effected before Edgar's minute was lodged, and when the pursuer and the trustee were the only parties to the case. The pursuer could not therefore now be compelled to give up the settlement. Edgar should have appealed under the provisions of section 169 of the Bankruptcy Act, and his proposed intervention was now too late.

Argued for the trustee;—Before the creditor could take up the action the trustee was entitled to an absolute indemnity for himself and the trust-estate. It was quite clear that the guarantee offered was not sufficient.

At advising,—

Lord Adam.—(After narrating the facts)—The Lord Ordinary has refused the crave of Mr Edgar's minute, and has interponed authority to the joint minute compromising the action. The question, accordingly, is whether the Lord Ordinary should have allowed Edgar to intervene as defender in the action. In my opinion the interlocutor of the Lord Ordinary is right. That interlocutor has been maintained to us on two grounds, the first by the pursuer and the second by the trustee.

It is said in the first place that a compromise has been effected by the trustee which is final and conclusive, and reference has been made to section 176 of the Bankruptcy (Scotland) Act, 1856, which provides that the trustee may, with the consent of the commissioners, compound any ques-

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[1] Bell's Com. (7th ed.), vol. ii., p. 325; Goudy on Bankruptcy, pp. 252 and 333; Spence v. Gibson, Dec. 13, 1832, 11 S. 212, at p. 214; Sprot v. Paul, July 5, 1828, 6 S. 1083; M'Kay v. Brownlee, Jan. 31, 1866, 4 Macph. 333; Marshall & Aitken v. Campbell's Trustee, July 2, 1889, 16 R. 895.

[2] Quoted *supra*, p. 453.

[3] Dewar v. Ainslie, Dec. 14, 1892, 20 R. 203.

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tion regarding the estate, and that the compromise shall be binding on the creditors. It appears to me that there is a great deal of force in this argument. I do not know what the language of section 176 means unless it gives the power to compromise. *Prima facie* the statute has considered that the interests of the creditors are sufficiently guarded by the trustees and commissioners, and if they are satisfied as to the compromise, they are entitled to carry it through. Whether a creditor who considers himself aggrieved has any recourse against the trustee I do not inquire.

I can fancy that in a case where the trustee has rushed through a compromise in order to defeat the rights of creditors something might be said, but nothing of that sort occurred here. The creditor here knew that the trustee and commissioners proposed to compromise the action, and took no advantage of the provisions of the statute, and I agree with Mr Constable that so far as his client, the pursuer in the action, is concerned, the compromise has been concluded.

But then it is said in the second place, that the creditor has still a right to intervene. I have no doubt that in certain circumstances a trustee is bound to allow a creditor, who thinks he has compromised for an inadequate sum, to use his name, provided he is willing to keep the trustee and the estate *indemnis*. But the trustee is not bound to allow the use of his name unless he is indemnified by the creditor, and the question is whether the indemnity proposed by Mr Edgar is sufficient.

The action is one of damages, and none can tell what a jury may award. Then, again, the amount of expenses is quite unsettled, and there are various other indefinite claims. The offer made by Mr Edgar is to pay a specific sum, with the legal expenses already incurred, and to grant a bond of indemnity for £500 to the satisfaction of the Clerk of Court. Is it clear beyond doubt that this limited guarantee for £500 is perfectly certain to indemnify the trustee and the estate? I think it is not, and on both grounds I think the Lord Ordinary is right.

LORD M'LAREN.—In the scheme of the Bankruptcy Act the three stages in the formation of a contract, which are commented on by Lord Stair and are familiar to lawyers, are kept distinct—the stages of consideration, resolution, and engagement. Full consideration is provided for by the necessity for consultation of the commissioners before the trustee resolves upon any administrative act of importance. If the trustee and the commissioners are then agreed, their resolution must be formulated by a deliverance, and a creditor who feels aggrieved by the resolution has the right of appealing against it to the Sheriff or the Lord Ordinary. It is only when the preliminary procedure has been carried through that the question has passed into the stage of resolution, and the trustee is entitled to enter into a binding engagement. Now, after an engagement has been entered into under these conditions, I do not think that a creditor can come forward and be heard to say,—"This is an improvident arrangement, and I object to it." The answer to that would be,—"Your rights, along with those of the general body of creditors, are placed (subject to review) in the hands of the trustee and commissioners, and your time to object, if you desired to do so, was when the resolution to compromise was taken." Here the disputed act of

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administration is a compromise, and I agree with Lord Adam that the power to compromise, given to a trustee by the Bankruptcy Act, is as broad and clear in its terms as such a power could well be, and the provision that a compromise shall be "binding on the creditors" is a warning to them that, unless they appeal at the proper time, they will be bound by the act of the trustee. Mr Edgar had his opportunity of going to the Lord Ordinary and objecting to the compromise. If he had done so, his first contention would no doubt have been that the trustee ought to contest the action, at the expense of the bankrupt estate, for the benefit of the general body of creditors. He would probably have failed in that contention, for I do not think that any Judge, who had examined the subject-matter of this action, would have held that the trustee could conscientiously defend it at the expense of the estate, and I think he would have held, and rightly held, that the trustee was justified in compromising, rather than in running the risk of a decree of reduction going out with expenses against the estate.

It is not contended that the creditor has been prevented from using his right of appeal, but it is maintained that cases might arise where, under similar circumstances, the creditor might be put to serious prejudice if kept in ignorance of the resolution. I do not think that the Bankruptcy Act professes to safeguard the interests of creditors in every possible contingency; it only provides for them such protection as is consistent with a speedy and effective winding-up of bankrupt estates. Further, it cannot be maintained here that Mr Edgar was prejudiced while in ignorance of the steps that the trustee proposed to take, for he was one of the commissioners himself, and was necessarily aware of what was going on, and yet he neither appealed nor entered into negotiations for carrying on the litigation himself. He is, unfortunately, not in a position to give the necessary guarantee himself, but has had to go to an insurance company to obtain it, and that is a proceeding that takes time. The trustee gave him due warning that the time during which the guarantee must be offered was running out, and it was no doubt a misfortune for Mr Edgar that he was unable to obtain it before that period expired. But I do not think that there was any duty on the part of the trustee to delay a compromise which he considered to be beneficial to the estate, merely for the purpose of enabling a creditor to contest an action which he himself thought he could not conscientiously defend. I think he was quite right in effecting the compromise when he did, and I see no grounds on which a Court of law could interfere to set it aside.

I do not know on what precise ground the Lord Ordinary based his judgment, but we are told that it was on the ground that the trustee had the power to compromise, and had effectually done so by the joint minute. Both on that ground, and on the ground that the trustee was not bound to lend his name to a creditor without an adequate indemnity, I concur with your Lordship in the judgment proposed.

LORD KINCAIRNEY.—I concur.

The LORD PRESIDENT and LORD KINNEAR were absent.

THE COURT adhered.

GARDINER & MACFIE, S.S.C.—MACGREGOR & STEWART, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

REID & LAIDLAW, LIMITED, AND ANOTHER, Pursuers (Respondents).—*R. L. Orr—Burt.*
JOHN REID, Defender (Reclaimer).—*Graham Stewart—Mercer.*

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Reid & Laidlaw, Limited, v. Reid.

*Company—Winding-up—Liquidator—Conduct of Liquidation—Compromise with debtor—Refusal of Liquidator to apply for sanction of Court—Locus Pœnitentiæ—Personal Exception—Companies Act*, 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 160.—In an action by a company, which was being wound up subject to the supervision of the Court, and its liquidator against an alleged debtor of the company, the defender pleaded that the liquidator having agreed to a compromise of the claim sued for, and having failed to apply to the Court for its sanction, was barred *personali exceptione* from insisting in the action. The Court *repelled* this plea upon the ground that there was *locus pœnitentiæ* until the sanction of the Court had been obtained, and that the liquidator was not bound to apply for the sanction of the Court or to recommend the compromise to it; and *per* Lord Kinnear also upon the grounds (1) that the liquidator could not be barred from insisting in an action brought on behalf of the company and its creditors by an exception personal to himself; and (2) that, apart from the absence of sanction by the Court there was in fact no finally concluded agreement between the parties.

THIS was an action at the instance of Reid & Laidlaw, Limited, wholesale ironmongers, Edinburgh, and William Robertson, liquidator thereof, against John Reid, formerly one of the directors and secretary of the company, concluding for payment of £1196, 17s. 2d. Reid & Laidlaw, Limited, were in course of being wound up voluntarily, subject to the supervision of the Court, pursuant to resolution by the company dated 19th February, and interlocutor of the Court dated 6th March, 1903.

1ST DIVISION. Ld. Kyllachy.

The defender lodged defences, in which he denied liability for the sum sued for, and further stated as follows:—(Ans. 7) " . . . Explained that the liquidator negotiated with the defender for a settlement of the claim (*i.e.*, the Company's claim for the sum now sued for), and that, in full knowledge of the circumstances, the liquidator agreed to accept £100 in full from the defender. It was accordingly arranged that the liquidator should apply to the Court to sanction said arrangement, but this he now refuses to do."*

The defender pleaded, *inter alia*;—(3) The liquidator having agreed with the defender on a compromise of his claim for the sum sued for, and having failed to apply to the Court for sanction of said compromise, is barred *personali exceptione* from insisting in the present action.

The pursuers pleaded, *inter alia*;—(3) No relevant defence.

The parties agreed that the defender's third plea in law should be

* The Companies Act, 1862 (25 and 26 Vict. cap. 89), enacts, section 160,—"The liquidators may, with the sanction of the Court, where the company is being wound up by the Court, or subject to the supervision of the Court . . . compromise all . . . debts, and liabilities capable of resulting in debts, and all claims, whether present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and any . . . debtor or person apprehending liability to the company . . . upon the receipt of such sums, payable at such times, and generally upon such terms as may be agreed upon, with power for the liquidators to take any security for the discharge of such debt or liabilities, and to give complete discharges in respect of all or any such . . . debts or liabilities."

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disposed of upon a correspondence, the material parts of which are quoted *infra*.*

* Letter, dated 14th March 1904, liquidator's law-agent to defenders' law-agents:—"We have now seen our client regarding the increased offer contained in your letter of the 8th inst., but he cannot see his way to accept it. He is, however, prepared, without prejudice, to agree to the following arrangement, subject to the approval of the Court, viz.:—(1) to accept a payment of £100, one hundred pounds, in full of the Company's claim against your client; and (2) that your client will make up an accurate state of affairs duly deponed to."

Letter in reply, 22d March 1904:—"We . . . have just received our client's instructions to agree to the proposal contained in your letter to us of 14th inst.

"Mr Reid is having a statement of his affairs prepared, and we hope to let you have same duly deponed in the course of a few days.

"This letter is without prejudice, and in the event of the Court not sanctioning the proposed compromise, is not to be founded on to any effect."

Letter, dated 31st March 1904, from defender's agents to liquidator's agents enclosing statement of his affairs by the defender, duly deponed to, and letter in reply of same date acknowledging receipt of statement.

Letter dated 23d May 1904 from liquidator's agents to defender's agents:—"We propose to lodge the necessary note to the Court regarding the claims at the instance of the Coy. against your client Mr Reid . . . but meantime we have received some communications from Mr Peter Macnaughton, who has apparently received instructions to take objections to the statements lodged on behalf of your client . . . We annex copy letter which we have received from Mr Macnaughton."

Copy Letter referred to, dated 19th May 1904.—" . . . I have no suggestions to make further than that looking to the fact that Messrs Laidlaw and Reid are jointly due to the company a sum of upwards of £2700, the trifling sums offered by them are quite out of the question. I cannot accept the sworn statements of the debtors as in any degree satisfactory, and I am surprised that the liquidator should be so ready to accept them. It appears that a sum of upwards of £1000 which clearly belonged to Mr Reid has now been put beyond the reach of his creditors by transferences to his wife and daughter. These transferences I consider will not bear inquiry. . . . I propose to call the attention of the Court to these statements and to the readiness which the liquidator displays in accepting them."

Letter dated 6th June 1904, liquidator's law-agents to defender's law-agents:—"We forwarded the papers in connection with this matter to counsel with the view of his preparing a note to the Court for approval of the proposals made in connection with this matter.

"We have to-day seen counsel, and he is perfectly satisfied that the Court would not accept the statements made by Mr Reid, nor agree to the proposals made by you on his behalf, and indeed he states that the objections of creditors would in all probability be sustained with expenses. . . ."

Letter in reply, dated 7th June 1904:—" . . . We do not understand the position you now take up. . . . You definitely accepted our client's offer . . . subject to the approval of the Court being obtained for the proposed compromise. We further understood that the liquidator would recommend the Court to sanction the compromise. We do not see how you can go back on that undertaking. It seems to us that the liquidator is bound to move the Court for approval of the proposed compromise, and to recommend the Court to approve same."

Letter dated 8th June 1904, liquidator's law-agents to defender's law-agents:—"In view . . . of the attitude taken up by the creditors,

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After hearing counsel in the Procedure-roll the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds that parties are agreed that the question raised by the third plea in law for the defender may be disposed of upon the correspondence, No. 11 of process, and relative documents: Finds that, upon a just construction of the same, no concluded agreement for a compromise has been come to between the liquidator and the defender; therefore repels said plea in law; *quoad ultra* allows the parties a proof of their respective averments, and to the pursuer a conjunct probation."

The defender reclaimed, and argued;—The liquidator having agreed to the compromise was bound to apply to the Court for its sanction thereto. He was not entitled to depart from the arrangement with the debtor, and without attempting to obtain the sanction of the Court to sue him for the sum originally claimed.

Counsel for the pursuers and respondents were not called upon.

LORD ADAM.—This is an action at the instance of a liquidator for payment of £1196. The defenders says that the pursuer is not entitled to insist in the action, because he agreed to a compromise of the claim, and has failed to apply to the Court for sanction of that compromise. The alleged agreement for compromise is to be found in an offer contained in a letter by the agents of the liquidator to the agents of the defender, dated 14th March 1904, and an acceptance of that offer contained in the defender's agents' letter of 22d March 1904—(His Lordship read these letters). These letters contain a clear offer and a clear acceptance of that offer. But the offer was made under the condition that it was subject to the approval of the Court. The statement referred to in the letter of the liquidator's agents was lodged with the liquidator, and after it had been in his hands for seven weeks, he received a letter, dated 19th May 1904, from Mr Peter Macnaughton, on behalf of creditors, objecting to the proposed compromise. This letter was forwarded to the defender's agents on 23d May. Then on 6th June the liquidator's agents write as follows—(His Lordship read the letter). Then finally on 8th June the liquidator's agents write that "in view of the attitude taken up by the creditors, and the strongly expressed opinion of counsel that the Court would not sanction the proposal, it seems futile at this stage to present the note to the Court on the subject." The liquidator consequently refused to proceed further with the compromise, and the question now is whether he is entitled to proceed with this action, or whether he can be compelled to present a note to the Lord Ordinary for approval of a settlement to which he is now opposed, and we are asked to dismiss this action and to compel the liquidator to take steps for the completion of the compromise. I have always understood that in all these questions which occur in the course of liquidations, when the consent of the Court is required, there is *locus pœnitentiæ* until the consent of the Court is obtained. Here no consent had been obtained, and I think in the circumstances the liquidator was justified in refusing to present a note for approval of the compromise, which he thought would be useless, and that

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and the strongly expressed opinion of counsel that the Court would not sanction the proposal, it seems futile at this stage to present the note to the Court on the subject."

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the Lord Ordinary was quite right in repelling the defender's third plea and allowing a proof.

LORD M'LAREN.—I agree with your Lordship. I think the letters that passed were probably sufficient to constitute a compromise if the liquidator had power to make one. But a liquidator has not the power to make a compromise without the sanction of the Court, and he must act on his own judgment as to applying for the sanction of the Court to a suggested compromise, especially when, as here, he was advised by counsel, on full consideration of the question and in view of objections by creditors, that it would not be advisable to make such an application.

The Court was not, in fact, asked to give its sanction to this proposed compromise which the liquidator now declines to conclude, and I consider that there must be *locus pœnitentiæ* up to the time when the parties whose consent is necessary, viz., the liquidator, the debtor and the Court, have agreed to give it.

In this case the Court has not given its consent, and consequently there is no concluded agreement.

I therefore think that the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR.—I agree. I think the defender's third plea might have been repelled upon its own demerits apart from the correspondence. The plea is that the liquidator is barred from insisting in this action by reason of an exception personal to himself, or in other words by a personal bar which does not affect the Company or its creditors, on whose behalf the action is brought. I think that is not a tenable contention, and that this would have been a sufficient ground for repelling the plea.

But I entirely agree that there was here no concluded compromise binding on the liquidator in his capacity as liquidator, because until the agreement for compromise had been finally approved and sanctioned by the Lord Ordinary there was *locus pœnitentiæ*.

I think also on the letters, apart from the absence of sanction by the Court, there was no concluded agreement, because it was only made conditionally (1) on the approval of the Court being obtained, and (2) upon an accurate statement of his affairs being made by the defender. In virtue of the second condition it was open to the liquidator, and indeed it was his duty to consider whether the statement made by the defender was accurate, and to accept or reject it accordingly. No doubt it is an observation against him that he retained the statement for six weeks without stating any objection, and indeed that he indicated that he saw no objection to it, because he intimated that he was going to present the note. But there was no definite acceptance, and while the matter was still open he received notice of an objection which apparently had not been previously known to him, because the agent of a creditor informed him by letter that he opposed the compromise on the ground that the sum offered was out of the question, and that the defender had put a sum of £1000 beyond the reach of his creditors by transferring it to his wife and daughter, and that these transferences would not bear inquiry. It is clear enough that the liquidator

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was not called upon to accept the mere statement of an opposing creditor as conclusive of the fact. But on the other hand, the statement made it impossible for him to move for sanction without informing the Lord Ordinary that it had been made; and it is certain that on that information the sanction of the Court must have been withheld until the creditor's allegation was disproved or withdrawn.

The defender says that the liquidator had bound himself to "recommend" the compromise for sanction. No such obligation could have been lawfully undertaken, and there is nothing in the correspondence from which it can be inferred. The duty of the liquidator when he presents a compromise for sanction is to bring all the facts before the Lord Ordinary, and to keep back nothing that is material to the propriety and expediency of the transaction. The pursuer would have been acting in breach of his duty if he had done what the defender says he ought to have done, and moved the Lord Ordinary to sanction the compromise in ignorance of the creditor's allegation that funds had been put away. I am therefore for adhering to the interlocutor.

THE COURT adhered, and remitted to the Lord Ordinary to proceed.

J. & A. HASTIE, Solicitors—GARDINER & MACFIE, S.S.C.—Agents.

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William Baird & Co., Limited, v. Kane.

WILLIAM BAIRD & COMPANY, LIMITED, Complainers (Reclaimers).—*Campbell, K.C.—Lippe.*
HENRY KANE, Respondent.—*Watt, K.C.—A. M. Anderson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *Schedule* 1, *sec.* 11—*Medical examination of workman—Refusal—Obstruction—*"*Provided and paid by the employer.*"—A workman who was receiving weekly payments as compensation fixed by agreement under the Workmen's Compensation Act, 1897, and who had twice submitted himself for examination by a medical practitioner provided by the employers, and been certified not to have recovered, immediately after the second examination went to Ireland to reside with his father. About two months thereafter he was again required to submit himself at Glasgow for examination by the employers' medical man. He offered to submit himself to a medical man near the place where he was residing in Ireland, but he refused to come to Glasgow for examination unless his expenses were paid.

*Held* that the workman had not refused to submit himself to medical examination or obstructed the same in the sense of the Workmen's Compensation Act, 1897, Schedule I., section 11,* and that the employers were not entitled to suspend payment of his compensation.

*Finnie & Son* v. *Duncan*, Dec. 13, 1904, *supra*, p. 254, *distinguished.*

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule, sec. 11, enacts,—"Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned

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Lord Kincairney.

On 17th October 1903 Henry Kane, locomotive man, Twechar, Dumbartonshire, met with an accident while in the course of his employment with William Baird & Company, Limited, coalmasters at Twechar. The employers agreed to pay Kane 10s. 8d. per week as the compensation payable to him under the Workmen's Compensation Act, 1897, and compensation at the agreed-on rate was paid down to 4th June 1904. On 21st March 1904 a memorandum of this agreement was registered. On the requisition of the employers Kane submitted himself on 16th December 1903, and again on 24th March 1904, for examination by a medical practitioner provided and paid by the employers, and on both occasions it was reported that he had not fully recovered. About the end of March 1904 Kane went to Ballymony, County Antrim, Ireland, to live with his father. On 16th June 1904, while Kane was still residing in Ireland, the employers called upon him to submit himself for examination by their medical practitioner in Glasgow. Kane refused to come to Glasgow or to Twechar for examination at his own expense, but offered either to come to Glasgow for examination on condition that the employers paid his outlays for coming and returning, or to proceed to the nearest large town to Ballymony at their expense, and be examined there by a medical practitioner provided by them. On 30th June 1904, the employers, who had paid no compensation since the 4th of that month, intimated that no further compensation would be paid until Kane submitted himself for examination at Glasgow or Twechar. The letters quoted *infra* * shew the positions taken by the parties. On 5th August 1904 Kane charged the employers on an extract of the registered memorandum of agreement to pay him £4, 5s. 4d. as compensation at 10s. 8d. per week from 5th June to 31st July 1904. The employers brought a suspension of the charge.

The complainers maintained that as the respondent had refused to submit himself for examination, or had obstructed such examination, his right to the weekly payments under the agreement had been suspended since 18th June 1904 in virtue of the provisions to that effect contained in section 11 of the First Schedule of the Workmen's Com-

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in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that conditlon. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place."

* Letter from Kane's law-agents, dated 7th July 1904.—"The request that you make, that Kane should now return to Twechar or Glasgow merely to be medically examined is most unreasonable. In our letter of 29th ultimo we gave you a copy of a medical report which Kane sent us, which shews that he has not recovered, and if you wish to see the original we shall be glad to exhibit it here. We have no objections to your having a medical report of Kane as often as ever you please, so long as it is at your expense and not his."

Letter in reply, dated 11th July 1904.—"I do not argue that I had any right to object to your client going to Ireland, but I most certainly hold that if a workman in receipt of compensation does leave this country he must, if he wishes to retain his right to same, be prepared to return at his own expense when called upon to comply with the provisions of the statute."

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pensation Act, 1897. They offered without prejudice to pay compensation for the period from 4th to 18th June.

The complainers pleaded, *inter alia*;—(1) The said charge is inept in respect (*a*) that it bears to proceed upon a recorded memorandum of agreement which has not been binding on the complainers since 18th June 1904; and (*b*) that the respondent's right to compensation has been suspended since 18th June 1904.

The respondent pleaded, *inter alia*;—(2) The respondent not having refused to submit himself to medical examination, and not having obstructed the same, the complainers were not entitled to suspend the weekly payments of compensation due to him.

On 4th January 1905 the Lord Ordinary (Kincairney), after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Finds (1) that on 17th October 1903 the respondent was injured in the course of his employment with the complainers; (2) that the parties agreed that 10s. 8d. was the amount of weekly compensation payable to the respondent by the complainers under the Workmen's Compensation Act; (3) that the respondent registered a memorandum of the said agreement; (4) that on the requisition of the complainers the respondent was examined by a medical practitioner provided by the complainers on 16th December 1903 and on 24th March 1904, when the medical practitioner reported that the respondent had not fully recovered; (5) that at or about the date last mentioned the respondent went to Ireland, where he has since resided with his father; (6) that on 13th June 1904 the complainers required him again to submit to examination at Glasgow by the medical man selected by the complainers; (7) that the complainers have not offered to pay to the respondent the expense of travelling to Glasgow in order to submit to said examination; (8) that the respondent has not submitted to the medical examination required by the complainers; (9) that he was not bound to do so without a tender of such expenses, and that he has not incurred the penalty imposed by the statute: Finds the charge orderly proceeded: Dismiss the suspension, and decerns."*

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* "OPINION.—This case raises a question of some importance under the Workmen's Compensation Act, and involves a consideration of the 11th section of the First Schedule, which has been differently construed by the two Divisions of the Court in recent cases—in *Davidson* v. *Summerlee and Mossend Iron and Steel Company, Limited*, 24th June 1903, 5 F. 991, pronounced in the Second Division; and in *Niddrie and Benhar Coal Company, Limited*, v. *Mackay*, 14th July 1903, 5 F. 1121, and *Strannigan* v. *Baird & Company*, 7th June 1904, 6 F. 784—both decided in the First Division. These cases refer chiefly to the meaning of the provision in the 11th section of the First Schedule in regard to the right conferred on a workman who has been injured to submit himself for examination to a medical practitioner appointed for the purposes of the Act, and the consequences to the workman if he does not do so. Generally speaking, the difference between the judgments of the two Divisions may be said to consist in this. The Second Division held that the provision was obligatory on the workman, and that his failure to comply with it involved the suspension of his right to weekly payments until that examination had taken place, holding that the words 'such examination' at the close of the section refer to, or include a reference to the examination by the medical practitioners appointed under the Act; whereas in the First Division it was held that the provision was not obligatory but optional only, and that no such

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The complainers reclaimed, and argued;—The respondent had obstructed the medical examination, and his right to compensation was consequently suspended. He must either submit himself to the medical practitioner selected by the employers, or, if he for any reason objected to an examination by the practitioner so selected, he must submit himself to one of the medical practitioners appointed under the Act.[1] If it was necessary the complainers here were prepared to maintain that the reasonableness of the demands of the parties respectively did not enter into the question, the statute having provided a remedy against unreasonableness on either part, viz., on the one hand a right to the workman to substitute an official medical practitioner for one selected by the employer, and on the other hand a right to the employer to suspend the payments if the workman did not submit himself either to the employer's medical practitioner or to an official one. But it was not necessary to put the complainers'

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consequence followed if the workman did not avail himself of the option. Their Lordships held that the words 'such examination' refer only to examinations required by the employers by the medical practitioner provided and paid by them. In the Second Division Lord Young dissented and expressed an opinion in accordance with that afterwards adopted by the First Division. In the case of the *Niddrie and Benhar Coal Company, Limited*, in the First Division, the judgment in the case of *Davidson* was doubted, but in the case of *Strannigan* it was expressly dissented from.

"In the case of *Neagle* v. *Nixon's Navigation Company, Limited*, 13th January 1904, 1 K. B. 339, a judgment was pronounced in the Court of Appeal, in which the opinion of Lord Young in the case of *Davidson* and the judgment of the First Division in the case of *Niddrie and Benhar Coal Company* were expressly adopted. In that state of the authorities I think it would be proper to follow the later judgments on these points so far as they fall to be considered in this case, even if I did not, as I do, assent to and concur in them.

"There are, however, peculiarities in this case which differentiate it from these cases. The special features of this case seem to be these: First, the workman Kane, the respondent, registered a memorandum of the agreement as to his remuneration, as provided by section 8 of the Second Schedule of the Act, and charged upon the extract of it, and the case was brought into the Court by a suspension of the charge by the employers instead of by a stated case. Secondly, the injured workman was thrice requested to submit to examination, and he complied with the first two requisitions—he being then resident in Scotland—and submitted twice to examination by the medical practitioner named by the employers; but he has not complied with the third requisition, on the ground that he is now resident in Ireland and cannot afford the expense of coming to Scotland to be examined by the employers' medical practitioner. Here, as in the cases cited, the workman has not, as he was entitled to do, exercised the option of submitting himself for examination to an official medical practitioner—although I take it for granted he could have found an official practitioner conveniently accessible in Ireland. I understand that the respondent offers to come to Glasgow at the complainers' expense, or else to submit to examination by a practitioner accessible to him in Ireland selected by the complainers.

"The complainers have contended that the workman, by failing to submit himself to examination by a statutory practitioner, incurred the penalty

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[1] Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule, section 11; Niddrie and Benhar Coal Co., Limited, v. M'Kay, July 14, 1903, 5 F. 1121; Strannigan v. Baird & Co., Limited, June 7, 1904, 6 F. 784.

case so high. Their conduct here had been quite reasonable; and it was unreasonable for the workman on the eve of convalescence to go to Ireland, far away from the scene of the accident, unless he was willing to come back for examination when required. If the workman was physically able to do so, he was bound to go to the medical practitioner, and the employer was not bound to send the medical practitioner to him. The rules as to medical referees[1] shewed that this was the true interpretation of the statutory provisions on the subject.

Counsel for the respondent were not called upon.

LORD ADAM.—This is a suspension brought by William Baird & Company, Limited, who were the employers of the respondent. The facts which raise the question are not in dispute. They are set forth in the Lord

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of the suspension of his right to weekly payments, as provided at the close of section 11 of the First Schedule. For this contention their authority is the case of *Davidson*, and their argument would be conclusive if that judgment were followed. But I am of opinion that that judgment has been overruled by the cases of *Niddrie* and *Strannigan*, supported by the English case of *Neagle;* and that, following these decisions, I must hold the respondent did not incur the statutory penalty merely because he has not exercised the option of applying to the medical referee.

"But it is argued that in these cases there was no refusal by the workman to submit himself for examination by the medical man selected by the employer. In these cases the workman had in fact submitted to the examination required. In this case also the workman has submitted twice to the examination of the medical practitioner provided and employed by the employers. But then the employers have required him to submit to such examination a third time, as, if their demand was reasonable, they were entitled to do, the Act providing that the workman shall submit to examination 'from time to time' if so required by his employers; and he seems to be under the same obligation to comply with the last of such requisitions as with the first, and the statutory consequences of refusal must be the same in the one case as in the other, and that consequence is undoubtedly suspension of payments until the examination takes place.

"If Kane had continued to reside in Glasgow, and had failed to submit to examination by the employers' medical man, there can be no doubt that the complainers would have been entitled to judgment; so that the question comes to be simply this—whether, having in view the circumstances of the case, the workman can be held to have refused, within the meaning of the section, to submit himself for examination by the practitioner provided by the employers. That depends on whether the requisition made by the complainers was a requisition which in the special circumstances they were entitled to insist on.

"The workman has provided himself with a registered memorandum, which certainly provides him with a *prima facie* right to the compensation agreed to, and it falls on the employers to shew why that compensation should not be paid. The employers are, it is true, authorised to require the workman to submit himself for examination. It does not follow that they are entitled to require him to go to the medical practitioner. In many cases of accident that would be impossible for the workman, often disabled by the accident, to comply with; or it would be unreasonable to ask him

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[1] Statutory Rules and Orders, 1898, No. 407, Master and Servant (Scotland) Workmen's Compensation Act, 1897, Regulations as to Medical Referees, section 4, and Schedule (Form B).

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Ordinary's interlocutor. (His Lordship stated the facts, and read portions of the letters dated 7th and 11th July 1904, which are quoted *supra*.) These letters shew the positions taken up by the complainers on the one side and the respondent on the other, and the question is which of these positions is the reasonable one. The complainers justify themselves under the 11th section of the 1st Schedule to the Workmen's Compensation Act, 1897. (His Lordship read the section.)

Under the Act the obligation of the workman is confined to submitting himself to examination by the employer's doctor, and the question upon the construction of the Act is whether Kane refused to submit himself for examination, or obstructed the examination. It is to be observed that while it is the employer's right to select his own medical man, there is an obligation upon him to provide and pay the medical man so selected. This

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to do so if involving much suffering or danger of aggravating his injury. In such cases the employer might be under the necessity of sending his medical practitioner to the workman; and if he did not do so, but required the workman to go to the practitioner, it would be a question depending on the special circumstances whether the workman's non-compliance would amount to a refusal to submit himself for examination in the sense of the statute. That case is provided for in the Statutory Rules and Orders of 1898; but these do not seem to apply directly to the present case; but they assume the employers' liability in the circumstances to which they refer to send a medical practitioner to the workman where that is reasonable. In each case the question, I apprehend, would be what was reasonable.

"If the workman lived, say, in the neighbourhood of Glasgow, but at some distance, I am not prepared to say that there might not be exceptional circumstances in which it might be held more reasonable to send the medical practitioner to him than to insist on the workman coming to Glasgow, or else to pay his expenses. I do not see that any absolute rule can be laid down.

"In this case the workman has gone to Ireland, not, as I understand, illegitimately, or with the object of evading medical examination—that is not stated—but simply, he says, because of his poverty. All the length the complainers go is to say, that he went to Ireland unnecessarily. Now, I do not think it would be reasonable to incur the expense of an inquiry on this point. The question can be settled more economically. The employers may, if they choose, employ a medical practitioner in Ireland within reasonable distance of the workman's residence, or they may pay the workman the expense of a visit to Glasgow and back. These are the employers' remedies. On the other hand, the workman has a remedy which is in some respects still cheaper. He may submit himself for examination to the nearest medical practitioner appointed under the Act. But then the Act does not require him to do that; and, if he does it, that carries the consequence that the certificate of the practitioner is final. I do not see that I can either add to the Act a prohibition of the workman to leave the neighbourhood so long as his injury continues, or convert the option which the statute gives him to apply to the medical referee into what would be practically an obligation to do so. I incline to think that in the circumstances the employers must provide and pay for a medical practitioner to whom the workman may have reasonable access without unreasonable expense.

"It is averred that the workman promised to return. But it is not averred that he promised to return at his own expense, and he is willing to return at his employers' cost; besides, I fail to see that the statutory

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appears to me to indicate an obligation upon the employer to select a medical man within a reasonable distance of the workman who is to be examined. There may be a question, but I do not think it arises in this case, as to what is meant by the words "submit himself." Is it enough for the workman when called upon to say "I am quite ready to submit myself for examination if you send your medical man to me at any reasonable time you choose"? That is one view of the meaning of the words, and if it is correct the workman here has never refused to "submit himself," for he has offered to submit himself for examination, as often as the employer likes, to anybody he chooses to send. The question would then be, if it were necessary to decide it here, whether the employer had complied sufficiently with the statute, and whether he was not only to select and pay a medical man, but to send him to the residence of the workman who was to be examined. I see nothing in the Act to shew that any duty is laid on the workman to go any distance—it may be a mile, or five miles, or, as in this case, two hundred miles—to be examined. But it is not necessary to decide that question. It is enough to consider whether what the employers did here was reasonable. The workman was entitled to go to Ireland, and he was entitled to say to the employer, "If you wish to have me examined you must select a medical man who is within my reach." There are plenty of qualified medical men in Ireland, and if the employer had chosen to select a medical man within this workman's reach, there is no doubt he would have gone and submitted himself to examination. Many cases might be put by way of illustration. One was suggested by Lord M'Laren. Suppose a man was injured in Scotland, and the employer wished that he should submit himself for examination by a London specialist. Would it be reasonable to demand that the workman should travel to London at his own expense? I think it would not. I think if the workman declined to do so he would not be refusing to submit himself to examination or obstructing examination in the sense of the Act. Has the workman done anything more unreasonable here? Having gone to Ireland to reside with his father, as he was entitled to do, he refused to come to Glasgow for examination at his own expense. I think he was not under any obligation to do so. No doubt the selection of the medical man lies with the employer.

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penalty would be incurred by the workman's failure to keep his promise. It is only imposed for failure to fulfil a statutory duty; so that I do not think that this averment is important or must be sent to proof.

"A case called *Finnie and Son* v. *Duncan* [*supra*, p. 254] was quoted, decided on 13th December last. It had not appeared in any of the Reports, but through the courtesy of the reporters I was furnished with a note of the opinions of the Judges. I thought it, however, better to delay my judgment until the case was reported. It will be found now reported on p. 557 of the current volume (12 Scots Law Times). In that case the workman had gone to Australia without leaving his address, and neither his wife, whom he had left in Scotland, nor his former agents could discover it. In these circumstances the Court, under section 11, suspended the weekly payments, because he had made it impossible for the employer to avail himself of the machinery of the Act, and had obstructed the Act. But in this case there is no such impossibility, only some increase of difficulty and expense.

"I am, on the whole, of opinion that the case of *Finnie* does not apply, and that the respondent is entitled to judgment."

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But it is his duty to select one within reasonable reach of the man to be examined. If he does that, and the workman refuses to go, say two miles, to be examined by the medical practitioner, and says, "You must send your doctor to me," then a question of some difficulty might arise. But that is not the kind of case we have here. The employers have demanded that the workman should come from Ireland at his own expense, some 200 miles to Glasgow, to be examined by a medical man there who has been selected by them. I think that demand was not reasonable. The workman said he would come to Glasgow for examination if the employers would pay his expenses. That was quite reasonable.

On the facts of the case, and the construction of the Act, I think the Lord Ordinary was right, and that we should adhere to his interlocutor.

LORD M'LAREN.—I am of opinion with the Lord Ordinary and your Lordship. There are cases where we have found the clauses of the Workmen's Compensation Act somewhat obscure and difficult of interpretation, but in the present case I think the language is well chosen and admits of only one construction. Every word of the clause which has been the subject of criticism points to the result at which the Lord Ordinary has arrived. I would observe that under the 11th section it is contemplated that the workman and the medical practitioner selected by the employer shall be brought together,—because it is only by a personal examination that a useful medical report can be given. While that is the contemplation of the Act, the duty laid on the workman is merely passive—he has to submit to such examination, while the duty laid on the employer is active—he has to provide and to pay the medical practitioner by whom the examination is to be conducted. That is a broad distinction which seems sufficient in itself to decide this case. But further I notice that not only is the practitioner to be provided by the employer, which according to the ordinary use of language would mean that he is to be brought to the spot and put into the position of making an examination, but he is to be paid by the employer, and I think that word was designedly selected so as to include not only the medical fee which in all cases would be required but also travelling or other expenses in case the employer thought that for his own advantage, or in the interests of justice, it was desirable to obtain the opinion of a medical expert from a distance.

Then the question is, whether this workman, who had gone to Ireland—legitimately as the Lord Ordinary has found—because he was unable to work and had been invited to go and reside with his father—the question is whether this man, who had gone to Ireland, not for any purpose of obstructing medical examination, but for a lawful purpose, can be required to travel to Glasgow in order to be examined by a medical expert selected by his employer. I cannot think that the direction to submit to examination can include an obligation to make a long journey to a place selected by the employer, a journey which in many cases of injury to person could not be undertaken without possible risk to health, to say nothing of the expense, which is always an important consideration to a disabled and impoverished workman. There must be cases where it is difficult to satisfy both parties in making a selection of an examining medical practitioner—a gentleman

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whose report would have the concurrence of both parties; and this is provided for by an examination by a medical referee selected by a public authority. But in the present case the parties do not differ upon any question as to the suitability of the medical practitioner. The respondent is quite willing to submit himself to examination by a doctor selected by the employer, if the employer will either appoint a doctor in Ireland, or pay the workman's expenses of going to Glasgow to be examined, and therefore I cannot hold that there has been any obstruction to an examination—any more than that there was a refusal to submit himself. I would only add this, that while under the obligation to provide and pay for medical examination, I think the duty is put upon the employer of bringing the medical practitioner to the place if he is not resident in the vicinity of the workman's home, this must always be construed with regard to professional usage and etiquette. If, for example, a statute directed the person to submit himself to examination upon the facts of the case by a legal commissioner appointed by the Court or the Sheriff, I should hold that it was the duty of the workman, if health permitted, to attend on the commissioner, because it is the usage of the profession that a party who is to be examined always goes to the judicial authority. If the injury is not of a disabling kind, if it does not prevent the man walking to the doctor's residence, then I think he must do what all other patients do, go to the doctor if able to do so, though doctors are always willing, if there is the slightest need for it, to attend at the house of the patient. But where the doctor is at a distance, then I think the case is different, because I could not stretch the code of medical practice further than that a man may be required to attend at the medical practitioner's house where he is a resident practitioner. But that does not imply any duty on the part of the workman to travel at his own expense in order to be examined by a medical practitioner at a distance from the place where he is residing.

Lord Kinnear.—I quite agree with your Lordships and the Lord Ordinary. My only doubt is whether it might not be sufficient to substitute for the somewhat numerous findings of the Lord Ordinary the respondent's own way of putting his case, which I think is perfectly satisfactory, as it is embodied in the second plea in law. The ground of judgment, in my opinion, is quite well stated there,—"The respondent not having refused to submit himself to medical examination, and not having obstructed the same, the complainers were not entitled to suspend the weekly payments of compensation due to him." I think that both of these two propositions in fact, which form the basis of the plea, are perfectly well made out, for the reasons your Lordships have already given. The respondent submitted twice to examination. So long as he was in the same place as the medical man, and the complainers desired to have him examined, he made no difficulty. He was called on to submit to examination on 16th December 1903. He was called on to do so again on 24th March 1904, and again submitted himself, and the only occasion on which he has declined to come to the doctor for examination is the occasion on which he was asked to come from Ireland to Glasgow, or to a place in Dumbartonshire, at his own expense in order to be examined by this medical practitioner. I agree that

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it was not reasonable to ask him to do so, and therefore the complainers have not satisfied the obligation laid on them by the statute in order to enforce his attendance which is that they have in a reasonable sense "provided" a doctor by whom he is to be examined. I think the distinction between the present case and the case of *Finnie* (*supra*, p. 254) is perfectly obvious, and it is quite rightly pointed out by the Lord Ordinary when he says that in *Finnie's* case the man had gone to Australia without leaving his address with anybody, leaving his wife at home, and neither his wife nor his former law-agents were able to find out where the man had gone to. That was held to be an obstruction to the operation of the statute, because it was impossible to find out the man and make any provision for examination. But in the present case there would not have been the slightest difficulty in the employer discovering a qualified practitioner where the workman was living, or if they could not find a qualified practitioner at the place where he was living, they could have found one within a reasonable distance. I think that in asking the respondent to come from Ireland to Glasgow at his own expense the employers were making an unreasonable demand.

THE COURT adhered.

W. & J. BURNESS, W.S.—BALFOUR & MANSON, S.S.C.—Agents.

No. 83.
Jan. 31, 1905.
Griffith's Judicial Factor v. Griffith's Executors.

WILLIAM YAIR CHRYSTAL (Griffith's Judicial Factor), Pursuer and Real Raiser (Respondent).—*J. A. Christie.*
JOHN HENRY BRATHWAITE AND ANOTHER (Griffith's Executors), Claimants (Reclaimers).—*Campbell, K.C.—Munro.*
THE LORD ADVOCATE, Claimant (Respondent).—*Sol.-Gen. Dundas—C. N. Johnston, K.C.—Howden.*

*Succession—Testament—Construction—Will made in Foreign Country—"Effects."*—A native of British Guiana who had been resident in Scotland for some years died in 1903 possessed of heritage in Scotland, leaving a will which had been executed in British Guiana in 1891. The will bore that the testator was about to leave the colony, and that in order to prevent disputes arising after his demise "as to the disposition of my effects in or out of the colony. . . . I now order as follows . . . I will and bequeath to . . . all my effects to be divided equally between the three . . ." The will concluded with a nomination of executors.

*Held* (1) that the question whether the will carried the Scottish heritage was a question for the Scottish Court; (2) that as the will was expressed in ordinary language, and as there was no relevant averment that it contained any technical term—or that it fell to be construed in accordance with any technical canon of construction—peculiar to the colony, it was not necessary for the Court to resort to any foreign Court for aid in its interpretation; and (3) that the will did not convey the testator's heritable estate in Scotland.

1ST DIVISION. LdStormonth-Darling.

WILLIAM MARTIN GRIFFITH, a native of British Guiana, died upon 9th July 1903. He left a will, dated 11th August 1891, which had been executed in British Guiana, and by which he appointed John Henry Brathwaite and M'Lean Ogle his executors.

Griffith, who was illegitimate, came to Scotland in 1891, and spent the remaining years of his life in Scotland. He died possessed of heritable property in Glasgow valued at £2000.

The following were the terms of the will:—

*"Last Will and Testament—Colony of British Guiana.* No. 83.

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"In the name of God. Amen.—Be it known that I, William Martin Griffith, residing in the city of Georgetown, county of Demerara, and Colony above named, being about to leave the Colony, and in order to prevent any doubts or disputes arising after my demise as to the disposition of my effects in and out of the Colony, do make, publish, and declare this to be my last will and testament, hereby expressly revoking all former wills and codicils, and I now order as follows, viz.:—

"(Firstly) I request that all my funeral expenses and just and lawful debts be paid as soon after my demise as possible.

"(Secondly) I will and bequeath to my brother, John Henry Brathwaite, my sister, Mary Rose Beete (born Lynch), and my unborn babe (mother Blanche Exepha Chapman), all my effects, to be divided equally between the three as soon as possible after my demise.

"In the event of the first (my brother) dying, his portion must go to his present wife and her heirs.

"In the event of the second (my sister) dying, her portion must go to her children; and in the event of my unborn babe dying, its portion must go to its mother, above named.

"(Thirdly) I nominate, constitute, and appoint John Henry Brathwaite and M'Lean Ogle as executors, with power of assumption, substitution, and surrogation."

On 29th August 1903, William Yair Chrystal, chartered accountant, Glasgow, was appointed judicial factor on the deceased's estate, and on 21st January 1904 he raised an action of multiplepoinding in which the fund *in medio* was the deceased's heritable property in Glasgow, and the rents thereof.

The Lord Advocate, as representing the Crown as *ultimus hæres*, claimed the whole fund *in medio*, and pleaded;—(1) The deceased William Martin Griffith having died leaving no heir intestate *quoad* his Scottish heritage, this claimant should be ranked and preferred in terms of his claim. (2) The succession to the deceased's Scottish heritage falling to be determined, and the deceased's will falling to be construed, according to the law of Scotland, and said will not being habile to convey said Scottish heritage, this claimant should be ranked and preferred in terms of his claim.

Brathwaite and Ogle, the deceased's executors, also claimed the whole fund *in medio*, and averred, *inter alia*,—(Cond. 2) "The domicile of the deceased William Martin Griffith at the date of his death was British Guiana. He was a native of that country, and, though in Scotland for some years prior to his death, he did not lose his domicile of origin or acquire a Scottish domicile." (Cond. 3) "The will of the said William Martin Griffith is effectual to carry heritage in Scotland. It is effectual to dispose of real estate in British Guiana, where it was made. The document falls to be construed according to the law of British Guiana. The said will purports to dispose of the testator's whole 'effects in and out of the Colony' of British Guiana. According to the law of the said Colony the term 'effects' includes the whole estate, whether real or personal, and wheresoever situated, belonging to the testator. By that law, the will validly disposes of the whole estate, heritable and moveable, which belonged to the deceased. The averments of the other claimant, in so far as not coinciding herewith, are denied."

They pleaded;—The will of the late William Martin Griffith

No. 83. being habile to dispose of heritage in Scotland, these claimants should be ranked and preferred in terms of their claim.

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On 17th June 1904 the Lord Ordinary (Stormonth-Darling) repelled the executors' claim, and ranked and preferred the Lord Advocate to the whole fund *in medio*.*

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* "OPINION.—The question here is whether a will executed by the deceased William Martin Griffith in British Guiana, and dated 11th August 1891, is habile to dispose of certain heritable property in Glasgow which belonged to him at his death on 9th July 1903. The will appointed two gentlemen as 'executors,' and purported to dispose of the testator's whole 'effects in and out of the colony' of British Guiana. He was a native of that colony, and he is said by his executors never to have lost his domicile of origin, although he left Guiana in 1891 and spent the last years of his life in Scotland.

"The fund *in medio* consists of his heritable estate in Glasgow, together with the accruing rents, and the competition is between the executors under the will and the Crown as *ultimus hæres*, Mr Griffith having been illegitimate. The executors maintain that the will ought to be construed according to the law of British Guiana, and that by that law the term 'effects' includes the whole estate, whether real or personal, and wheresoever situated, belonging to the testator. The Lord Advocate, on the other hand, maintains that the will falls to be construed according to the law of Scotland, as the law which regulates all questions affecting the succession to the testator's Scottish heritage.

"Now, the question whether a foreign will was intended to pass and does pass heritable estate in Scotland is, primarily at all events, a question of Scots law. This depends not only on a well-settled rule of international law, but upon section 20 of the Titles to Land Act of 1868, by which it was for the first time made possible to settle the succession to heritable subjects in Scotland by testament; for the first requirement of any such testament is that it shall 'purport to convey or bequeath' Scottish lands. Similarly, in a later part of the section, which substitutes for the old words of style in a conveyance of Scottish lands such words as would be sufficient to confer upon an executor a right to moveables, it is provided that the words must be used 'with reference to such lands.' If this be a question to be determined by the law of Scotland, there can be no doubt of the answer, for it has been twice decided (*Pitcairn*, 8 Macph. 604, and *Edmond*, 11 Macph. 348) that the word 'effects' is not sufficient to carry heritage.

"But then the executors maintain that the thing to be got at is the intention of a testator who made his will in a foreign country, and they offer to prove that by the law of that foreign country the term 'effects' would include the testator's whole estate of every description. They also point to the fact that the term 'effects' was followed by the words 'in and out of the colony,' which, they say, must have been intended to cover real estate, inasmuch as *mobilia situm non habent*. I am not sure whether this argument is used as strengthening the likelihood that the law of British Guiana would pronounce the will as habile to carry heritage, or whether it is urged as a reason why even a Scottish Court should declare it to have that effect. If it be used for the latter purpose, then I must decline to ascribe so important an effect to the words 'in and out of the colony.' While it may be true in a legal sense that personal estate has no locality, there is a popular and very real sense in which it has, and that is the sense in which the testator must be understood as having described his 'effects' as both in and out of the colony. I cannot imagine any testator who really wished to affect his real estate describing it in so obscure a fashion.

"*Studd* v. *Cook*, 10 R. (H. L.) 53, was the only case on which the executors were able to found as at all supporting the strange proposition that a

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The executors reclaimed, and argued;—The claimants were entitled to prove their averment, that by the law of British Guiana the will was effectual to dispose of heritage. The decisions on section 20 of the Titles to Land Consolidation Act, 1868, to which the Lord Ordinary attached so much weight, were not conclusive of the present question. The question here was, what did the testator intend to convey? To arrive at the testator's intention it was necessary to ascertain the interpretation of the words used in the will according to the law of British Guiana, because that was the system of law which was present to the testator's mind when his will was made.[1] A will made in the place of the testator's domicile must be interpreted according to the *lex domicilii*.[2] The rule applied both to moveable and immoveable property, unless it could be clearly shewn from the terms used in the will that the testator had in view the law of the place where the immoveable property was situated.[3] There was no such indication here. It was admitted that inquiry was necessary where the will was expressed in a foreign language; it was equally necessary where, as here, an established principle of construction by the foreign Court was averred.[4] After the inquiry had been made it would still be for the Court to construe the will.

Argued for the Lord Advocate, claimant and respondent;—The will was expressed in ordinary language, it contained no technical words, and there was no relevant averment of any technical rule of construction peculiar to the law of British Guiana. There was therefore no

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Scottish Court is not to decide for itself the question whether Scottish land is carried by a foreign will, but is to resort to the Courts of the country where the will was executed to determine that question, even although the words to be construed are simple English words, and not terms of art. But *Studd* v. *Cook* when properly examined affords no countenance to such a proposition. The will under construction in that case purported to convey Scottish lands in express terms about which there could be no dubiety, and the only purpose for which English law was invoked was to interpret certain technical words of English conveyancing in order that they might be translated into the nearest analogue afforded by the law of Scotland. That is all that Lord Watson really meant when he spoke (at p. 61) of the Legislature having intended that the intention of the testator should be 'gathered from the whole context of the will interpreted by the rules of English law.' Indeed, his Lordship treated the whole question as turning on the provisions of section 20 of the Titles to Land Act; and one of the curious results of the executors' argument would be that the construction of an Act relating to Scotland should be relegated to the Courts of a foreign country. I quite admit that if this will had been expressed in a foreign language, or had used technical words unintelligible in Scotland, it would have been competent and necessary to resort to the *lex loci actus* for their interpretation. But there are no such words in this will. The primary question is whether it 'purports to convey or bequeath lands' in Scotland, and that is a question for the Courts of Scotland, and for no other.

"I shall therefore sustain the claim of the Crown and repel the claim of the executors."

[1] Hamlyn & Co. v. Talisker Distillery, May 10, 1894, 21 R. (H. L.) 21.

[2] Story, Conflict of Laws (8th ed.), pp. 663-665, sec. 479a; Burge's Comms., vol. ii. pp. 857 and 858; Phillimore, International Law (3d ed.), vol. iv. pp. 711 and 712; Trotter v. Trotter, June 10, 1829, 3 W. and S. 407, at p. 415.

[3] Story, Conflict of Laws (8th ed.), p. 671, sec. 479h.

[4] Duchess Di Sora v. Phillips, 1863, 10 H. L. C. 624, at pp. 638 and 639.

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room for inquiry, and the will must be construed according to the law of Scotland.[1] It was admitted that "effects" could not carry heritage in Scotland, and there was nothing in the will to shew that heritage was in the testator's mind, *e.g.*, no power was given to sell, and the bequest was not to trustees, but to executors only.[2] The question whether heritage was carried by a will was ruled by the *lex situs*.[3] The passage in Story[4] relied on by the reclaimers was much too widely stated, and was not supported by the authorities cited.

At advising,—

LORD M'LAREN.—This case comes before us on a reclaiming note against an interlocutor of Lord Stormonth-Darling, and it relates to the disposal of the heritable estate in Scotland of the late William Martin Griffiths, who was a native of British Guiana, but had latterly resided for some time in Scotland. He left a will, executed in British Guiana, the subject of the argument here, by which he appointed executors, but it was found advisable to appoint a judicial factor for the administration of the executry estate, and he has raised this action of multiplepoinding. The claimants are the executors appointed under the will, who claim the whole estate of the deceased, and the Lord Advocate, who appears for the Crown as *ultimus hæres* and claims the heritable estate in Scotland as not effectually disposed of by the terms of the will. It appears that Mr Griffiths was illegitimate, and failing lawful issue any estate undisposed of by him would fall to the Crown as *ultimus hæres*. The will itself is brief and clear in its terms, and is expressed in ordinary language. In it the testator sets forth that, being about to leave the Colony, he has made this will "in order to prevent any doubts or disputes arising after my demise as to the disposition of my effects in and out of the Colony." There is nothing in the will in the nature of a conveyance to executors, but I assume that this was not necessary. Then he proceeds to dispose of his "effects" to certain beneficiaries, and the will concludes with a clause of substitution in the event of the deaths of any of the beneficiaries, and a nomination of executors. I remark on the use of the word "effects" that it appears to have been deliberately chosen, for it is the only word employed both in the narrative clause and in the clause disposing of the testator's property; and what we have to consider is whether a will, expressed as this one is in ordinary language and purporting to devise "effects," is available as a disposition of heritable estate in Scotland. It was alleged for the executors that by the law of Guiana a will so expressed is a valid disposition of the whole estate, heritable and moveable, of the testator, and we were asked to ascertain the law of the Colony for the purpose of determining the meaning of the will. In considering the decisions relating to the effect of foreign law with respect to testamentary

[1] M'Laren, Wills and Succession, vol. i. p. 32; Duchess Di Sora v. Phillips, 1863, 10 H. L. C. 624, at p. 639; Thomson's Trustees v. Alexander, Dec. 18, 1857, 14 D. 217.

[2] Urquhart v. Dewar, June 13, 1879, 6 R. 1026; Campbell v. Campbell, Nov. 30, 1887, 15 R. 103; Grant v. Morren, Feb. 22, 1893, 20 R. 404.

[3] Gillespie, Bar's Private International Law (2d ed.), p. 830; Yeats v. Thomson, June 5, 1835, 1 S. and M'L. 795, at p. 837; Studd v. Cook, May 8, 1883, 10 R. (H. L.) 53.

[4] Story, Conflict of Laws (8th ed.), pp. 663-665 and 671, secs. 479a, 479h.

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bequests, it is necessary to keep in mind that this branch of law, like some others, must be considered historically, and note must be taken of the steps in the development of the principles that have come to be established. It is impossible to solve a question of this kind by referring only to the older decisions, or by quoting isolated expressions from the works of the text writers. The law as finally formulated may be taken to be in terms of the judgment in the case of the *Duchess Di Sora* v. *Phillips*,[1] and that exposition of it has been recognised as sound both in the House of Lords and in the Judicial Committee. It is to the effect that it is always for the Court of construction or administration to interpret a will expressed in ordinary language. If the will is not expressed altogether in ordinary language, then the Court may, if necessary, have a translation of the will, and may have evidence or an opinion explanatory of any terms of art in it, and of any rules of foreign law that may take effect upon it. With such assistance it is the function of the Court to construe the will for itself. The only point on which the parties are at variance is as to the meaning of the word "effects." Now, I am of opinion that, regarded as a question of intention, a will that disposes of a man's "effects" is not a disposition or devise of his heritable property. No one in correspondence or in conversation would ever describe landed property as "effects." No one who had bought a house would say, "I have purchased some effects in Princes Street." Now, in construing this will we have to follow no other rule than to give to the testator's words their ordinary meaning, and to interpret the will according to its grammatical significance and according to the ordinary use of the words employed. Therefore if the will is to be construed by this Court, I am of opinion that it is not expressed in terms which are effectual to operate as a conveyance of heritable property in Scotland.

We have, however, to consider whether there are any relevant averments as to the effect of foreign law, which would have to be ascertained before we could proceed to construe the will. It is to be noted that there is no averment that the word "effects" has, according to the jurisprudence of this British Colony, any technical meaning, nor is it said that there is any rule of law of the Colony which would have the effect of making a will which only purports to dispose of moveable estate effective to convey heritable estate in Scotland. As to the first of these I do not suppose that the word "effects" is a word of technical meaning under any system of law; but that point does not require to be considered, as there is not here any relevant averment to that effect. As to the second point, I do not think that in dealing with estate within the territory we are at liberty to give effect to a rule of foreign law so as to include within the provisions of a will more than appears on the face of it to be dealt with. The result of all the decisions is to the effect that, for the transference of heritage in this country, a foreign will, however clearly expressed, is not operative to prevent the *lex situs* from deciding whether heritable estate has or has not been validly conveyed. I do not find here any sufficiently definite averment that a will, which on the face of it is only valid to carry personalty in this country, is really by the operation of foreign law effectual as a conveyance of heri-

[1] 10 H. L. C. 624.

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tage. The averments are altogether too vague to entitle us to institute an inquiry for our guidance in construing this will, and it is contrary to settled practice to put the interpretation of a will affecting heritage in Scotland into the hands of a foreign expert, which is practically what we are asked to do in this case.

LORD KINNEAR.—I agree, and for the reasons given by Lord M'Laren. I think, indeed, that there was force in Mr Campbell's argument that the consideration to which the Lord Ordinary has attached so much weight—to wit, that it is for this Court to construe the Titles to Land Consolidation Act of 1868,—is not conclusive, because all that that statute requires is that in order to bequeath land words of bequest must be used in reference to such lands "which would, if used in a will or testament with reference to moveables, be sufficient" to convey such moveables, and therefore the consequence of the statute which it is said that it is for us alone to construe is simply that we must go on to construe the terms of a will executed in British Guiana. I therefore assent to the argument that the Conveyancing Act of 1868 is out of the way. I must also assent to the proposition which was stated by the reclaimers' counsel to the effect that where a will is executed in a foreign country by a person domiciled in that country, it must be interpreted according to the law of that country. It was so laid down by the Lord Chancellor in the case of *Trotter* v. *Trotter*,[1] and I think we must accept it as a general rule. But then also I consider, as was pointed out by Lord M'Laren, that when a will, which is written in ordinary language, contains no technical words, and is not subject to any technical rule of construction by the law of the place where it is made, the intention of the testator must be gathered from the instrument by the Judge of any Court conversant with the language in which the will is written. We cannot refuse to construe a will written in ordinary English language, or remit the question of its interpretation to a foreign Court or to foreign experts. It was decided in *Thomson's Trustees* v. *Alexander*[2] that as soon as it is ascertained that the will is written in ordinary language the Court must take the construction upon itself, and is not to defer to the opinion of foreign experts. It is true that in that case the Court first ascertained by reference to English counsel that there was no technical rule of English law to govern the interpretation of the will; but then every reference to foreign counsel or to an English Court necessarily involves a preliminary decision that there is matter which falls to be determined by foreign law, and is not capable of construction in this Court. This was clearly the case in *Trotter* v. *Trotter*,[1] on which the reclaimers' counsel relied. The question was as to the sufficiency of words of conveyance in an Indian will to carry real property in India, and Lord Cuninghame says, —"No one who looks at the case could doubt that the legal construction of Colonel Trotter's will was unintelligible to any but an English lawyer. It was as purely a technical question of English law as ever was submitted to a Court." I agree with Lord M'Laren that if there had been in this case any relevant averment of any technical rule of construction peculiar to the

[1] 3 W. and S. 407, at p. 415. [2] 14 D. 217.

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law of British Guiana, inquiry might have been necessary, but nothing of that kind is suggested. I cannot agree with the reclaimers' argument that the word "effects" has a technical meaning peculiar to the law of Scotland, or that any such technical meaning has been recognised by the decisions in this Court. The word is one of ordinary language, and has been construed in the decisions according to its ordinary meaning. I agree with the Lord Ordinary that this will is expressed in ordinary language, and that there is no relevant averment that it contains any technical terms, or that it must be construed in accordance with any technical canon of construction peculiar to the place where it was made. I think we are bound to construe the will according to its plain meaning, and so construing it I agree with the Lord Ordinary and Lord M'Laren.

LORD ADAM concurred.

THE COURT adhered.

ST CLAIR SWANSON & MANSON, W.S.—W. G. L. WINCHESTER, W.S.—Agents.

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TONI TYRES, LIMITED, AND ANOTHER, Complainers (Respondents).—*Salvesen, K.C.—Findlay.*
THE PALMER TYRE, LIMITED, Respondents (Reclaimers).—*Clyde, K.C.—Smith Clark.*

*Jurisdiction—Preventive Jurisdiction—Quasi-delict—Interdict—Wrong done by English Company in Scotland—Arrestment—Personal Service—Forum non conveniens.—Held* (*aff.* judgment of Lord Stormonth-Darling) (1) that the Court of Session has jurisdiction to interdict, at the instance of an English Company, the infringement in Scotland of a patent belonging to them by another English company, although no arrestments have been used to found jurisdiction and personal service has not been made on the respondents; and (2) (repelling plea of *forum non conveniens*) that the Court of Session was the appropriate *forum* in which to seek interdict against a continuance of the alleged wrong.

1ST DIVISION. LdStormonth-Darling.

TONI TYRES, LIMITED, incorporated under the Companies Acts, 1862 to 1900, and having its registered office at 212 Shaftesbury Avenue, London, and Francesco Toni, 56 Berners Street, London, presented a note of suspension and interdict against the Palmer Tyre, Limited, having its registered office at 15 Martineau Street, Birmingham, and carrying on business at Silvertown, London, and 8 Buchanan Street, Glasgow.

The prayer of the note craved the Court to interdict the respondents from manufacturing, selling, disposing, or using within Scotland any pneumatic tyres with wheel rims and means of attaching pneumatic tyres to wheel rims, made in accordance with the invention described in the specification filed relative to certain letters-patent, numbered 17,787, and dated 13th August 1903, and granted to the complainer Toni, and from infringing in any manner of way within Scotland the rights and privileges granted by said letters-patent.

The interdict originally craved extended to Great Britain and Ireland, but by an amendment made and allowed in the Procedure-roll, the interdict sought was limited to Scotland.

Interim interdict was of consent refused by the Lord Ordinary on the Bills upon the respondents undertaking to keep an account, and

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the note was passed under reservation of the respondents' plea against jurisdiction. Thereafter a record was made up and closed before Lord Stormonth-Darling.

The complainers, after setting forth the nature of their invention, averred (Stat. 2) that the respondents "were at the date of the presentation of the note exhibiting and offering for sale tyres with wheel rims and flanges of a similar description at a motor and cycle show being held in the Waverley Market, Edinburgh. They had a stall at that show with a large sign-board bearing the respondents' name. They had there a large supply of tyres and tyre attachments and other goods, and they solicited and took orders there for the sale thereof. They also distributed their catalogues at the show and throughout Scotland, and they offered for sale tyres and rims made according to the said flange attachment to many persons at the show and also throughout Scotland, by correspondence and otherwise. . . . The respondents carry on business at 8 Buchanan Street, Glasgow. Their name is on a brass plate at the side of the entrance door. They keep a stock of Palmer tyres and other goods there for sale. Orders sent to them there are executed by them, and invoices are sent out to the purchasers in name of the respondents. They announce in their trade catalogues that they have a branch depot there, and also a registered telegraphic address, viz., 'Silvergray, Glasgow,' and that they are on the telephone in Glasgow at that address. They are entered in the Glasgow Post-Office Directory, with their sanction, as having a warehouse there. In point of fact, they are on the telephone in Glasgow, and have a postal, telegraphic, and telephonic address at 8 Buchanan Street there. The note of suspension and interdict was served on the respondents there, and also at the registered office of the Company, and a copy sent to their known agents."

The respondents in their answers denied that they had infringed the complainers' letters-patent, and averred;—(Ans. 2) " . . . The respondents have no office or place of business in Scotland, and are not subject to the jurisdiction of the Courts of Scotland. In particular, they have no office or place of business at 8 Buchanan Street, Glasgow, where the pretended intimation or service of the present note of suspension and interdict was made. In any event, the Courts of Scotland are not a convenient *forum* for adjudicating upon the subject-matter of the present action. The complainers and respondents are both English companies, and are both subject to the jurisdiction of the English Courts, in which the respondents are ready and willing to answer any writ or action which the complainers may bring against them with reference to the subject-matter of the present process. Further, all, or nearly all, the necessary witnesses and the whole documents, plans, models, &c., relative to the case are in England, the Courts of which country accordingly afford the most convenient *forum* for the adjudication of all questions arising under the present action."

The complainers pleaded, *inter alia*;—1. The respondents are subject to the jurisdiction of the Court in respect that—(1) At the date of presentation of the note, they were carrying on business in Scotland, and had a warehouse, branch depot, postal, telegraphic, and telephonic address, at 8 Buchanan Street, Glasgow. (2) At said date, they were offering for sale, at a stall in the exhibition in Edinburgh, tyres and attachments made in contravention of the com-

plainers' patent, and by the circulation of their trade catalogues, and by correspondence, they were offering such for sale in Scotland generally. (3) The Court in Scotland is the proper Court to grant interdict within Scotland against the continuance of the wrongdoing complained of.

The respondents pleaded, *inter alia*;—1. The Court has no jurisdiction over the respondents. 2. *Forum non conveniens.* 3. The interdict craved should be refused, in respect that the alleged letters-patent founded on are, and have from the date thereof been null and void and invalid, in respect—(*a*) that the alleged inventor was not the true and first inventor of the alleged inventions; (*b*) that the said alleged inventions were published and publicly known prior to the date of the said alleged letters-patent; and (*c*) that the specifications do not distinguish between what was published and publicly known prior to their dates, and what was new, if anything. 4. The respondents not having infringed the alleged letters-patent founded on by the complainers, interdict should be refused.

On 15th November 1904 the Lord Ordinary (Stormonth-Darling) repelled the first and second pleas in law for the respondents, and allowed the parties a proof of their averments.*

The respondents reclaimed, and argued;—(1) *On the plea of no jurisdiction.*—The respondents were not subject to the jurisdiction of the Court. They were an English Company, and had no place of business in Scotland. The averment that they carried on business in Scotland was not enough.[1] In order to found jurisdiction against a foreigner in Scotland either arrestment or personal service was neces-

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* "OPINION.—The averment that the respondents are subject to the jurisdiction of this Court in respect of their having a place of business in Scotland is certainly rather bare. At the same time, in a proceeding of this kind it is probably sufficient, for I read it as meaning that the respondents have a right to the possession of heritage in Scotland. If that had been the only ground of jurisdiction averred, I should at present have limited the proof to the question of jurisdiction. As it is, I am not prepared to restrict the proof in that way, if the complainers are ready to amend their prayer so as to limit the scope of the interdict craved to Scotland. The remedy sought is purely preventive. It is not petitory or declaratory. It is directed purely to prevent the respondents repeating a delict or quasi-delict, which the complainer says the respondents have in the past committed in Scotland. In an action *ratione delicti*, for the purpose of preventing the repetition of a delict, I cannot doubt that the Courts of the territory have jurisdiction over a foreigner, though he be not found within the territory. It is necessary he should be so found when the ground of the action is founded on contract, but not when the ground is a delict or quasi-delict, and the remedy asked is purely preventive. *Waygood's* (12 R. 651) case is authority for that, and it is not inconsistent with the other judgments cited, such as *Kermick* v. *Watson* (9 Macph. 984), where the quasi-delict was a slander, and where the jurisdiction of the Sheriff would not have been sustained if the defender had not been served within the county, for the jurisdiction of the Sheriff over foreigners on this ground never extends to the case where the foreigner is not cited within the sheriffdom. The cases are therefore not inconsistent, and the principles of international law are in favour of allowing jurisdiction though there has been no personal service within the country."

[1] Laidlaw v. Provident Plate Glass Insurance Co., Limited, Feb. 28, 1890, 17 R. 544.

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sary.[1] In the case of *Waygood* v. *Bennie*,[2] which was relied on by the complainers, leave had been given by the English Courts to serve the writ in Scotland, and the service was therefore statutory. The real question at issue here was the validity of the patent, and in order to try that question in the Court of Session, it was necessary to found jurisdiction against a foreigner in the ordinary way. It was not disputed that there was a preventive jurisdiction in the Bill-Chamber to prevent the continuance of a quasi-delict, but that jurisdiction was confined to the Bill-Chamber and could not be extended to the Court of Session, otherwise the ordinary rules as to the founding of jurisdiction in the Court of Session could be evaded in any action where interdict was a competent proceeding. The preventive jurisdiction of the Bill-Chamber gave a summary remedy against a wrong done in Scotland irrespective of the domicile of the wrongdoer, but this summary process was quite inappropriate for determining questions of right. As a matter of fact even if interdict were granted in this case it could not be enforced, because, in a petition and complaint for breach of interdict, personal service on the respondent was necessary. The mere fact of passing the note did not confer jurisdiction on the Court of Session to deal with the question of right.[3] (2) *On the plea of forum non conveniens.*—The Court in England was the appropriate *forum* in which to try the question in dispute. The parties were both resident in England. Evidence as to the validity of the patent could be more conveniently obtained in England, and evidence of infringement was equally available there. The patent was a British one, and an injunction obtained in England would be effective over the whole area to which the patent applied. An interdict or injunction was not necessarily limited to the country in which it was obtained, though its enforcement outside the jurisdiction might be a matter of difficulty.[4] The case should be dismissed or sisted to allow of an action being brought in England.[5]

Argued for the complainers;—(1) *On the plea of no jurisdiction.*—The Court had jurisdiction to prevent wrong being done by foreigners to foreigners in Scotland. The rule with regard to personal service applied only to cases of contract. The cases quoted on the other side made this clear. This was a case of quasi-delict, and personal service was not necessary in order to get a purely preventive remedy against a continuance of the wrong.[6] Personal service could not be made upon a limited company. Service had been made at the registered office of the Company in England, and at their office in Glasgow, and this was the only way in which service could be made. The interdict sought could be enforced otherwise than by imprison-

[1] Sinclair v. Smith, July 17, 1860, 22 D. 1475; Longworth v. Hope, &c., July 1, 1865, 3 Macph. 1049; Kermick v. Watson, July 7, 1871, 9 Macph. 984; Parnell v. Walter, Feb. 5, 1889, 16 R. 917; Maxwell v. Horwood's Trustees, Jan. 30, 1902, 4 F. 489.

[2] Feb. 17, 1885, 12 R. 651.

[3] A. S. Dec. 24, 1838 (Bill-Chamber Proceedings).

[4] Young v. Barclay, May 27, 1846, 8 D. 774; California Redwood Co. v. Merchant Banking Co. of London, July 20, 1886, 13 R. 1202.

[5] Tulloch v. Williams, March 6, 1846, 8 D. 657; Williamson v. North-Eastern Railway Co., Feb. 28, 1884, 11 R. 596; Marshall v. Marshall, 1888, L. R., 38 Ch. Div. 330.

[6] Waygood v. Bennie, Feb. 17, 1885, 12 R. 651.

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ment, *e.g.*, by an action for damages. There was no preventive jurisdiction in the Bill-Chamber as distinguished from the Court of Session. The complainer had to go through the Bill-Chamber if he wanted interim interdict, but the jurisdiction was the same whether it was exercised in the Bill-Chamber or the Court of Session. (2) *On the plea of forum non conveniens.*—The Court of Session was the appropriate *forum* in which to seek interdict against a wrong which was being done in Scotland. An injunction obtained in England could not be enforced in Scotland without a supplementary action. The respondent had not shewn that any injustice would result from the case being tried in Scotland.[1]

At advising,—

LORD ADAM.—This is a suspension brought at the instance of a firm called Toni Tyres, Limited, which is an English company having its office in London. The suspension is brought against another English company, The Palmer Tyre, Limited, having its registered office in Birmingham, and said to be carrying on business in London and in Buchanan Street, Glasgow. The prayer of the petition is that the complainers seek to have the respondents interdicted and prohibited during the continuance of certain letters-patent "from manufacturing, selling . . . any pneumatic tyres with wheel rims, and means of attaching pneumatic tyres to wheel rims, made in accordance with the invention described in the specification filed relatively to the letters-patent, and from directly or indirectly using . . . the invention in . . . Scotland"; so that it has to be observed that the effect of the interdict would be limited entirely to Scotland—it would not interfere with anything beyond Scotland. (His Lordship then stated the averments made in regard to the patent and infringement.)

Now, that is all they say in respect of the patent and the infringement. Then they go on to say that the respondents carry on business at 8 Buchanan Street, Glasgow, and have a place of business there. In answer to that there is no denial by the respondents that they did propose to sell these tyres in Scotland. They then set forth that their attachment differs from that of the other Company, but I need not go into that, for that is on the merits, and in particular they deny that they have a place of business in Glasgow, and then they say that "in any event, the Courts of Scotland are not a convenient *forum* for adjudicating upon the subject-matter of the present action. The complainers and respondents are both English companies, and are both subject to the jurisdiction of the English Courts, in which the respondents are ready and willing to answer any writ or action which the complainers may bring against them with reference to the subject-matter of the present process."

These are the averments and the counter averments set forth in this note of suspension, and upon these the respondents have two pleas in law. The first is that the Court has no jurisdiction over the respondents, and the second is that the Court of this country is not a *forum conveniens*. The Lord Ordinary by his interlocutor has repelled both these pleas, and allowed a proof, and the question is whether his Lordship's interlocutor is right.

Now, this question of jurisdiction was founded by the complainers upon

[1] Longworth v. Hope, July 1, 1865, 3 Macph. 1049.

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two grounds—the first being that the respondents had in point of law a place of business in Glasgow, and the second was that stated in the third subdivision of the first plea,—"The Court in Scotland is the proper Court to grant interdict within Scotland against the continuance of the wrong-doing complained of." These are the two pleas as to the jurisdiction. The Lord Ordinary in disposing of these pleas does not sustain the jurisdiction on the first, as to the place of business, because he says that, as a question of fact, that would need to be inquired into. But he says the third plea—the plea I have just read—is a sound plea, and has given effect to it. Now, it appears to me that the Lord Ordinary is right. If the complainers' statements are true—and we must assume them to be true at this stage of the case—a wrong has been done, and it being done in Scotland I think it would be singular if the Courts of Scotland had not jurisdiction to prevent that wrong being continued. I agree with the Lord Ordinary that there is no analogy between jurisdiction in cases of delict or quasi-delict and a case of contract. In this case the effect of the jurisdiction is confined entirely to Scotland. The alleged illegal acts are being done in Scotland, and the object of the suspension is to stop these illegal acts being done in Scotland. I accordingly agree with the Lord Ordinary when he says,—"The remedy sought is purely preventive; it is not petitory or declaratory. It is directed purely to prevent the respondents repeating a delict or quasi-delict which the complainers say the respondents have in the past committed in Scotland. In an action *ratione delicti* for the purpose of preventing the repetition of a delict, I cannot doubt that the Courts of the territory have jurisdiction over a foreigner, though he be not found within the territory." I entirely agree with that statement, and I think the Lord Ordinary has rightly sustained the plea of jurisdiction on the ground that he has done. Then as to the plea of *forum non conveniens*. If the Lord Ordinary is right in sustaining the jurisdiction, it humbly appears to me that the *forum* to which this application is made was not only a *forum conveniens*, but the only appropriate *forum* before which to bring it. On these grounds, I think the judgment of the Lord Ordinary should be adhered to.

Lord M'Laren.—It is a proposition recognised not only in our jurisprudence, but I think all over the world, that patent rights, rights to the exclusive privilege of working an invention, are in the fullest sense rights of property. They are capable of being transferred for valuable consideration or otherwise disposed of, just like any other incorporeal right of property. An infringement of a patent right is therefore an invasion of private property, and is, I think, rightly described in the Lord Ordinary's judgment as quasi-delict. Now, when an action is brought in this country alleging interference with the rights of property in a patent, and stating reasonable grounds for apprehending that such infringement will be continued, I think the Courts of this country have jurisdiction in regard to such an action—in other words, to exercise what is called preventive jurisdiction. The question is so elementary that I do not think it can be made clearer by argument or illustration, but our decision results from the general function of the Courts of every country to exercise their authority so that law and order may be maintained within the territory of the Court.

But further, it appears to me that in this case the Courts of Scotland are the only Courts that have power to prevent the continuance of this alleged illegal course of action, because no injunction or interdict granted by any other Court could be enforced in this country without a supplementary application to the Courts of this country, which would just be doing by a circuitous method what is now proposed, and I think rightly, to be done directly. I am therefore of opinion with your Lordship that the Lord Ordinary's judgment is right.

LORD LOW.—I have no doubt that when a delict or quasi-delict is committed in Scotland the Court has jurisdiction to protect the injured party.

Such jurisdiction, however, requires in the case of foreigners to be carefully exercised. It ought not, in my judgment, to be extended beyond the necessities of the particular case, and it ought to be invoked in an appropriate form of proceeding.

The respondents' counsel supposed the case of the complainers having, instead of bringing a note of suspension and interdict in the Bill-Chamber, raised an action in the Court of Session for declarator that their patent was valid, and for interdict against the respondents selling the protected article.

It may be (I express no opinion on this point) that the plea of no jurisdiction would have fallen to be sustained in such an action, because it would have been the appropriate form of action for having the general question of the complainers' rights as holders of the patent determined, and would not have been an appropriate proceeding if all that the complainers desired was to be protected against an alleged wrong which had been done to them in Scotland.

But for the latter purpose a note of suspension and interdict is a proper and recognised form of proceeding, and one in which the Court has a large discretion in regard to the extent of the remedy which ought to be given.

It may be, and often is, competent and expedient to determine in a note of suspension and interdict questions of right or of title which might properly be made the subject of an action of declarator. On the other hand, the Court may, and frequently does, refuse to do more in a note of suspension and interdict than make interim regulations until the question of right or title can be determined in an appropriate action.

Such a course might have been adopted in this very case if the circumstances had rendered it expedient or possible. For example, if it had appeared that either of the parties was about to raise proceedings in the English Courts to have the question of the validity of the patent tried, then I think that the present note might very well have been sisted to await the result of the English action, interim interdict being granted in the meantime, or an obligation taken from the respondents in such terms as would have kept the complainers free from loss in the event of their establishing that the patent was good.

But that is not at all the position of matters here. Neither party proposes to take proceedings in England, and neither party is bound to do so. The position taken up by the respondents is simply that because they are foreigners and jurisdiction has not been founded against them by arrestment or personal service in Scotland, the Scottish Courts cannot take cog-

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nisance of anything which they have done or may threaten to do in Scotland. The argument would have been equally applicable if the respondents had admitted both the validity of the patent and its infringement by them. But in that case it seems to me that it would be intolerable if the Court was impotent to prevent a repetition of the admitted wrong. The only difference, however, between that case and the present is that here the respondents say that the patent is not valid.

I do not think that it can be maintained that the jurisdiction of the Courts to give protection against an alleged wrong depends upon whether the wrong is admitted or denied.

Whether the plea that the patent is not valid is or is not well founded cannot be ascertained without investigation, but I imagine that the patent must be presumed to be good until the contrary is proved. I therefore do not see how any other course could be followed except that adopted by the Lord Ordinary. As I have indicated, if the main issue which had been raised had been the validity of the patent for any purpose and for any country which it embraces, the plea of no jurisdiction might have been sustained, even although the occasion of bringing the action had been an infringement of the patent in Scotland.

But the question raised in the present proceeding is confined to this—Whether the respondents have committed a wrong against the complainers in Scotland alone, and whether they are entitled to be protected against a repetition of that wrong in Scotland? I am of opinion that that is a question which this Court has necessarily jurisdiction to entertain and to dispose of, and that it is immaterial that, owing to the position taken up by the respondents, it is necessary in order to determine that question, to inquire incidentally whether or not the patent is valid.

In regard to the plea of *forum non conveniens*, I think that what I have said shews that it is in no way applicable to a case of this kind.

I am therefore of opinion that the Court should refuse the reclaiming note, and adhere to the interlocutor of the Lord Ordinary.

Lord Kinnear was absent.

The Court adhered.

Gill & Pringle, W.S.—J. & D. Smith Clark, W.S.—Agents.

No. 85.

Feb. 3, 1905.
Hepburn.

John Scrymgeour Hepburn, Petitioner.—*Morton.*

*Burgh—Burgh Register of Sasines—Town-clerk—Authentication of Minutes—Omission of former Town-clerk to authenticate Minutes—Public Records—Nobile Officium.*—Authority granted to the town-clerk of a royal burgh to authenticate and subscribe minutes in the minute-books of the Burgh Register of Sasines which had not been authenticated by his predecessors, and to record the petition and warrant in the Burgh Register of Sasines.

1st Division.

John Scrymgeour Hepburn, Town-clerk of the Royal Burgh of Rothesay, who had been appointed to that office on 7th December 1903, presented a petition, in which he stated,—"It is the duty of town-clerks of royal burghs, in which are kept Burgh Registers of Sasines, to register all deeds appropriate and presented for registration

in said Burgh Register, and to keep and authenticate minutes of such deeds in the Minute-books of the Register. No. 85.

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"On entering upon the duties of his office the petitioner discovered that the minute of a deed presented for registration on 19th March 1896, and all the minutes of deeds presented for registration between and including 1st April 1896 and 7th February 1901, and between and including 3d March 1902 and 10th March 1902, although entered in the Minute-books, had not been authenticated by the signature of the town-clerk of the burgh for the time being. The number of these deeds unauthenticated is 434."

The petitioner craved the Court "to authorise the petitioner to authenticate and subscribe the minutes entered in the Minute-books of the Burgh Register of Sasines of the Royal Burgh of Rothesay," on and between the dates mentioned, "and any other minute or minutes which may hereafter be discovered not to have been subscribed by the town-clerk for the time being, to the same effect as the said town-clerk for the time being might have done himself, and to authorise the petitioner to record this petition and any warrant following thereon in the said Burgh Register of Sasines."

THE COURT pronounced this interlocutor:—"Having considered the petition, and heard counsel for the petitioner, grant the prayer thereof, and decern."

SCOTT & GLOVER, W.S., Agents.

GLASGOW COAL COMPANY, LIMITED, Appellants.—*Wilson, K.C.—R. S. Horne.*
MRS MARGARET M'LEAN SNEDDON, Respondent.—*Watt, K.C.—A. Moncreiff.*

No. 86.

Feb. 14, 1905. Glasgow Coal Co., Limited, v. Sneddon.

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *subsec.* (2)—*Injury "attributable" to serious and wilful misconduct.*—A miner while riding on the top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, was killed by the fall of a stone from the roof of the tunnel in which the hutch was running.

*Held* that although the miner was guilty of serious and wilful misconduct his death was not "attributable" thereto in the sense of section 2, subsection 2, of the Workmen's Compensation Act, 1897, and that his widow was not barred from claiming compensation.

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897, Mrs Margaret M'Lean Sneddon, widow of John Miller Sneddon, miner, Cambuslang, on her own behoof, and as tutrix of her pupil children, claimed compensation under the Workmen's Compensation Act, 1897, from the Glasgow Coal Company, Limited, on account of the death of her husband.

The Sheriff-substitute at Hamilton (Thomson) having awarded compensation, the Glasgow Coal Company obtained a case for appeal.

The case set forth that the following facts were admitted or proved:—"(1) That on 4th May 1904 the said deceased John Miller Sneddon was a miner in respondents' Kenmuirhill Colliery, and a workman in terms of the Workmen's Compensation Act, 1897. (2) That on said date, at the close of their days' work, he and three other workmen, including the assistant oversman, got on top of a rake of loaded hutches drawn by a pony, for the purpose of being conveyed to the pit bottom on their way home. (3) That they had no permission from

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the manager to do so, and that in doing so they contravened Special Rule No. 72, which is in force in said pit, and is duly enforced in terms of the Coal Mines Regulation Act, 1887. (4) That they were thereby guilty of serious and wilful misconduct. (5) That as the hutches were being drawn to the pit bottom a large stone, about 15 feet in length and weighing several tons, fell from the roof, with the result that he was instantaneously killed. (6) That the roof of the roadway is about 5 feet above the pavement, and the top of the coal in the hutches was about 3 feet 9 inches above the pavement, and that there was plenty of room (30 inches on one side and 24 inches on the other) between the hutches and the walls for men to walk."

"In these circumstances I found that although by lying on the hutches the deceased contravened Special Rule No. 72, and was thus guilty of serious and wilful misconduct, his death was not 'attributable' to such misconduct, and that the accident arose out of and in the course of deceased's employment, and I awarded" compensation accordingly.

The question of law was—"Was the death of the said John Miller Sneddon, occurring as it did under the circumstances above set forth, 'attributable' within the meaning of the Act to his serious and wilful misconduct in contravening said Special Rule, so as to bar the claimants from recovering compensation under said Act in respect of his death?"[1]

Argued for the appellants;—There was here a question of law—the question as to what was included in the word "attributable." Every question as to the meaning or definition of a word in an Act of Parliament was a question of law.[2] The accident was attributable to the workman's misconduct. His presence in the hutch was as much a part of the cause of the accident as was the falling of the stone, for if he had not been in the hutch the accident would not have taken place; and as his presence in the hutch was an act of serious and wilful misconduct, the accident was attributable to his serious and wilful misconduct.

Argued for the respondent;—The question here stated was a question of fact, not a question of law, and therefore the Court ought not to answer it. If it was a question of law, the answer that ought to be given was, that the accident was not attributable to the serious and wilful misconduct of the deceased. There was no causal relation between his misconduct and the accident. On the facts stated the Sheriff-substitute had reached the right conclusion.[3]

LORD M'LAREN.—The case relates to an accident which occurred to a miner when he was on his way homewards in an underground passage of the mine. According to one of the rules, No. 72, which is in force in the pit, and which is found to be a lawful rule in terms of the Coal Mines Regulation Act, 1887, miners are prohibited from riding on the hutches employed for carrying coal along the underground passages. In this case

[1] The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 1, subsec. (2) (*c*), enacts:—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed."

[2] Dailly v. John Watson, Limited, June 19, 1900, 2 F. 1044; Condron v. Gavin Paul & Sons, Limited, Nov. 5, 1903, 6 F. 29.

[3] Logue v. Fullerton, Hodgart, & Barclay, June 20, 1901, 3 F. 1006.

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the miner, whose death resulted from the fall of a stone, was along with other miners riding on one of the hutches indisputably in contravention of the rule. While the "rake" of hutches was on its way a large stone fell from the roof and instantaneously killed the miner, whose family are now suing for compensation. The Sheriff has found as matter of fact that riding on the hutch was serious misconduct on the part of the workman—not simple misconduct but serious misconduct. I take it that this means that he was exposing either himself or his master's property to danger, and that this was not a trivial contravention of a rule. Then he comes to the conclusion that "although by lying on the hutches the deceased contravened Special Rule No. 72, and was thus guilty of serious and wilful misconduct, his death was not 'attributable' to such misconduct, and that the accident arose out of and in the course of deceased's employment."

I think the question whether the death of Sneddon was attributable within the meaning of the Act to his own misconduct is a proper question for the consideration of a Court of appeal. It has been held in both Divisions of this Court, and also in the English judicatories, that every question of the construction of a statute is a proper subject of appeal to the higher Court, and I think the question of law which the Sheriff here puts to us is neither more or less than this—What is included under the word "attributable"? I think that under that word there must be some causal relation between the misconduct of a workman and the injury which he suffers. It would not do to say that he was carrying a naked light on his person at the time when the stone came down, because although that would be a very serious act of misconduct in a mine where naked lights are not permitted, it has nothing to do with the accident or the consequent injury. It does not follow, however, that we are to interpret the word "attributable" as meaning that misconduct is the sole and only cause of the man's death or injury. It is enough that it is a material cause that in some way contributes to the unfortunate result. Therefore, I think that the question to be considered under the word "attributable" is very much the same as we have to consider in cases at common law where there is fault on the part of the employer or his servant, and the meaning is that the injury was either caused solely by the workman's own fault, or was contributed to materially by his act or fault.

Now, in this case the Sheriff has come to the conclusion that the fall of the roof was not attributable to the miner's contravention of the rule by mounting the waggon, and this is, or at least includes, a question of fact, because I can well believe that there might be cases where if a considerable number of men, for example, got into a train of empty hutches, and in the opinion of experts the total weight upon the train of hutches and the consequent vibration was the cause of dislodging loose stones in the roof at the moment when the train was passing, if that were proved or inferred from sound scientific and technical evidence, then the conclusion would be irresistible that the injury was attributable to the contravention of the rule. But then in the present case the Sheriff has found that the fall of stone and the consequent death of the workman were not attributable to his having mounted the waggon, and apparently his view is that the man might have met his death just the same if he had been walking behind the waggon

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instead of lying on the top of it. In the absence of scientific evidence to establish that additional weight put on this waggon was the cause of the stone coming down I am unable to differ from the Sheriff. I do not know that on the matter of fact it would have signified whether I differed or not, for we are only a Court of appeal as to matters of law, but so far as I understand the facts I think the Sheriff was perfectly justified in coming to the conclusion he did, and if he was of opinion that there was no connection between the falling of the stone that caused the accident and the men mounting on the hutch, I think he rightly decided that this was an accident in the course of the workman's employment, and for which his wife and children are entitled to compensation.

LORD KYLLACHY.—I entirely concur. As I read the case, the Sheriff has not found himself on the evidence able to affirm that the misconduct of the deceased was either the sole or a materially contributing cause of the accident. Upon the statement in the case I find myself in the same position; and therefore I am unable to hold that in the sense of the statute the deceased's death was "attributable" to his own misconduct.

LORD JUSTICE-CLERK.—I am of the same opinion, and have nothing to add.

THE COURT answered the question of law in the negative, and affirmed the award of the arbitrator.

W. & J. BURNESS, W.S.—SIMPSON & MARWICK, W.S.—Agents.

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London and Edinburgh Shipping Co. v. Brown.

LONDON AND EDINBURGH SHIPPING COMPANY, Appellants.—*Salvesen, K.C.—J. G. Jameson.*

MRS AGNES BROWN, Respondent.—*Younger—W. T. Watson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *subsec.* (1)—*Accident arising out of and in the course of the employment—"Accident"—Voluntary attempt to rescue fellow-workman.*—A steamship was moored to a quay in a dock discharging her cargo under a stevedore, who had contracted with her owners to unload her. The labourers in the employment of the stevedore were each appointed to work in connection with a particular hold of the vessel, either on board her or on the quay. A, who was employed on the quay to discharge cargo from the afterhold, and who did not require in the performance of his duty to go on board the vessel, on being informed that one of his fellow-workmen employed in the forehold was lying there in an unconscious condition owing to inhaling noxious gas, offered to attempt a rescue, and after a handkerchief had been tied round his mouth, was lowered into the forehold, where both he and the man he had attempted to rescue were suffocated by carbonic acid gas. A acted without instructions from his employer—the stevedore—who had gone for rescue appliances. A's mother brought a claim for compensation under the Workmen's Compensation Act, 1897, against the steamship owners as the undertakers in the sense of the Act.

*Held* that A met his death by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, sec. 1, subsec. (1), and that the respondents were liable in compensation to A's mother—*diss.* Lord Kyllachy, who was of opinion that A's death was not caused by an "accident."

*Expenses—Stated Case—Interlocutor—Construction—"Expenses of stated*

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*case"—Adjustment of case—Fee to counsel—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37).—The respondent in an appeal under the Workmen's Compensation Act, 1897, was found entitled to "the expenses of the stated case." The Auditor taxed off all the items charged in the respondent's account of expenses in connection with the adjustment of the stated case, amounting in all to £7, 7s. 2d.

The respondent having objected to the Auditor's report, the Court *held* (distinguishing *M'Govern* v. *Cooper & Company*, 4 F. 249), that "the expenses of the stated case" included the legitimate expenses in connection with the adjustment of the case, and *allowed* £2, 2s. of modified expenses under this head.

Fee to counsel for revising the case *disallowed*.

2D DIVISION.
Sheriff of the Lothians and Peebles.

MRS AGNES BROWN, widow, 5 Citadel, Leith, having claimed compensation under the Workmen's Compensation Act, 1897, from the London and Edinburgh Shipping Company, Leith, the matter was referred to the arbitration of one of the Sheriffs-substitute (Guy) at Edinburgh, who awarded compensation, and at the request of the London and Edinburgh Shipping Company stated a case for appeal.

The case set forth that the following facts were admitted or proved:—"On 6th May 1904, the steamship 'Fingal,' owned by the appellants, was moored at the quay adjoining the West Pier, Leith. On that date her cargo was being discharged by workmen in the employment of Peter M'Leod, stevedore, Leith, who was under contract with the appellants to discharge the cargo at an overhead rate per ton. The discharge was being carried out at three holds of the vessel,—namely, the forehold, mainhold, and afterhold,—by means of steam cranes on board the vessel. Certain of Peter M'Leod's employees were engaged on board the vessel, and certain of them on the quay, each man being appointed to work in or in connection with one of said holds. Peter Brown, who resided at 5 Citadel, Leith, was one of Peter M'Leod's employees engaged to work on the quay in connection with the discharge of the cargo from the afterhold. His duty was to remove the cargo, on its being put upon the quay, to the place appointed for it, and he did not require in the performance of such duty to go on board the vessel. In returning from the place where he had put part of the cargo, and while passing the forehold of the vessel, he was informed by another employee of Peter M'Leod, who was working on board the vessel in connection with the forehold, that a man was lying unconscious in the forehold. This man was David Preston, also in the employment of Peter M'Leod, and engaged in the work of discharging the forehold. Peter Brown, on receiving this information, did not return to his work on the quay at the afterhold, but immediately went on board the vessel by the forehold gangway, offered to descend into the forehold, and was lowered by means of the crane there situated, for the purpose of rescuing Preston. Prior to his being so lowered, a handkerchief was tied over his mouth to prevent, if possible, his inhaling any noxious gas. In so acting, Brown did not wait to receive instructions from his employer, who was absent from the forehatch at the time he was lowered into the hold, though his said employer had learned of Preston's being unconscious, and had himself gone in search of rescue appliances. The crane was used for lowering the said Peter Brown without the knowledge of the said Peter M'Leod. On being lowered into the hold, Brown also became unconscious, and before the two men could be rescued they died. Their death was occasioned by their

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inhaling carbonic acid gas that had been generated in the said forehold from a cargo of artificial manure."

The Sheriff-substitute found "that Peter Brown's employment was on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897; that the appellants were the undertakers within the meaning of said Act; and that said accident arose out of and in the course of the said Peter Brown's employment."

The questions of law were:—"(1) Whether the deceased's employment was on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897? and (2) Whether on the facts proved the accident arose out of and in the course of the deceased's employment?"

Argued for the appellants;—The accident did not arise out of and in the course of the employment of the deceased.[1] His employment was confined to the quay; it was not part of his duty to go on board the ship. He simply volunteered to rescue the other man, just as any bystander might have done. The fact that he was in the same employment as the man whom he tried to rescue made no difference. It might have been otherwise had the two men been working on the same job, and one of them on the impulse of the moment had attempted to rescue the other; but the claimant's son was not working on the same job as the other man, for the claimant's son belonged to a quay gang and the other man to a gang on board the ship, and the claimant's son deliberately undertook and set about the work of rescue. It was said that he acted in the interest of his master in attempting this rescue. It was not stated as a fact that he acted in the interest of his master; on the other hand it was stated that he acted without his master's instructions, and that his master had himself gone for rescue appliances. In the case of *Rees* v. *Thomas*[2] the workman when engaged in the ordinary course of his employment was injured by doing something which was not within his strict duty but was in his master's interest, on the occurrence of a sudden emergency. There were here too different factories—the ship and the quay; the deceased was employed on the quay; the accident certainly did not occur "on or in" the quay, and it was difficult to see how it could be said to have occurred about the "quay" when it, in fact, took place in another "factory," namely the ship.

Argued for the respondent;—The deceased met his death through an accident which arose out of and in the course of his employment. Both he and the man whom he tried to rescue were working in the same employment and in the same factory. He acted in his master's interest on the occurrence of a sudden emergency. There might be a duty, although not a legal duty capable of being enforced by action, of which the Court would take cognisance in considering claims under the Act or for damages at common law.[3] To exclude a claim like the present a case of serious and wilful misconduct must be established.[4]

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[1] Smith v. Lancashire and Yorkshire Railway Co., L. R. [1899], 1 Q. B. 141.

[2] L. R. [1899], 1 Q. B. 1015.

[3] Williamson v. Kinneil Cannel and Coking Coal Co., Limited, July 1, 1897, 24 R. 1001, *per* Lord Young at p. 1005.

[4] Rees v. Thomas, L. R. [1899], 1 Q. B. 1015; Menzies v. M'Quibban, March 13, 1900, 2 F. 732; Goodlet v. Caledonian Railway Co., July 10, 1902, 4 F. 986; Durham v. Brown Brothers & Co., Limited, Dec. 13, 1898, 1 F. 279; Lynch v. Baird & Co., Jan. 16, 1904, 6 F. 271.

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LORD JUSTICE-CLERK.—It appears to me that there can be no doubt that the deceased workman was, at the time when working immediately before the accident, employed on, in, or about a factory, the work which was being done having been the unloading of a ship and the placing of her cargo upon the quay alongside. Therefore the only real question in the case is whether it can be held that he was in the course of his employment at the time when the accident to him occurred which caused his death. The circumstances are, that while at the side of the vessel he was suddenly informed that a fellow-workman was unconscious in the forehold, that he at once tied a handkerchief over his mouth, and got himself lowered to try to rescue the other man, and was himself suffocated.

Is he to be held, in these circumstances, to have acted in his employment? I think it must be fairly held that that question may be answered as it was answered in the Court below. I cannot doubt that, in a sudden emergency where there is danger, a workman does not go out of his employment if he endeavours to prevent the danger from taking effect. For example, if, in a yard where a man is working, a horse suddenly runs off, and there is danger to others, I would hold that, if the man did his best to stop the horse, and met with an injury, he suffered that injury in the course of his employment. It would be a right thing to do, in the interest of the safety of those in the yard, and, therefore, in the interest of his master. The same would apply to the endeavour to sprag a runaway waggon, which might cause loss of life. No doubt this case is somewhat unusual, and the endeavour was made to liken it to the case of persons arriving on the scene of a disaster, such as a coal pit explosion, and deliberately volunteering to join a rescue party, and who, therefore, could be held not to be acting as employees, but solely as individuals. I can conceive such a case, where it would be very difficult to make the Act apply; but, in my view, any such case is distinguishable from the present one. Here the deceased was at the work that was going on. Had one of the men who was with him, engaged in work on the quay, come suddenly into danger, and he had instantly endeavoured to save him, I could have no hesitation in saying that his doing so was an act in the course of his employment. I do not feel that his case falls into a different category because the man he tried to save was engaged at a different department of the same work in the factory. My opinion is that there is no sufficient ground disclosed in the statement of facts to require that we should hold that the Sheriff pronounced a wrong decision in law in finding liability under the Act, and that the questions in the case should be answered in the affirmative.

LORD YOUNG.—I concur.

LORD KYLLACHY.—In this case I should have been glad to have seen my way to concur in the Sheriff's judgment, for undoubtedly the unfortunate deceased sacrificed his life in performing a most meritorious action. But the question is whether his relatives are entitled to compensation under the Workmen's Compensation Act, 1897; and I have come to the conclu-

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sion that, putting on the provisions of that Act the most liberal interpretation possible, the case with which we have to deal is not a case to which they apply.

It is admitted—at least it is clear—that there are three conditions which must be satisfied before the Act can apply: (1) the occurrence which has caused the death or injury must have been in the sense of the Act an "accident"; (2) the accident must have arisen out of the workman's employment—that is to say, his employment with the defending employer; and (3) it must also have been an accident arising in the course of that employment. All these things, I apprehend, must be affirmed before the Act can apply.

Now, I do not find it necessary to determine whether in the present case the two latter conditions are satisfied. I confess I have some doubt whether the occurrence happened in the course of the deceased's employment. And I also doubt whether it can be said to have arisen out of his employment—I mean out of his employment at the particular time and place. I rather think that upon the facts stated it is difficult to affirm that what happened would not equally have happened although, the deceased being at the time where he was, had been there in some other employment, or in no employment at all.

But assuming both of these points in the respondent's favour, the question (I think the initial question) still remains—viz., whether the deceased lost his life by what can properly be called "accident." The statute, according to its title, applies only to "accidental injuries"; and compensation is allowed not in respect of all injuries arising out of or in the course of the workman's employment, but only in respect of personal injury by accident. That being so, and the statute containing no definition of the term "accident," that term must, I apprehend, be taken in its ordinary and usual sense—the sense in which it is employed in common speech. What has to be affirmed therefore is that, in the ordinary sense of the expression, the death of the deceased was a death by accident.

Now, it is, of course, not enough that the deceased met his death in seeking to redress the results of an accident. The unfortunate man whom he sought to rescue may have been a victim of accident; that does not appear, but it probably was so. But the presence, accidental or otherwise, of poisonous fumes in the hold of this vessel was of course in no proper sense the cause of the deceased's death. The cause of his death was his descending into the hold, and coming in contact with those fumes. Accordingly the question, I apprehend, is whether he came in contact with the fumes by accident in the sense of the statute.

Now, when the question is so stated, it seems to me to be difficult to return an affirmative answer. For how did the deceased come into contact with the poisonous fumes by which he perished? It is, I am afraid, clear that he did not do so acting instinctively upon some sudden and instinctive impulse —some impulse so sudden and instinctive as to be perhaps in itself an accident. Nor, again, was what occurred the result of something casual and adventitious—such, for example, as tripping or stumbling or losing his hold, and so falling into the hold. On the contrary, what happened was this: He (the deceased) voluntarily and deliberately, knowing and having in view

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that he was going out to encounter a serious and perhaps deadly danger, left the place of his work, boarded the ship, offered to descend into the hold, had himself lowered into it by the crane, and so purposely and deliberately put himself into contact with the poisonous fumes, by the direct action of which he died.

I confess I do not see how such an occurrence can be an accident under the statute, unless, indeed, it is to be held that in the sense of the statute the term "accident" includes everything that is not the result of gross and wilful misconduct on the part of the workman. That was not suggested in argument, and for myself I am not prepared to put so extreme a construction upon the statute. It is not necessary, and I do not propose to attempt any formal definition of the term accident, a term which the statute does not define, but leaves, as I have said, to be interpreted according to its use in common speech. But I think, speaking generally, we know fairly well the kind of occurrence which the expression denotes; and all I can say is, that it does not seem to me to denote or cover such occurrences as we have here to consider. It appears, I confess, to me that to describe the death of this brave man as a death by accident would be a misnomer, as much a misnomer as if the expression were applied, say to the death of the leader of a forlorn hope; or, of a soldier who, taking his life in his hand, crosses a zone of fire to rescue a wounded comrade; or, of a servant who, to save, say his master, makes his way through smoke and flame into a burning house; or, of a miner who forms one of a rescue party, who (volunteers being called for) descends into a fiery mine, and succumbs to the peril which he has bravely faced. Such enterprises may be heroic, and deserve, and, I hope, generally receive recognition. But, for myself, I doubt whether persons who engage in such enterprises would be flattered by the suggestion that (if employees in the position of this deceased) the appropriate recognition of their heroism was compensation by their employer as for an accident—compensation as for an accident arising out of or in the course of their employment.

On the whole, therefore, I am of opinion that, while the first question in the case may be answered in the affirmative, the second question falls to be answered in the negative; and, in any case, that the appeal should be sustained, and the defender assoilzied.

THE COURT pronounced this interlocutor:—"Answer the two questions of law therein stated in the affirmative: Find and declare accordingly: Therefore affirm the award of the arbitrator and decern: Find the respondent entitled to the expenses of the stated case, and remit the account thereof to the Auditor to tax and to report."

The respondent's account of expenses, as lodged with the Auditor, consisted, *inter alia*, of charges amounting in all to £7, 7s. 2d. incurred in connection with the adjustment of the case stated for appeal. The sum of £7, 7s. 2d. included charges for considering the minute for the case, attendance obtaining case at Sheriff-clerk's office, perusing case, correspondence and meetings with appellant's agents, fee (£2, 7s.) to counsel and his clerk for revising stated case, charges for instructing counsel to revise the stated case, for attendance on counsel in connection with the revising and adjustment of the stated case, &c.

The Auditor disallowed all the charges incurred in connection with

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the adjustment of the stated case, and allowed a sum of £27, 14s. 6d. in all, including a fee of £1 "for taking instructions to defend the Sheriff-substitute's interlocutor."

The respondent objected to the Auditor's report in so far as it disallowed the charges in connection with the adjustment of the stated case.

Argued for the respondent;—The charges disallowed were for work properly done in connection with the preparation of the case for appeal,[1] and as such they fell under the allowance in the interlocutor of 31st January of "the expenses of the stated case." *M'Govern* v. *Cooper & Company*[2] was distinguishable, for there the award was of the "expenses of the appeal," which covered only expenses incurred after the case had come into the Court of Session.

Argued for the appellants;—The case was ruled by *M'Govern*.[2] In any view, the charges in question, in so far as they were legitimate charges against the appellants, were included in the £1 allowed by the Auditor as the fee for taking instructions to defend the Sheriff-substitute's interlocutor.

At advising,—

LORD JUSTICE-CLERK.—I do not think that the present case is governed by *M'Govern* v. *Cooper & Co.*[2] The interlocutors in the two cases are different. In the case of *M'Govern* the respondents were found entitled to "the expenses of the appeal"; in the present case the respondent is founded entitled to "the expenses of the stated case." The two expressions are different, and I do not regard the cases as being *in pari casu*. Here, where the respondent has been allowed the expenses of the stated case, I consider that the Auditor has erred in holding that all the expenses connected with the preparation of the case prior to its actual presentation to the Court are excluded. I am of opinion that the fair and reasonable expenses of preparing the case are included in the interlocutor, and should have been allowed.

Many, however, of the items set forth in the respondent's account cannot be included in that category, and are not charges which a successful party is entitled to call upon the unsuccessful party to bear. Here we have, without going into the matter in detail, charges for a list of preliminary letters connected with the adjustment of the case, a charge for instructing counsel to revise the case, a fee to counsel and clerk for revising the case, a charge for attendance on counsel in connection with the revision and adjustment, and so on. One of the objects of the Act is to avoid the multiplication of expenses in so far as that is possible, and the class of expenses I have indicated above is one which, if incurred at all, must be borne by the party who incurs it. As regards especially the fees and charges connected with the employment of counsel, I am at a loss to see what counsel can adjust. The facts of the case can only be adjusted by those who were present at the arbitration, and who knew what took place. The Act of Sederunt which provides for the method of adjusting the stated case imposes the duty of its preparation upon the Sheriff-clerk, who must submit it in draft to the parties and their agents, and if they cannot agree

[1] Workmen's Compensation Act, 1897, Second Schedule (14); A. S. 3d June 1898, sec. 9.

[2] Nov. 30, 1901, 4 F. 249.

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as to its terms, the Sheriff himself adjusts it. As regards the questions of law, although in practice they may be arranged by the parties, they are really questions propounded by the Sheriff, and are entirely outwith the province of counsel. I am quite clear that all charges connected with the employment of counsel in connection with the preparation of the case are illegitimate. As I have already indicated, I think the same remark applies to certain other charges. The total charges connected with the preparation of the case apparently come to approximately the sum of £7. I think it would be undesirable to remit them to the Auditor for taxation, as that would involve still further cost, and accordingly I propose that we should modify them at two guineas.

LORD ADAM.—I understand that the interlocutor in this case finds the pursuer entitled to "the expenses of the stated case." I also understand that the Auditor has not considered the particular items in question separately, but has struck out all the charges connected with the preparation of the stated case. I agree with your Lordship that there are certain expenses incurred in preparing the stated case which are necessary and legitimate, such as the cost of the application to the Sheriff to state a case, and the adjustment of the draft. I also agree that, so far as these necessary expenses are concerned, the successful party is entitled, under such an award as the present, to recover them from his opponent. I do not think that this case is ruled by *M'Govern* v. *Cooper & Co.*[1] In that case the respondent was found entitled to the expenses, not of "the stated case," but of "the appeal," and this included only the expenses of the proceedings after the action was brought into the Court of Session, and not expenses incurred prior to that date. Then it is said that the charges in question are covered by the fee which has been allowed for taking instructions, and which is included in the account of expenses in the Court of Session. I do not think that this is meant to cover the expenses of the proceedings in the Sheriff Court connected with the preparation of the case. As regards the particular items in this account, they have not been, as I have said, separately considered by the Auditor, and I think that the amount charged is too large. I agree that in this case the amount should be modified to two guineas.

LORD KYLLACHY concurred.

LORD YOUNG and LORD KINCAIRNEY were absent.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the Auditor's report on the respondent's account of expenses and note of objections thereto for the respondent, sustain the objections by adding the sum of £2, 2s. to the amount of £27, 14s. 6d. allowed by the Auditor: *Quoad ultra* approve of the Auditor's report, and decern against the appellants for payment to the respondent of the sum of £29, 16s. 6d. of expenses: Further, find the respondent entitled to the expenses of the discussion, which modify at the sum of £2, 2s., for which also decern."

BOYD, JAMESON, & YOUNG, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, W.S.—Agents.

[1] 4 F. 249.

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MRS JESSIE MUIRHEAD AND OTHERS, Defenders (Respondents).—*Crabb Watt, K.C.—A. M. Anderson.*

*Heritable and Moveable—Public-House—Goodwill—Terce—Jus relictæ.*—The question whether the goodwill of a public-house is heritable or moveable depends on the circumstances of each case.

Circumstances in which *held* (following *Graham's Trustees* v. *Graham*, July 20, 1904, 6 F. 1015), in a question as to a widow's legal rights, that the value of the goodwill of two public-houses, one of which was occupied by the deceased as tenant, while the other belonged to him as proprietor, was heritable estate.

1ST DIVISION. Ld. Kyllachy.

JAMES MUIRHEAD, wine and spirit-merchant, Glasgow, died upon 6th March 1900. At the time of his death Mr Muirhead carried on a wine and spirit business in two shops in Glasgow, the one at Keppochhill Road as tenant, the other at Springburn Road in premises of which he was proprietor. Mr Muirhead's testamentary trustees carried on the Keppochhill Road business till February 1901, when they sold the goodwill, fittings, and utensils to Mr William Mackintosh, Mr Muirhead's manager, for £4350, on condition that the purchaser should be accepted as tenant by the landlord.

The trustees carried on the Springburn Road business till March 1902, when they sold "the goodwill, fittings, and utensils of the business for £11,600 on condition that the purchaser should receive a licence at the next April Licensing Court, and should receive a lease for ten years at a rent of £190.

The truster's widow having claimed her legal rights, the trustees brought an action of multiplepoinding in which they called the widow and children of the deceased as defenders for the purpose of determining whether the sums received for the two businesses which formed the fund *in medio* were heritable or moveable.

The trustees claimed to be ranked and preferred as trustees to the whole fund *in medio.*

The widow claimed to be ranked and preferred to her *jus relictæ*, being one-third of the fund *in medio*, or alternatively, in the event of the fund *in medio* being held to be partly heritable and partly moveable to *jus relictæ* out of the moveable portion, and terce out of the price of the Springburn Road business so far as it might be held to be heritable on the footing that the price was to be treated as a grassum and one-tenth thereof added to the rent of each year.

The proof, which was allowed and led, disclosed the following facts:—

(1) *The wine and spirit business carried on at* 439-441 *Keppochhill Road, Glasgow.*—The licence certificate was an ordinary public-house licence, and was held by the deceased in his own name. The deceased was tenant of these premises under a lease whereby the premises were let to the deceased and his heirs, executors, and disponees, but excluding subtenants and assignees, legal and voluntary, without the consent of the proprietor, for seven years from Whitsunday 1896, at the yearly rent of £95. The business was carried on by the trustees till February 1901, when it was sold along with the fittings and utensils for £4350, on condition that the certificate would be transferred to the purchaser, and that he would be accepted by the land-

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(2) *The wine and spirit business at* 380-382 *Springburn Road, Glasgow.*—The licence certificate for these premises was an ordinary public-house licence, and was held by the deceased in his own name. The shop in which the business was carried on belonged to the deceased. The business was carried on by the trustees for fully two years after the testator's death, when it was sold, along with the fittings and utensils, in March 1902, for £11,600, on condition that a ten years' lease would be given to the purchaser, at a rent of £190 per annum, and that the licence certificate would be transferred to him. The transfer was duly granted, the price paid, and the lease entered into. No stipulation was made for a continuance of the deceased's name in the business, and the purchaser carried it on in his own name. The shop in which the business was carried on remained the property of the trustees. The value of the fittings and utensils, as given up in the inventory of the deceased's estate, was £49, 8s. 6d.

On 19th July 1904 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"The Lord Ordinary, having considered the proof and productions and heard counsel for the parties, finds (1) that the value of the goodwill, utensils, fittings, &c., of the business in Keppochhill Road, Glasgow, which belonged to the deceased James Muirhead, was, at the date of his death, £4000, and that for the purpose of fixing the widow's legal rights it falls to be regarded as wholly moveable in its character; (2) that the sum of £11,600 obtained by the pursuers in March 1902, for the goodwill, utensils, fittings, &c., of the business in Springburn Road falls to be regarded for said purpose as moveable in its character to the extent of £5800, and as heritable to the extent of the like sum of £5800; (3) that for the purpose of fixing the widow's *jus relictæ*, the value of the goodwill of the Springburn Road business, at the date of the death of the said James Muirhead, is to be taken at £10,600, of which the sum of £5300 is to be taken as representing moveable estate; (4) that the said sum of £5800, part of the price of the Springburn Road business, effeiring to the heritable estate, is of the nature of a grassum paid by the tenant to whom the said premises have been let, and is subject to the widow's claim for terce; (5) that the defender and claimant, Mrs Muirhead, is entitled to payment, in name of *jus relictæ*, of one-third of the said sums of £4000 and £5300 respectively, effeiring to the deceased's moveable estate, with interest thereon at 5 per cent per annum from 6th March 1900, until payment; and (6) that the said sum of £5800, being the part of the value of the goodwill of the Springburn Road business effeiring to the deceased's heritable estate, falls to be divided into ten equal parts, corresponding to the years of the lease granted by the pursuers to the purchaser of the Springburn Road business, and that accordingly, for the purpose of fixing Mrs Muirhead's terce, the rent for each year of said lease falls to be increased from £190, being the amount stipulated in the said lease, to £770: And in respect of these findings ranks and prefers the said defender, Mrs Jessie Ballantyne or Muirhead, on the fund *in medio* (1) to the extent of the sum of

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£3100, in name of *jus relictæ*, with interest thereon at the rate of 5 per cent per annum from 6th March 1900 until payment; and (2) to the extent of £193, 6s. 8d. per annum in name of terce, payable half-yearly so long as she is in life, for the period of ten years from and after the term of Whitsunday 1902, commencing the first half year's payment as at the term of Martinmas 1902, for the half year preceding, and with interest on said half-yearly payments at the rate of 5 per cent per annum, declaring, however, that the *jus relictæ* and terce are subject to deduction in respect of all debts which by law are deductible therefrom as at the death of the said James Muirhead: Reserving to the said Mrs Jessie Ballantyne or Muirhead all her claims for *jus relictæ* and terce out of the estate of her deceased husband, so far as not forming part of the fund *in medio* in this action, including all further claims for terce in respect of the property in Springburn Road after the expiry of the current lease thereof: Ranks and prefers the claimants, the trustees of the said James Muirhead, to the balance of the fund *in medio*: . . . Grants leave to reclaim."*

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* "OPINION.—In this multiplepoinding the competing claimants are, on the one hand, the widow, and, on the other hand, the trustees of the late Mr Muirhead, who died in March 1901, having for a number of years carried on a successful business in two public-houses in Glasgow. One of these public-houses was his own property. The other was held under a lease, which at his death had about two years to run, and which excluded assignees and subtenants. The widow having elected to claim her legal rights, questions have arisen as to how far she is entitled to participate in two sums—one of £11,600, and the other of £4350—obtained by the trustees for the goodwills of the two licensed businesses. These sums form the fund *in medio*. The widow claims that they both represented elements of goodwill which were entirely personal. The trustees, on the other hand, claim that in each case the price obtained represented elements which were wholly heritable. They say in the one case that the £11,600, whatever it was called, was really a grassum paid over and above his rent by the tenant to whom they (the trustees) let, on a ten years' lease, the shop of which the deceased was owner. They say similarly in the other case that the £4350 was simply a large premium paid by the purchaser for the reversion, such as it was, of the lease which the deceased held of the public-house of which he was tenant.

"A proof has been led, and what I have now to consider is what conclusions fall to be drawn from it. I say so, because it is important to keep in mind that we are here in a class of questions where we have to deal with facts, and not with legal formulas, or even legal presumptions. Certain things, of course, require to be postulated. For example, nobody, I suppose, disputes that in connection with the business of a public-house, as of any other business, there is, or may be, something which is called goodwill,—something which is of marketable value and is personal property. Nor is it, I suppose, doubtful that this personal goodwill may survive the owner's death, may pass to his executors, may enter his inventory, may be the subject of taxation, and may generally, and for all purposes, form part of his moveable succession. All that is probably quite clear. But how far in any particular case such goodwill exists: how far it survives its owner and transmits as a marketable subject to his executors: how, if it has been sold *in cumulo* with other assets having a heritable character, the necessary apportionment of the *cumulo* price is to be made:—all these are questions which depend necessarily upon the facts of the particular case; and which

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The pursuers reclaimed, and argued;—The case was ruled by the decision in *Graham* v. *Graham's Trustees*[1] where the facts were precisely similar. No doubt there might be a personal element in the goodwill of a public-house,[2] but, according to the test laid down by Lord Rutherfurd Clark in *Philp's Executor* v. *Philp's Executor*,[3] that element was wanting here. Acquiescence in the transfer of the certificate was of no value in determining the question,[4] and there was here no obligation not to compete as in *Assessor for Lanark* v. *Selkirk*.[5] The practice of dividing the sum received for goodwill into one-half heritable and one-half moveable had only been adopted where there was an absence of definite evidence as to the nature of the goodwill. Here the evidence that the goodwill was heritable was clear and distinct. The English cases relied on by the other side dealt with an entirely different class of subject, and were not in point.

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are questions not of law, or of legal presumption, but of fact and of evidence.

"Keeping this in view, my conclusions upon the proof are shortly these:—

"In the first place, I think it is clear that both goodwills were assets of the deceased at the time of his death. I see no reason to doubt that if he had during the last years of his life desired to do so, he might have obtained for them sums substantially the same as those subsequently obtained by his trustees. Nor do I see any reason to think (subject to what I shall say presently as to certain increases in the drawings after his death), that the sums in question were obtained by the trustees in respect of anything contributed by them (the trustees) or by the beneficiaries individually. The trustees held and sold simply as representatives of the deceased. The case of *Philp*, 21 R. 482, and cases of that kind, have, I think, obviously no application here.

"(2) Further, I think it clear that (subject to the same qualification) the whole sum received for the goodwill of the smaller business—the Keppochhill business—must be held as moveable estate. In this case there was—so far as I see—no heritable element which entered into the price. The premises did not belong to the deceased, he had merely a lease which was nearly run out. It was moreover, as I have said, a lease which was not assignable. Nor was it in fact assigned. Anything heritable—anything attaching to the premises—the purchaser got, not from the trustees, but from the landlord, with whom he directly transacted.

"(3) I am next of opinion that (subject to the same qualification) the £11,600 paid for the goodwill of the larger business—the Springburn business—must be apportioned as between the heritable and moveable succession. It is, I think, proved, that to a large extent, possibly the larger extent, the sum in question represented what is called heritable goodwill—goodwill inseparably attached to the premises, and the price of which was really and in substance a grassum paid by the tenant. But, on the other hand, it is, I think, also proved that to a large extent the price represented those elements of goodwill which I have called personal—elements which did not attach to the premises, which were largely associated with the licence, and which I sometime ago endeavoured to analyse in the case of *Hughes*, 19 R. 840. How

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[1] July 20, 1904, 6 F. 1015.

[2] Hughes v. Assessor for Stirling, June 7, 1892, 19 R. 840.

[3] Feb. 1, 1894, 21 R. 482.

[4] Hawick Heritable Investment Bank, Limited, v. Huggan, Nov. 6, 1902, 5 F. 75.

[5] March 9, 1887, 14 R. 579.

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Argued for the respondent;—The Lord Ordinary was right. The goodwill of the Keppochhill business was wholly moveable. All that *Graham's Trustees*[1] laid down was that the decision as between heritable and moveable must depend upon the circumstances of each case. The present case was ruled by the decision in *Murray's Trustees* v. *M'Intyre*.[2] The case of *Philp's Executor* v. *Philp's Executor*[3] raised a very special question as to the ownership of the business, and had been distinguished in *Murray's Trustees*.[2] The practice of the Valuation Court was to divide the price received for goodwill equally between heritable and moveable.[4] The English cases supported this view.[5]

At advising,—

LORD ADAM.—This multiplepoinding has been brought by the trustees of James Muirhead, who died on 6th March 1900. He had carried on busi-

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in such circumstances the apportionment is to be made is always a matter of difficulty. It is a question which comes up frequently in the Valuation Courts; and there it has been found necessary to sanction, or at least accept, a certain rough and ready method commonly adopted in practice, and found generally to be not unfair—viz., to divide the total price in equal portions between the two kinds of goodwill. I do not think that in view of the figures disclosed by the other transaction—the Keppochhill transaction—that apportionment is unfair here. In saying so, I have quite in view that the premises here are superior to, and in a better locality than, the Keppochhill premises. But, on the other hand, I have also to keep in view that there was here in addition to the payment of goodwill a very substantial increase of rent. On the whole, therefore, I propose to apportion the goodwill on the principle I have mentioned.

"(4) I have said, however, that there is a certain qualification applicable to both cases. It appears that the mode in which the goodwill was here estimated (a mode said to be the usual mode) is to take a certain average of the weekly drawings. That being so, it has to be considered what effect is to be given to a certain increase in the weekly drawings which occurred between the deceased's death and the sale, and while the trustees were themselves carrying on both businesses. The increase was not in either case very great. It was £10 a week in the one case, and £3 in the other; and partly, at all events, it must have been merely a natural increment due in no way to the management of the trustees or their personal merits. But in a question of legitim or *jus relictæ* it is no doubt true that the moveable estate must be estimated as at the date of the death—the rule, I think, being that the children or widow receive interest from the date of the death, and not (at least in the general case) anything else. That being so, I think I must for the present purpose make some deduction from the total price in each case. It is, of course, only possible to do so roughly; but it appears to me that, all things considered, £1000 may be fairly deducted in the one case, and £350 in the other. The net result, therefore, is that the widow in name of *jus relictæ* gets in respect of personal goodwill, including fittings,

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[1] July 20, 1904, 6 F. 1015.

[2] March 12, 1904, 6 F. 588.

[3] Feb. 1, 1894, 21 R. 482.

[4] Drummond v Assessor for Leith, Feb. 5, 1886, 13 R. 540; Assessor for Lanark v. Selkirk, March 9, 1887, 14 R. 579; Hughes v. Assessor for Stirling, June 7, 1892, 19 R. 840.

[5] Trego v. Hunt, [1896], A. C. 7; West London Syndicate v. Inland Revenue Commissioners, [1898], 2 Q. B. 507; Inland Revenue Commissioners v. Muller & Company's Margarine, Limited, [1901], A. C. 217.

ness as a wine and spirit-merchant at two shops in Glasgow, the one at Keppochhill Road, and the other at Springburn Road. He was tenant of the premises at Keppochhill Road under a lease for seven years from Whitsunday 1896, and was proprietor of the premises at Springburn Road. His trustees continued his business at Keppochhill Road until February 1901, when they sold "the goodwill, fittings, and utensils" to Mr William Mackintosh, Mr Muirhead's manager, for £4350, on the condition that the purchaser was accepted by the landlord as tenant. The trustees carried on the business at Springburn Road until March 1902, when they sold the "goodwill, fittings, and utensils" of the business for £11,600 on the condition that the purchaser should receive the licence at the next April Licensing Court; that he should receive a lease of the premises for ten years after Whitsunday 1902 at a rent of £190; and that the purchaser would apply for a transfer of the licence certificate at the April Licensing Court.

In both cases the fittings were included in the sales, but no reference is made to them on record, nor were they referred to at the debate, which proceeded on the footing that the sums paid were paid for the goodwills of the respective businesses.

The question, therefore, in this case is whether the sums paid for the goodwill of these two businesses are to be treated as wholly heritable or as wholly moveable, or as partly heritable and partly moveable, and, if the latter, in what proportions?

I agree with the Lord Ordinary that this depends upon the facts and circumstances of the particular case. I agree with the definition or description of goodwill given by Lord Macnaghten in the case of *Trego* v. *Hunt*.[1] "What goodwill means," (he says) "must depend on the character and nature of the business to which it is attached. Generally speaking, it means much more than what Lord Eldon took it to mean in the particular case actually before him in *Cruttwell* v. *Lye*,[2] where he says,—'The goodwill

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&c., from the price of the Springburn business one-third of one-half of £10,600—that is to say £1766, 13s. 4d.; and from the price of the Keppochhill business one-third of £4000—that is to say, £1333, 6s. 8d.

"(5) The widow, however, in addition to her *jus relictæ* claims terce in respect of one half of the £11,600 which was received for the Springburn business; that half, if I am right, being really a grassum paid by the tenant of the shop in addition to the rent expressed in his lease. Now, it appears to me that this claim is well founded. The widow cannot, I apprehend, repudiate the lease or rather the transaction of which the lease was a part. She had not served to her terce or otherwise interpelled the trustees when the lease was granted. In any case, she does not propose to repudiate. But having looked into the authorities, I see no reason why she should not as against the trustees have right to one-third of the additional rent which the grassum represents. In other words, the £5800, which was really a grassum, must be distributed over the ten years of the lease—the additional rent in which the widow is entitled to participate being thus £580.

"The net result is that the widow will receive out of the two funds *in medio* as *jus relictæ* the sum of £3100, with interest from the date of the testator's death. She will also receive out of the proceeds of the fund *in medio*, in name of terce, £193, 6s. 8d. per annum during the currency of the lease."

[1] [1896], A. C. 7.

[2] 17 Ves. 335, at p. 346.

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which has been the subject of sale is nothing more than the probability that the old customers will resort to the old place.' Often it happens that the goodwill is the very sap and life of the business, without which the business would yield little or no fruit. It is the whole advantage, whatever it may be, of the reputation and connection of the firm, which may have been built up by years of honest work or gained by lavish expenditure of money."

It appears to me that the goodwill of a business carried on in licensed premises is of a somewhat peculiar character. It is true that in Scotland it is the person who carries on the business who is licensed, and not the premises, but he is licensed to carry on the business only in particular premises, and hence it is that the licence attaches to the premises and enhances their value, and that such premises are generally known and spoken of as licensed premises.

If there were free trade in the sale of liquors, if a person could open a shop anywhere for their sale, the goodwill of an existing business in the centre of a populous city like Glasgow would be of little or no value. It is the known fact of the objections which the licensing authorities entertain to increasing the number of public-houses which gives to existing public-houses their enhanced value. It is the person who has a right to the possession of the licensed premises, whether as landlord or tenant, at the date of the sale, who has a valuable asset to sell.

I further think that the goodwill in this case does not fall within the class of cases pictured by Lord Macnaghten in which the goodwill consists in the advantage of the reputation and connection of a firm built up by years of honest work or lavish expenditure of money. In such a case the right to use the name, whether of a firm or individual, is a valuable asset, and in the sale of such a business is a matter of transaction or arrangement. But I think there is little of that element in this case. The right to use the name of the seller was not purchased, and both purchasers immediately proceeded to carry on the respective businesses they had acquired in their own names.

Although, as I have said, the nature of goodwill, whether heritable or moveable, depends on the circumstances of each case, yet the facts of this case and the facts of the case in *Graham's Trustees*[1] are so similar that I think this case is ruled by the principles affirmed by this Division of the Court in that case.

Take the case of the Keppochhill Road shop in this case, and the Oxford Street shop in *Graham's* case.[1]

In both cases the sale of the goodwill is of licensed premises in Glasgow.

In both cases the deceased Mr Muirhead and Mr Graham were tenants of the premises, in which they carried on their businesses, in this case under a lease which had rather more than three years to run, and in *Graham's* case[1] under a lease which had rather more than a year. In both cases the trustees carried on the business for a time. In this case the sale took place when the lease had rather more than two years to run. In *Graham's* case,[1] when it had about six weeks. In this case the sale was conditional on the purchaser being accepted by the landlord as tenant. In *Graham's* case[1] the purchaser had already arranged with the landlord for a new lease.

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These being the essential facts bearing on this question of goodwill, I cannot distinguish between the two cases, and as we held in *Graham's* case[1] that the goodwill was heritable, so I think we must hold in this case that it also is heritable.

I am also of opinion that the goodwill of the business carried on at Springburn Road is wholly heritable. It was not disputed that the value of that goodwill was to be taken as £10,600.

These premises belonged to Mr Muirhead himself, and he carried on the business there. After his death his trustees carried on the business for about two years. In March 1902 they sold it to a Mr Murray for £11,600, on condition that a lease for ten years should be given to him at a rent of £190 per annum from Whitsunday 1902, and that he should obtain a transference of the licence. All this was duly carried through. Mr Murray paid the £11,600 and obtained the lease and the transfer of the licence. £1000 has been deducted from the £11,600 by the Lord Ordinary as representing the increased earnings of the shop during the trustees' management, and this, as I have said, is acquiesced in.

The Lord Ordinary has held that the sum of £10,600 representing the goodwill of the business is half heritable and half moveable, but if I am right in what I have already said, that the principles laid down in *Graham's* case[1] apply to this case, it is clearly wholly heritable.

It will be observed from the purchaser Mr Murray's evidence that he attached no value to the name in which the business had been carried on.

I agree with the Lord Ordinary that the heritable goodwill, effeiring to the Springburn Road premises, whatever its amount, is to be treated as a grassum and one-tenth of it added to the rent of each year. If this be so, then, taking the amount of the goodwill at £10,600, the claimant will be entitled to an additional annual payment of £160 to that allowed her by the Lord Ordinary, or in all to an annual payment of £353, 6s. 8d.

I am of opinion, accordingly, that we should recall the Lord Ordinary's interlocutor, in so far as it finds the goodwill of the Keppochhill Road business to be moveable, and in so far as it finds one-half of the goodwill of the Springburn Road business to be moveable and one-half heritable, and to find that the whole of it is heritable, and is to be divided into ten equal parts, and to be disposed of exactly as he has directed with regard to the one-half of it which he held to be heritable.

LORD KINNEAR.—I agree with your Lordship. I only desire to add that I do not dissent from the view of the Lord Ordinary that there is no rule of our law which makes it impossible for the executors or heirs *in mobilibus* of a deceased publican to shew that they have an interest in the goodwill of his business. But whether any of the elements which go to make a saleable goodwill are heritable or moveable is a question of fact which must be determined according to the circumstances of the particular case, and treating the question here raised as a question of fact, I agree with your Lordship, for the reasons you have given, that the goodwill of these two public-houses is heritable. I therefore concur.

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LORD KINCAIRNEY.—I have had the advantage of reading the opinion of your Lordship in the chair, and I concur with the views therein expressed. I think this case is ruled by the decision in *Graham's Trustees*[1] which was decided subsequently to the interlocutor of the Lord Ordinary, and that, in accordance with the principles of that decision, the values of both the goodwills here fall to be treated as heritable.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor: Find (1) that the value of the goodwill, utensils, fittings, &c. of the business in Keppochhill Road, Glasgow, which belonged to the deceased James Muirhead, was, at the date of his death, £4000, and that, for the purpose of fixing the widow's legal rights, the goodwill of said business falls to be regarded as wholly heritable in its character; (2) that the sum of £11,600 obtained by the pursuers in March 1902, for the goodwill, utensils, fittings, &c. of the business in Springburn Road falls to be regarded for said purpose, in so far as it consists of the value of goodwill, as wholly heritable in its character; (3) that the value of the goodwill of the said Springburn Road business as at the date of the death of the said James Muirhead is to be taken at the sum of £10,600; (4) that the said sum of £10,600 is of the nature of a grassum paid by the tenant, to whom the said premises have been let, and is subject to the widow's claim for terce; and (5) that the said sum of £10,600, being the part of the value of the goodwill of the Springburn Road business, effeiring to the deceased's heritable estate, falls to be divided into ten equal parts, corresponding to the years of the lease granted by the pursuers to the purchaser of the Springburn Road business, and that accordingly, for the purpose of fixing Mrs Muirhead's terce, the rent for each year of said lease falls to be increased from £190, being the amount stipulated in the said lease, to £1250; and in respect of these findings rank and prefer the defender, Mrs Jessie Ballantyne or Muirhead, on the fund *in medio* to the extent of £353, 6s. 8d. per annum (being one-third of one-tenth part of said sum of £10,600) in name of terce, payable half-yearly so long as she is in life, for the period of ten years from and after the term of Whitsunday 1902, commencing the first half year's payment as at the term of Martinmas 1902, for the half year preceding, and with interest on said half-yearly payments at the rate of 5 per cent per annum, declaring however that the said terce is subject to deduction in respect of all debts which by law are deductible therefrom as at the death of the said James Muirhead: Reserving to the said Mrs Jessie Ballantyne or Muirhead all her claims to *jus relictæ* and terce out of the estate of her deceased husband, so far as not forming part of the fund *in medio* in this action, including all further claims for terce in respect of the property in Springburn Road, after the expiry of the current lease thereof: Rank and prefer the claimants, the trustees of the said James Muirhead, to the balance of the fund *in medio*, and decern."

MACKENZIE & BLACK, W.S.—ALEX. MORISON & Co., W.S.—Agents.

[1] 6 F. 1015.

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Mackenzie's Trustee v. Mackenzie.

JAMES MUNRO MACKENZIE (Mackenzie's Trustee), Pursuer (Respondent).—*M'Lennan—Munro.*

DONALD MACKENZIE, Defender (Appellant).—*Constable.*

*Crofter—Bankruptcy—Forfeiture of tenancy precluding renunciation—Compensation for improvements—Crofters Holdings (Scotland) Act*, 1886 (49 *and* 50 *Vict. cap.* 29), *secs.* 1, 3, 7, *and* 8—*Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 81.—The Crofters Holdings (Scotland) Act, 1886, secs. 1 and 3, enacts that a crofter who shall do any act whereby he becomes notour bankrupt shall forfeit his tenancy and shall be liable to be removed by the landlord under sec. 4 of the Act of Sederunt, 14th December 1756.

Secs. 7 and 8 enact that a crofter shall be entitled, after one year's notice to his landlord, to renounce his tenancy, and upon such renunciation, or upon his being removed from his holding, shall be entitled to compensation for permanent improvements.

Where the estates of a crofter had been sequestrated, but his landlord had taken no steps to remove him, *held* that the crofter having been made notour bankrupt his tenancy was forfeited under section 3 of the Crofters Act, and consequently that he could not be called upon by the trustee to renounce a tenancy which no longer existed.

1ST DIVISION. Sheriff of Ross-shire.

DONALD MACKENZIE, fisherman, Shader Point, Stornoway, was the holder of a croft No. 4 Shuilishader, New Lands, Stornoway, under Major Duncan Matheson of Achany and the Lews, upon which he had erected a dwelling-house and other buildings.

Donald Mackenzie's estates were sequestrated on 5th April 1904, and James Munro Mackenzie, law-clerk, Stornoway, was appointed trustee in the sequestration.*

The landlord took no steps to remove the bankrupt from his holding.

Thereafter the trustee in the sequestration, with a view to claiming compensation for improvements from the landlord, requested the bankrupt to execute a notice of renunciation of his tenancy as from Martinmas 1905 in favour of the landlord.†

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* The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), enacts, section 1,—"A crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of one or more of the conditions following (in this Act referred to as statutory conditions), but he shall have no power to assign his tenancy . . . Subsec. 6. The crofter shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), and the Debtors (Scotland) Act, 1880 (43 and 44 Vict. cap. 34), and shall not execute a trust-deed for behoof of creditors."

Section 3. " . . . Where two years' rent of the holding is due and unpaid, or where the crofter has broken any other of the statutory conditions, he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the fourth section of the Act of Sederunt anent Removing of the fourteenth day of December one thousand seven hundred and fifty-six."

† The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), enacts, sec. 7, "A crofter shall be entitled, upon one year's notice in writing to the landlord, to renounce his tenancy as at any term of Whitsunday or Martinmas."

Sec. 8. "When a crofter renounces his tenancy or is removed from his holding, he shall be entitled to compensation for any permanent improvements . . ."

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The bankrupt refused to execute the renunciation, and on 4th June 1904 the trustee presented a petition in the Sheriff Court at Stornoway in which he craved the Court to ordain the bankrupt to execute in favour of the landlord a renunciation of his holding in terms of the deed to be lodged in the course of the proceedings, and in the event of his refusing or delaying to do so "to grant warrant to officers of Court to apprehend and imprison him within the prison of Stornoway, or such other prison as the Court may appoint, therein to be detained till he execute the said renunciation or conveyance, or till the further orders of the Court, and to grant warrant to the governor of the said prison to receive and detain the said Donald Mackenzie accordingly; and also to find and declare that the said Donald Mackenzie has forfeited the benefits of the Bankruptcy (Scotland) Act, 1856, and Acts explaining and amending the same."

The trustee averred, *inter alia*, that part of the debt under the sequestration was incurred by the defender in connection with erection of the dwelling-house on his holding, which, with other buildings, was of the value of about £300.

The defender in his answers denied that the buildings were of the value of £300, and averred that "most of the cost of the said buildings was contributed by the sons of the defender."

The pursuer pleaded, *inter alia*;—(2) The bankrupt, being bound to make his estate available for the benefit of his creditors, should be ordained to execute the deed in question; and failing his so doing, warrant should be granted for his imprisonment as craved.

The defender pleaded, *inter alia*;—(1) The petition is incompetent. (2) The defender not being bound to grant the renunciation asked, the prayer should be refused, with expenses.

On 28th November 1904, the Sheriff-substitute (Squair) "repels the first plea in law stated for the defender, Donald Mackenzie: Sustains the first plea stated for the pursuer to the effect that the defences are irrelevant: Ordains the defender to execute in favour of Major Duncan Matheson, of Achany and the Lews, Lews Castle, Stornoway, a renunciation or other conveyance of the tenancy of the croft or holding No. 4 Shuilishader, New Lands Point, Stornoway, in terms of No. 2/6 of process after deletion of the words 'Martinmas 1905' and the substitution therefor of the words 'Whitsunday 1906'; and in the event of the said Donald Mackenzie refusing or delaying to do so, grants warrant as craved."

The defender appealed, and argued;—Section 81 of the Bankruptcy Act must be read in conjunction with the vesting clause (section 102) and the definition clause (section 4). The interest sought to be attached here was not "property" or "estate." It was a mere faculty, and in a worse position than a *spes successionis*, which a bankrupt could not be compelled to assign.[1] Further, by the defender's bankruptcy his tenancy had *ipso facto* been forfeited,[2] and could not now be renounced. A petition to remove a crofter from his holding by his trustee *in cessio* had been refused.[3] The policy of the Crofters Act was to give security of tenure and exclude creditors.

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[1] Trappes v. Meredith, Nov. 3, 1871, 10 Macph. 38; Kirkland v. Kirkland's Trustee, March 18, 1886, 13 R. 798; Reid v. Morrison, March 10, 1893, 20 R. 510.

[2] Crofters Holdings (Scotland) Act, 1886, sec. 3, quoted *supra*, p. 505.

[3] Mackenzie v. Munro, Nov. 10, 1894, 22 R. 45.

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Argued for the respondent;—The bankrupt's right to renounce had vested in the trustee, and the bankrupt could be compelled to execute the necessary deed.[1] The right to renounce was a heritable right, but even if it were held to be personal it could be affected by diligence.[2] There was no analogy between a right to renounce and a *spes successionis*. The former was a vested right which the bankrupt could make available at any time, and which emerged the moment he was removed by the landlord. It was not the policy of the Crofters Act to allow a bankrupt to wait till he got his discharge and then claim compensation, thus defrauding his creditors who had supplied the money for the buildings.

At advising,—

LORD ADAM.—This is a somewhat peculiar action.

The pursuer is trustee on the sequestrated estates of the defender, who is the tenant of a croft under Major Matheson of Achany, and he seeks to have the defender ordained to execute a renunciation of his croft, not in favour of himself, but of Major Matheson, his landlord.

The grounds on which the action is founded are that the defender has erected on his croft buildings to the value of £300; that a tenant has, under the Crofters Holdings Act, section 7, a right to renounce his tenancy, and when he does so, is entitled under section 8 to compensation from his landlord for permanent improvements executed by him on his holding; that the defender has executed such improvements, and is entitled to compensation therefor from his landlord; that the defender is bound under section 81 of the Bankruptcy Act to do all that may be necessary to make this compensation available for his creditors; and that it is necessary for that purpose that he should renounce his tenancy.

The Sheriff is of opinion that he is bound to do so, and, on 28th Novem- 1904, pronounced an interlocutor by which he ordained the defender to execute in favour of Major Matheson a renunciation of his holding in terms of a certain deed in process as amended by the interlocutor, and in the event of his refusing or delaying to do so, granted warrant for his apprehension and imprisonment.

It appears to me, however, that before determining whether the defender was bound to renounce his tenancy another question has to be determined, but which does not seem to have been considered in the Sheriff Court, and that is whether the defender was entitled to do so in the circumstances disclosed, or had any right in the tenancy susceptible of being renounced.

Section 1 of the Crofters Act provides that a crofter shall not be removed from the holding of which he is tenant except in consequence of the breach of certain statutory conditions therein set forth. The sixth of these conditions is that the crofter shall not do any act whereby he becomes notour bankrupt within the meaning of the Bankruptcy (Scotland) Act, 1856, and the Debtors (Scotland) Act, 1880.

The defender is certainly in breach of this statutory condition, and the penalty is to be found in section 3 of the Act, which enacts that when two years' rent of the holding is due and unpaid, or when the crofter has broken

[1] Bankruptcy (Scotland) Act, 1856, secs. 4, 81, and 102.
[2] Graham Stewart on Diligence, p. 604; Ersk. Inst. ii. 12, 6.

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any other of the statutory conditions, he shall forfeit his tenancy, and shall be liable to be removed in manner provided by the 4th section of the Act of Sederunt anent Removings of 14th December 1756.

Section 7 of the Act enacts that a crofter shall be entitled, upon one year's notice in writing to the landlord, to renounce his tenancy as at any term of Whitsunday or Martinmas. But that seems to me to assume the case of a crofter who has a right to remain for a year in his holding, and has no application to the case of a crofter whose tenancy is already forfeited, and who can be removed at any time by the landlord on giving the requisite notice under the Act of Sederunt.

The Act does not entitle a crofter to claim compensation for permanent improvements on forfeiture of his tenancy. The clause dealing with compensation is the eighth, which enacts that when a crofter renounces his tenancy or is removed, he shall be entitled to compensation. Assuming that a crofter who has forfeited his tenancy has any right to compensation at all, which I think very doubtful, it is only when the landlord proceeds to remove him that he is entitled to compensation. The landlord is the only person who has a title to remove him, but I see nothing to compel a landlord to remove a forfeiting crofter or to prevent him from allowing the crofter to remain as a tenant at will if he so pleases, or on such terms as they may agree upon.

It is said that this result would be very inequitable as regards the defenders' other creditors, who may have, and are said in this case to have, largely contributed to the expense of the buildings of which the defender will be left in the enjoyment. That may be so, but the matter is entirely statutory. The relations between landlord and crofter introduced by the statute are novel and peculiar, and possibly may have produced results which may not appear to be equitable as regards third parties. But however that may be, we must be guided by the statute alone, and for the reasons I have given I think the defender had no power to grant a renunciation of his holding after it had been forfeited. If that be so, it is unnecessary to consider the question which the Sheriff has dealt with, whether if he had the power he was bound to exercise it, as to which I give no opinion.

Assuming, however, that the Sheriff's interlocutor was right on the merits, I do not see how we could have affirmed it in the terms in which it is expressed. The Sheriff has ordained the defender to execute a deed of renunciation, and "in the event of his refusing or delaying" to do so granted warrant for his apprehension and incarceration—that is to say, he has left it to the messengers of Court to judge whether the defender has refused or delayed to execute the deed. I doubt whether they would have ventured to execute such a warrant. At anyrate the defender, after the case had been decided against him on the merits, was entitled to some little time to consider whether he would persist in his refusal. The Sheriff should have ordained him to execute the deed on or before a certain day, and, if he had not done so, then have granted warrant *de plano* for his incarceration.

I am of opinion that the appeal should be allowed and the defender assoilzied.

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LORD M'LAREN.—I have had the opportunity of seeing your Lordship's opinion, and I entirely concur. I only wish to add that while our decision relates to the case where the tenant has become bankrupt, it can have no bearing where the tenancy comes to an end by voluntary renunciation or by the landlord putting in force the statutory machinery for the recovery of his rent. I wish to reserve my opinion as to any future case of that kind which may raise a different question as to the construction of the statute.

LORD KINCAIRNEY.—I concur in your Lordship's opinion. I think the case turns on the 7th section of the Crofters Act. If it applied I would not, as at present advised, be prepared to alter the judgment of the Sheriff, because under the 81st section of the Bankruptcy Act a bankrupt is bound to execute such deeds as would increase his estate for the benefit of his creditors. But I am of opinion that the 7th section does not apply, and there is no other clause in the Act which entitles a crofter to renounce his holding. The appellant is in the predicament of a crofter who is in breach of a condition of his holding, and has forfeited it under section 3 of the Crofters Act, and section 7 cannot apply to a holding which has been forfeited; and we cannot ordain the appellant to execute a renunciation of a holding which has ceased to exist. I think the Act does not confer a right to compensation on a crofter who is in breach of the conditions of his holding.

THE COURT recalled the interlocutor of the Sheriff-substitute, and assoilzied the defender.

ALEXANDER ROSS, S.S.C.—HENRY & SCOTT, W.S.—Agents.

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Feb. 21, 1905. Michie's Executors v. Michie.

WILLIAM MICHIE AND OTHERS (Executors of the Reverend John Grant Michie), First Parties.—*Clyde, K.C.—A. R. Brown.*
WILLIAM MICHIE AND ANOTHER, Second Parties.—*Mackenzie, K.C.—Constable.*
JAMES MICHIE AND OTHERS, Third Parties.—*Clyde, K.C.—A. R. Brown.*
MAGGIE ANN MICHIE AND ANOTHER, Fourth Parties.—*Mackenzie, K.C.—Constable.*
MARGARET MICHIE AND OTHERS, Fifth Parties.—*D. Anderson.*
THE VERY REVEREND JOHN GILLESPIE AND OTHERS, Sixth Parties.—*C. N. Johnston, K.C.—Horne.*

*Succession—Destination—Bequest to "A for behoof of his family"—Conditions—Restrictions on Vested Right—Trust.*—A testator by his holograph will bequeathed one-fifth share of residue to his brother A "for behoof of his family." *Held* (1) that this expression was equivalent to "in trust for his children," and that the beneficial right was in the children only; and (2) that the children being of full age were entitled to immediate payment.

*Trust—Expenses of "this trust"—Estate-Duty—Legacy-Duty—Succession.*—A testator directed the residue after payment of debts to be divided into five shares, and after disposing of three and three-fourths of these shares directed that the remaining one and one-fourth share should be devoted to certain purposes, and *inter alia*, "discharging the necessary expenses connected with this trust." *Held* that the whole expenses of

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Feb. 21, 1905. Michie's Executors v. Michie.

*Succession—Legacy—Destination—Executor—Bequest to Executors—Certain persons or "the successor of each" appointed executors—Right of successors to share in bequest.*—A testator directed certain of his books to "be parted among" his executors. He appointed as his executors, *inter alios*, his brothers A and B and his sister C, "or their representatives, namely, the successor of each as representing their respective families." B predeceased the testator. C declined to accept office, and her eldest son was assumed as an executor. *Held* that B's eldest son being an executor as the successor and representative of his father was entitled to share in the bequest, but that C's eldest son was not so entitled.

1st Division. THE REVEREND JOHN GRANT MICHIE, minister of the *quoad sacra* parish of Dinnet, died unmarried on 21st January 1904, leaving a holograph last will and testament, dated 11th April 1901, and holograph codicil thereto, dated 14th March 1904. By his will the testator provided as follows:—"After the settlement of my pecuniary affairs—debts due to and by me—the residue of my property, personal and heritable, I leave to be divided into five equal shares (exclusive, however, of my books, pictures, works of art, and specimens of all sorts, which I propose otherwise to dispose of):—

"1st I leave to my brother William for behoof of his family One Share.

"2d I leave to my brother Charles for behoof of his family One Share.

"3d I leave to my sister Jane for behoof of her family One Share.

"4th I leave to my sister Margaret one-half share (½ share). The reason why I bequeath her only half a share is that she has no dependants. My affection for her is as great as for any of my relatives. Should she predecease me, I wish her portion to be equally divided among the three first mentioned beneficiaries.

"5th I leave to the surviving children of my late sister Anne Michie or Smith one-fourth of a share. . . . The reason why I thus dispose of this fourth of a share is that I believe these children are already better provided for than my other nephews and nieces. My brother James whom I have maintained since his return from Australia, having means of his own and no dependants, I have not included as a beneficiary.

"6th The remaining one and one-fourth share I wish to be devoted to the following purposes, viz.":—(1) Legacy to his housekeeper; (2) expense of tombstone and memorial tablet; (3) provisions as to books, &c., including this provision,—"As there are several rare books of history, science, and reference, I desire that these be parted among my executors as they shall agree among themselves. Any manuscripts of historical interest or collections of printed matter I wish to be disposed of in the same manner. The residue of the above mentioned One and one-fourth share I desire to be apportioned to the following objects:—(First) After discharging the necessary expenses connected with this trust, To" (as substituted by the codicil) "the Church of Scotland's Committees of the Aged and Infirm Ministers' Fund and the Small Livings Fund, equally between them share and share alike." "I appoint the following to be my executors, viz.:—My brothers William

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and Charles and my sister Jane, or their representatives, namely, the successor of each as representing their respective families." He also appointed two other persons to be executors.

The testator was survived by his brother William and his sister Jane, who both had children, all of whom were major at the date of the will. He was predeceased by his brother Charles, who left children who were in minority at the date of the will, but attained majority prior to the testator's death. John Lundie Michie, as the representative and successor of his deceased father the testator's brother Charles, accepted office and acted as an executor. The testator's sister Jane (Mrs M'Lean) declined to accept office, and her eldest son Robert M'Lean was assumed as an executor by the other executors.

Questions having arisen as to the interpretation of the will, this special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the trustees; (2) William Michie and Mrs Jane Michie or M'Lean; (3) the children of William Michie and the children of Mrs M'Lean; (4) the children of Charles Michie; (5) the heirs *in mobilibus* of the testator other than the second and fourth parties; (6) the Committees of the Church of Scotland's Small Livings Fund, and of the Church of Scotland's Aged and Infirm Ministers' Fund.

The questions of law were, *inter alia*, as follows:—"1. Are the second parties (the testator's brother and sister, William and Jane) each entitled to demand immediate payment from the first parties of one-fifth share of the residue of the testator's estate, exclusive of the books, manuscripts, pictures, specimens, works of art, and relics mentioned in the will? or Are the third parties, the children of William Michie and the children of Jane Michie or M'Lean respectively entitled to immediate payment equally among them, from the first parties, of one-fifth share of said residue, exclusive as aforesaid? 2. In the event of the first alternative of the preceding question being answered in the affirmative, are the second parties each vested in the fee of one of the said shares of residue? or Are they each entitled to hold and administer one of the said shares of residue for themselves in liferent and their respective children in fee? or Are they bound to make immediate payment of the said shares to the third parties so soon as the same are received by them? 3. Are the fourth parties (the children of the testator's deceased brother Charles) entitled to demand immediate payment, equally between them, of the one-fifth share of residue bequeathed to Charles Michie for behoof of his family? or Does the said share fall to be divided among them and the second and fifth parties as intestate succession? 4. Are the whole expenses of administering the will, the estate and other Government duties exigible from the testator's estate, and legacy-duty a proper charge against the whole residue of the trust-estate before it is divided into fifths? or Are they, or any of them, properly chargeable against the one and one-fourth share of residue destined to the sixth parties? 7. Are John Lundie Michie as the successor and representative of his father in the office of executor, and Robert M'Lean, as the eldest son of his mother and an assumed trustee, entitled to share in the bequest of books, manuscripts, and collections of printed matter directed by the testator to be parted among his executors?"

After the case was heard a minute of amendment was lodged by

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which, *inter alia*, the parties craved the Court to add another alternative to the 2d question, and to substitute a question different in form for question 4, but in view of the way in which questions 2 and 4 were answered by the Court it is not necessary to refer further to these amendments.

Argued for the third parties;—(1) A gift to A for behoof of B constituted a trust for behoof of B.[1] "Family" here meant "children." William and Jane, the father and mother of the respective families, were not included. The children were therefore the sole beneficiaries; and the children so entitled to the beneficial interest were the children existing at the date of the testator's death, and not children *post nati*.[2] [LORD M'LAREN referred to *Massy* v. *Scott's Trustees*.[3]] If the parents were the beneficiaries, then logically the children of a predeceasing parent took nothing. That was obviously not the testator's intention. As there were no ulterior trust purposes and the beneficiaries were all of full age, the third parties were entitled to immediate payment.[4] The third parties also maintained alternatively that the second parties were bound each to hold and administer during their respective lives one of the fifth shares as trustees for their respective children. (2) The expenses of the whole trust, including estate and legacy-duty, were chargeable against the one and one-fourth share. "This" trust must mean the whole trust. The sixth purpose was not a separate trust. The only deduction to be made before the residue which was to be divided into fifths was ascertained was the debts due by the testator at his death. "Expenses" comprised everything necessarily paid by the executors in discharging their duty, including estate and legacy-duty.[5] Estate-duty was a payment due by the executor, and payment of it was a condition of administration.[6] Legacy or residue-duty was in the same position. It was payable by the executor, and must be paid before payment of the legacy or residue to the beneficiary.[7] The intention of the testator was that all payments not to beneficiaries except his debts should come out of the one and one-fourth share. Estate-duty at least was just as much expenses as any other stamp-duty, or the cost of obtaining confirmation. (3) The representatives of the deceased and of the declining executor were both entitled to share in the bequest to the executors. They were both executors as representatives.

Argued for the second parties;—(1) The intention of the testator was to benefit his brothers and sisters themselves. There was no purpose in mentioning William and Jane unless they were to have a beneficial interest. The bequest to Margaret and the destination over, the bequest to Anne's children, and the explanation of the

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[1] Gillespie v. City of Glasgow Bank, July 1, 1879, 6 R. (H. L.) 104, *per* Lord Cairns, L. C., at p. 106; Feb. 27, 1879, 6 R. 714; Macpherson v. Macpherson's Curator Bonis, Jan. 17, 1894, 21 R. 386.

[2] Wood v. Wood, Jan. 18, 1861, 23 D. 338, 33 Scot. Jur. 177; Gregory's Trustees v. Alison, April 8, 1889, 16 R. (H. L.) 10.

[3] Dec. 5, 1872, 11 Macph. 173, 45 Scot. Jur. 127.

[4] Lewin on Trusts (11th ed.) p. 16; Miller's Trustees v. Miller, Dec. 19, 1890, 18 R. 301.

[5] *In re* Clemow, [1900], 2 Ch. 182; *In re* Fearnsides, [1903], 1 Ch. 250; Sharp v. Lush (1879), 10 Ch. D. 468.

[6] Finance Act, 1894 (57 and 58 Vict. cap. 30), secs. 6 (2) and 8 (3).

[7] Legacy-Duty Act, 1796 (36 Geo. III. cap. 52), sec. 6.

omission of James, all shewed that he intended parents of families to be beneficiaries. If so, what was the extent of the beneficial interest intended in the case of William and Jane? The answer was that they were intended to be the sole beneficiaries to the extent of one-fifth each. The meaning of the words used was "to my brother, to enable him to provide for his family." Where the intention of the testator was *in dubio*, as between parent and children, the presumption was in favour of the parent.[1] There was no intention here to create a trust for the children. There was no object in doing so, as the children were all *sui juris*. There were no directions for carrying out such a trust. Where the directions were too vague to be carried out, that resulted in a gift absolutely to the primary donee. If there was a trust for children then payment could only be made after the death of the parent, as then only could the class be ascertained. This case fell under *Carleton* v. *Thomson*[2] rather than *Wood*.[3] If there was a trust at all it was a continuing trust. Some benefit was intended to be conferred upon the parents, and at least the parents were entitled to the income during their lives. If necessary the second parties would maintain that "family" included parent as well as children.[4] The cases cited for the third parties did not apply. (2) As to the meaning of "expenses of this trust," the second parties adopted the argument of the third parties.

Argued for the fourth parties;—(1) The fourth parties (the children of Charles) were entitled to take as conditional institutes. They could not take under the *conditio si institutus sine liberis decesserit*, which did not apply to provisions in favour of collaterals.[5] There was a clear intention that dependants (that is children) should benefit secondarily failing their parent, the primary beneficiary. If the gift was to the parent in trust for his children, and the children were the beneficiaries, the failure of the trustee could not prejudice them. (2) On the question as to expenses of this trust the fourth parties adopted the argument of the third parties. (3) The executor, who was acting as eldest son and representative of Charles, was entitled to share in the bequest to executors, but Jane's eldest son, who had been assumed as an executor in consequence of the declinature of his mother, was not so entitled. He was not the representative and successor of his mother. No one could be the successor of a person who was still alive.

Argued for the fifth parties;—(1) Under the destination to Charles for behoof of his family Charles was sole beneficiary. The fifth parties adopted the main contention of the second parties. There was no trust created for Charles' children. On Charles' failure the bequest to him lapsed, and fell to be dealt with as intestate succession. (2) As to "expenses," the fifth parties adopted the argument of the third parties.

Argued for the sixth parties;—"Necessary expenses of this trust"

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[1] Frog's Creditors v. His Children (1735), M. 4262, 3 Ross' L. C. Land Rights, 602, recognised as still authoritative, though not to be extended, in Gifford's Trustees v. Gifford, March 20, 1903, 5 F. 723.

[2] July 30, 1867, 5 Macph. (H. L.) 151, 39 Scot. Jur. 640.

[3] 23 D. 338.

[4] Blackwell v. Bull (1836), 1 Keen, 176; Green v. Marsden (1853), 1 Drew. 646.

[5] Hall v. Hall, March 17, 1891, 18 R. 690.

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meant expenses connected with the sixth purpose, not the expenses of the whole testamentary trust. But apart from that, the expenses which were to be defrayed out of the one and one-fourth share did not include estate-duty or legacy-duty. Estate-duty was a sum by which all estates were diminished before the State would allow them to be administered. It must be deducted before the estate available for division could be fixed. It could not therefore be included under expenses of the trust. It must be deducted before the division into fifths could be made. The cases cited for the third parties on this point were single Judge decisions and not authorities. But the expressions "testamentary" or "executorship expenses," which were interpreted, were not the same as the expression used here. Necessary expenses of the trust only included proper expenses of administration, not a charge laid on by the State on the whole estate before it could be ingathered or apportioned. It was even clearer that legacy-duty was not included under necessary expenses of the trust. It was not an expense of the trust, but a charge laid upon the individual legatee. It was payable on payment to the legatee or retention for his behoof,[1] and it could be demanded from the legatee if not paid by the executor.[1] It varied with the degree of relationship, and attached to the particular legacy only. If it was intended that it should be paid out of residue and not out of the particular legacy, the only way in which that could be effected was to provide that the legacy should be paid free of legacy-duty. On the contention of the other parties, in every case where the trustees were directed in ordinary form *primo loco* to pay the expenses of the trust, that would involve payment of legacies free of legacy-duty. This had never been suggested before.

At advising,—

Lord Adam.—The questions in this case arise upon the construction of a holograph will and codicil left by the late John Grant Michie, minister of Dinnet.

Mr Michie directed the residue of his estate to be divided into five equal shares (exclusive of his books, pictures, &c.), and he bequeathed three of these shares in these terms, "I leave to my brother William, for behoof of his family, one share," and to his brother Charles and to his sister Jane one share each in exactly the same terms.

William and Jane, who are the second parties to the case, claim to be entitled to the fee of their respective shares, in respect that no effective condition limiting their right has been imposed by the testator. On the other hand, their children, who are the third parties to the case, claim immediate payment of the shares, in respect that they are the sole objects of the testator's bounty, and are now all of full age.

I see no reason to doubt that the children are right in saying that they are the sole objects of the testator's bounty. It is true that in the fourth purpose of the will, when dealing with one half share which he had bequeathed to his sister Margaret, he provides that should she predecease him her portion is to be divided among "the three first mentioned beneficiaries," referring thereby, no doubt, to William, Charles, and Jane, and

[1] Legacy-Duty Act, 1796 (36 Geo. III. cap. 52), sec. 6.

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again, in the fifth purpose, when dealing with one-fourth share which he had bequeathed to the children of a deceased sister, Ann, he explains why he had not included his brother James "as a beneficiary."

Were we construing a will prepared by a professional man, presumably well aware of the distinctive meanings of trustee and beneficiary, the fact that the testator had in his will described his brothers and sister as beneficiaries would have had much weight in determining whether they took as trustees or solely for their own benefit. But I can quite understand that the testator should consider it a benefit to them to put money into their hands to be expended for the good of their families, and so style them beneficiaries. In any view, I do not think that such considerations can prevail against the words in which the shares are given, viz., not to them for their own behoof, but expressly for behoof of their families, which I think clearly raises a trust in them for behoof of their children.

By giving these shares of succession to his brothers and sister for behoof of their children, the testator apparently intended that the parents should have the control and administration of their respective provisions. If they had had any minor descendants this intention might have received a certain effect during their minorities. But as the testator's nephews and nieces are all of full age, this intention cannot be carried into effect, because by the general law of this country, if a gift is made of a capital sum, the donor cannot limit the enjoyment of his gift except by giving an interest in it to some other person. As no persons other than the members of the respective families take any interest in the shares, and as no power of appointment is given to the parents, it follows that as to each family the bequest is subject to equal division, and that the legatees are entitled to immediate payment.

The testator's brother Charles, to whom he bequeathed one-fifth share for behoof of his family, predeceased him. The fourth parties are Charles' surviving children, and now claim his share as having vested in them at the death of the testator. This claim is opposed by the fifth parties, who maintain that the gift lapsed by Charles' predecease of the testator, and falls to be divided as intestate estate.

If I am right in thinking that the legacy to Charles, as in the case of his brother and sister, was, as trustee, merely in trust for his children, I see no reason for thinking that by reason of the predecease of the trustee the legacy to those who were truly the beneficiaries should fail. These children are now all of full age, and I think they are entitled to payment of the share as claimed, and accordingly that the first alternative of the third question should be answered in the affirmative.

The remaining questions are of a different character, and arise upon the construction of the sixth purpose of the trust, by which the testator disposes of the one share and a quarter share of the residue of his estate, which he had not previously disposed of. He directs his executors (1) to pay a legacy of £20; (2) to pay the expense of a tombstone and of a memorial tablet; and, in the third place, he disposes of his books, manuscripts, pictures, and certain other things. Then he provides as follows:—"The residue of the above-mentioned one and one-fourth share I desire to be apportioned to the following objects:—(1) After discharging the necessary

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expenses connected with this trust, to" (as altered by codicil) "the Church of Scotland's Committees of the Aged and Infirm Ministers Fund and of the Small Livings Fund, equally between them," and to certain other objects. The Church of Scotland's Committees in question are the sixth parties to the case.

The first question is what sums are to be deducted from the residue of the one and one-fourth share "as necessary expenses connected with this trust" before it is apportioned as directed by the will.

The sixth parties maintain that the words "this trust" mean the trust created by the directions contained in the sixth purpose of the will, and that only the expense of administering that trust should be charged against the residue. The second, third, fourth, and fifth parties, on the other hand, maintain that the expenses of administering the whole trust-estate fall to be so charged. I do not doubt that this latter view is right.

It will be observed that it is upon the settlement of the testator's pecuniary affairs, which he explains to mean the payment of debts due to and by him, that he desires the residue of his property to be divided into five shares. Nothing is said about the expenses of the trust being deducted or provided for before division. Had the testator said nothing about expenses, they would, no doubt, have been a charge against the whole estate. But he has provided for them, as I think, by making them a charge on the residue of the one and one-fourth share.

The next question is what is included under "necessary expenses," and, in particular, whether estate and Government duties, exigible from the testator's estate, and legacy-duty are included. In my opinion, only the legal and ordinary expenses incurred in administering the will are included. As regards estate-duty, that is a debt due by the estate which must be paid by the trustees before division, and I see no reason to suppose that the testator intended to include such a charge under the head "expenses." As regards legacy-duty, that is recoverable from the legatees, so that I do not see that any question arises with regard to it. There is no direction that the legacies are to be paid by the trustees free of legacy-duty.

I understand that the parties do not desire an answer to the fifth and sixth questions.

The seventh and last question is whether John Lundie Michie and Robert M'Lean are entitled to share in the books, manuscripts, &c. directed by the testator to be parted among his executors.

By the sixth purpose of the will the testator left his books, manuscripts, &c. to be disposed of by his executors as should seem to them to be best, with the request that should there be a parish lending library at Dinnet they should make a gift to it of such works as they should think suitable, and as there were some rare books of history, science, and reference he desired that these should be parted among his executors.

The nomination of executors is in these terms:—"I appoint the following to be my executors, viz.:—My brothers William and Charles and my sister Jane or their representatives, namely, the successors of each, as representing their respective families."

In order to participate in the gift an executor must, I think, have been appointed by the testator himself and have accepted the office. John

Lundie Michie and Robert M'Lean appear to me to be in different positions. Charles Michie, John Lundie Michie's father, predeceased the testator, and John, as his father's successor, is appointed by the testator himself.

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Robert M'Lean's mother, Jane, is still alive, but has declined to act as executor. Her son is not "her successor," and therefore had no right to the office, but he has been assumed as an executor. That being so, I think that John Lundie Michie is entitled to participate in the legacy, but that Robert M'Lean is not.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find in answer to the first and second questions that the second parties are each entitled to demand immediate payment from the first parties of one-fifth share of the residue of the testator's estate, exclusive of the books, manuscripts, pictures, specimens, works of art, and relics mentioned in the will; but that the third parties, the children of William Michie and the children of Jane Michie or M'Lean, being now all of full age, are respectively entitled to immediate payment from the said second parties of one-fifth share of said residue, exclusive as aforesaid, each of said one-fifth shares being divisible among the respective children equally: Answer the first alternative of the third question in the affirmative, and the second alternative in the negative: Find in answer to the fourth question that the whole expenses of administering the will are properly chargeable against the one and one-fourth share of residue destined to the sixth parties; but find that such expenses do not include estate-duty, which falls to be paid by the trustees before division, nor legacy-duty: . . . Find in answer to the seventh question that John Lundie Michie, as the successor and representative of his father in the office of executor, is entitled to share in the bequest of books, manuscripts, and collections of printed matter directed by the testator to be parted among his executors; but that Robert M'Lean is not so entitled: Find and declare accordingly, and decern."

SMITH & WATT, W.S.—CONSTABLE & SYM, W.S.—DAVIDSON & MACNAUGHTON, S.S.C. —MENZIES, BLACK, & MENZIES, W.S.—Agents.

GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND AND OTHERS, Complainers (Respondents).—*Johnston, K.C.—Christie.*
REVEREND JAMES JOHNSTON AND OTHERS, Respondents (Reclaimers). —*Mackenzie, K.C.—Orr.*

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General Assembly of the Free Church of Scotland v. Johnston.

*Interdict—Interim Interdict—Prima facie title—Dissenting Church.*—In 1900 a majority of the General Assembly of the Free Church of Scotland passed an act uniting that Church with the United Presbyterian Church of Scotland, the united Church to be called the United Free Church of Scotland.

In 1904 the Free Church of Scotland, composed of the minority of the original Free Church who had not entered into the union, obtained a judgment of the House of Lords to the effect that all the general property belonging to the original Free Church and held by trustees for behoof of that Church fell to be made over to trustees for behoof of the Free Church as it existed after the union. At the same time, in an action raised by

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the United Free Church against trustees holding church buildings in trust for behoof of the Buccleuch-Greyfriars congregation in Edinburgh for declarator that the said church buildings were held for behoof of the United Free Church congregation, the House of Lords held that the congregation of the United Free Church had no right to the buildings.

Thereafter the Free Church and the congregation of the Free Church at Strathpeffer, founding on these judgments, presented a note of suspension and interdict against the United Free Church and the congregation of the United Free Church at Strathpeffer, praying for interdict against the United Free Church congregation using the church at Strathpeffer, which was held on a trust title *prima facie* identical with the title of the Buccleuch-Greyfriars Church in Edinburgh.

The complainers having moved for interim interdict, the United Free Church congregation maintained that interim interdict ought not to be granted, in respect (1) that the judgments of the House of Lords were not *res judicatæ* against the present respondents, and were pronounced upon incomplete information as to the facts; (2) that the church at Strathpeffer had been built by subscription in 1886 after the original Free Church had (in 1873) resolved that there was no bar in principle to union with the United Presbyterian Church, while the Buccleuch-Greyfriars Church was built at a much earlier date, and that the subscribers to the building of the church at Strathpeffer as a body were in favour of the competency and the expediency of the union; and (3) that the Government intended to take immediate legislative action with a view to a settlement of the differences between the two Churches.

*Held* (*aff.* judgment of Lord Pearson) that the church at Strathpeffer being held on a title *prima facie* identical, *mutatis mutandis*, with that of the Buccleuch-Greyfriars Church, interim interdict fell to be granted.

Bill-Chamber. 2D DIVISION. Lord Pearson.

THIS was one of a group of notes of suspension and interdict arising consequent upon the decisions of the House of Lords in the cases of *The Free Church of Scotland* v. *Lord Overtoun*, and of *Macalister* v. *Young*, Aug. 1, 1904 (H. L.), present vol., p. 1, and L. R. [1904], A. C. 515, and raising the question as to the right to the congregational property of certain congregations of the Free Church of Scotland as it stood at the time of the Union on 30th October 1900—the particular congregational property to which the present note of suspension and interdict related being the church at Strathpeffer.

The complainers were—(1) the General Assembly of the Free Church of Scotland, acting through its Commission of Assembly, and the Moderator and Clerks of the said General Assembly as representing the said General Assembly and Church; (2) Colin Fraser and Donald Munro, "the whole existing and acting trustees for the congregation of the Free Church worshipping at Strathpeffer," appointed prior to 31st October 1900; (3) certain additional trustees appointed for the said congregation in December 1900; and (4) the Moderator and Kirk-session of the said congregation.

The respondents were—(1) the Reverend James Johnston and others, the minister and elders forming the kirk-session at Strathpeffer of the United Free Church of Scotland; (2) the Deacons' Court of the said congregation; (3) the said Minister, Elders, and Deacons' Court, as representing the said congregation; (4) the Moderator and Clerks of the United Free Church of Scotland, as representing the said Church; and (5) Donald Macrae and William Mackenzie "formerly trustees for the said congregation of the Free Church of Scotland, and now or lately members of or adhering to the United Free Church of Scotland, for any interest they may have."

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The prayer of the note was in substance for interdict against the respondents first, second, and third enumerated, officiating as minister, elders, and deacons respectively, within the property known as the Free Church at Strathpeffer, except with the permission in writing of the complainers second enumerated, with consent of the complainers first enumerated, and molesting the complainers in the peaceable possession of the said property, and for interim interdict.

The complainers averred;—(Stat. 4) "On 31st October 1900, the respondents, the Reverend James Johnston and others, separated themselves from the said Free Church of Scotland, and having associated themselves as a congregation in connection with the said United Free Church of Scotland, occupied the said buildings belonging to and held in trust for the congregation of the Free Church of Scotland. The complainers, other than those first enumerated, continued, along with others, associated together as a congregation of the Free Church of Scotland. . . . They have maintained in full order the organisation of such a congregation. The number of members and adherents of the congregation is 424 or thereby, a number which is greatly in excess of the members and adherents of the United Free Church in Strathpeffer." (Stat. 5) "The title to the church is contained in a feu-charter, dated 7th and 11th December 1886, and recorded in the General Register of Sasines 25th January 1887, granted by Anne Mackenzie, Duchess of Sutherland and Countess of Cromartie," in favour of Alexander Macphail and others, as trustees for behoof of the Free Church congregation at Strathpeffer, and to the successors of the said trustees to be from time to time appointed in the manner provided in the disposition known as the Model Trust Deed. Of the said original trustees "Colin Fraser and Donald Munro are complainers, the others are deceased. The infeftment taken by recording the said title in favour of the original trustees enures to the benefit of the trustees now in office." The complainers averred that the feu-charter incorporated by reference the conditions and declarations from *primo* to *duodecimo* of the Model Trust Deed. (Stat. 6) "The terms of the foresaid feu-charter, in so far as relating to the present question, are similar to the terms of the title" in the case of *Macalister* v. *Young*. "The effect of the judgment in the said case, taken along with the judgment in the case of" *The Free Church of Scotland* v. *Lord Overtoun*, "is to declare that persons in the position of the respondents, who, prior to 30th October 1900, were members of the Free Church of Scotland, with certain rights in the property thereof, and who thereafter associated themselves with the United Free Church of Scotland as members thereof and otherwise, thereupon ceased to have any right or interest in the property of, or held in trust for, the said Free Church of Scotland or congregations thereof, and to be qualified to act as trustees therefor. The respondents have thus no title, right, or interest in the subjects referred to in this note."

Answers were lodged for all the persons called as respondents with the exception of those fourth enumerated.

The compearing respondents (Ans. 4) "Admitted that at the time of said Union these respondents adhered to the United Free Church and occupied the said buildings. Explained that at the time of said Union the total number of members and adherents of said Free Church congregation at Strathpeffer who adhered to the United Free Church and to the ministry of the respondent the Reverend James

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Johnston, exceeded those who declined to adhere to the United Church. Of the members fifty-four or thereby adhered to the United Free Church, while only thirty or thereby refused to adhere. Explained that the Act of Union was entirely within the competency of the Free Church, and that the property in question in this action now accordingly in fact belongs to the trustees thereof, none of whom are disqualified from acting as trustees by reason of being members of the United Free Church. *Quoad ultra* denied."

The compearing respondents further averred that the actions of *The Free Church of Scotland* v. *Lord Overtoun*, and of *Macalister* v. *Young*, were decided without proof; that facts essential upon the question of the position of the Free Church and its history and power to enter into the Union, and as to the rights to property held under the Model Trust Deed, were not before the House of Lords; that the compearing respondents were not parties to the said actions, and that the decisions therein were not *res judicatæ* against them; and that the complainers did not hold any decree against the respondents relating to the subjects mentioned in the prayer of the note.

In a statement of facts the compearing respondents further averred; —(Stat. 2) "It was intended and contemplated by the founders of the Free Church that the said Church should, as opportunity occurred, enter into unions with other churches in Scotland, and should, if it thought fit, change its name as it has done. . . . At the time of the Disruption there were several bodies of Protestant Presbyterian dissenters in Scotland, including the Secession Church, the Relief Church, and others. The Secession and Relief Churches united in 1847 and formed the United Presbyterian Church. The leaders of the Free Church in their public utterances at the time of the Disruption repeatedly declared that the principles of the Free Church did not differ on any essential or fundamental principle from those of the said Protestant Presbyterian dissenters, and they declared that they contemplated and looked forward to not only co-operation, but also incorporative union between the said bodies of Protestant Presbyterian dissenters and the Free Church. . . ." (Stat. 3) "Holding the views above set forth in regard to the union with other Churches, the Free Church at the beginning of her separate existence made provision for her congregational property being held by titles which expressly provided for the event of the said Church entering into such unions. The General Assembly of 1844 passed an Act entitled 'Act anent Trust Deeds,' enacting that the property of each place of worship be held as nearly as possible in the form of the Model Trust Deed contained in the Act. . . . It was the declared intention of the founders of the Free Church, as therein expressed, that the said Church should be entitled, as she saw fit, to enter into union with any other body of Christians, under any name or designation which she chose to assume, and that in so doing the said Church should not forfeit her right to the properties held by her in terms of the Model Trust Deed, but that on the contrary properties so held should continue to be used, occupied, and enjoyed as places of worship by congregations of the United Church. . . . The title founded on by the present complainers is in terms of and incorporates by reference the Model Trust Deed. . . ." (Stat. 4) " . . . The Free Church publicly declared, by resolution of her General Assembly of 1873, that there was no bar in principle to union with the United Presbyterian Church. . . . Since said date it has

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been well known to all the Church's members and adherents that the Church looked forward to an incorporating union with the United Presbyterian Church. . . . All gifts of money or property made to the Free Church since said date have been made in the knowledge of said declaration. . . ." (Stat. 6) " . . . The church property belonging to the Strathpeffer congregation was acquired in the years 1886 to 1887, long after . . . it was fully recognised by all parties that there was no bar in principle to union with the United Presbyterian Church. . . . Subscriptions were obtained for the building of the church. . . . A large body of the subscribers is still alive, and their views and the views of those deceased in favour not only of the competency, but the expediency, of the union are known. In point of fact, out of the £2000 or thereby subscribed, the sum of £18, 16s. is the total *cumulo* amount of the subscriptions of those who objected or object to the union. . . . Were interdict to be granted it would be in violation of the wish of the donors and of their views when their donations and subscriptions were given. . . ." (Stat. 7) "The respondents desire to state that, while maintaining their whole rights and interests in the premises, they have no desire for litigation in the matter, but on the contrary their desire is that the matters dealt with in this note, together with the whole questions now in controversy between the United Free Church and the Free Church, should be speedily settled without litigation, either by voluntary arbitration, or by the action of Parliament. This desire has been communicated to the complainers. Both parties are in fact aware of the intention of the Executive Government to take immediate action to achieve such a settlement. In these circumstances the present note of suspension is nimious and oppressive, and is intended to be a means of impeding the solution proposed to be found for the difficulties of parties. . . ."

The complainers pleaded;—(1) The complainers having all the rights in the said subjects mentioned in the title-deeds herewith produced are entitled to have the note passed, and to interdict as craved, and in the circumstances, also to interim interdict. (2) The respondents having no right, title, or interest in the said subjects, or to the use thereof, and there being reasonable ground for believing that the respondents have nevertheless been using, and intend to use, the same unlawfully, to the deprivation of the complainers, interim interdict should be granted as craved.

The respondents pleaded;—(1) No title to sue. (2) No relevant case. (3) The complainers having no right or title to the heritable subjects mentioned in the note, interdict should be refused. (4) The respondents being entitled to enter into the union of 1900, and not having forfeited thereby their rights and interests in said heritable subjects under the title-deeds produced, interdict should be refused. (5) The complainers' whole material averments being unfounded in fact and untenable in law, interdict should be refused.

On 6th December 1904, the Lord Ordinary on the Bills (Pearson) pronounced this interlocutor:—" Having heard counsel on the note and answers and considered the cause, passes the note, and grants interim interdict without caution." *

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* " OPINION.—The case of Strathpeffer, which I have now before me, is the first of a group of cases which raise the question of the right to the congregational property of the Free Church as it stood at the time of the

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The respondents reclaimed.

At the hearing it was stated that a commission had been issued by the Crown to inquire and report as to the matters in dispute between the Churches, and further that Sir John Cheyne, K.C., had been appointed as a commissioner to regulate questions of interim possession.

LORD JUSTICE-CLERK.—At this stage the Lord Ordinary has taken the course of allowing interim interdict in this case. It is quite plain that he has done so upon a very careful consideration of the case presented to him, and certainly his note is a most excellent exposition of the grounds upon which he has proceeded. I must say that I see no ground for interfering with the judgment at which he has arrived on that preliminary question. It is suggested that there are certain things now before the Court that were not before the Lord Ordinary, but these things are not of the nature of cer-

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Union in 1900. It is conceded that the note must be passed, and the only question I have to decide at present is the question of interim interdict.

"In considering this question, I must of course take special note of the distinction between this case and the similar application which was made in the New College case. There the property in question admittedly fell within the very terms of the judgment of the House of Lords, and my duty was little more than ministerial. Here there is no judgment applying to the property in dispute; and the respondents urge that those who are now seeking to turn them out have themselves no title to the property by declarator or otherwise. Now it is true that there has been no litigation between those particular parties; and, because of that, either party is free to make new averments, to state new pleas in law, and to put forward new grounds of judgment. But it is impossible, in deciding the question now in hand, to ignore all that has happened. Of course on this question of interim interdict, I can only deal with the matter provisionally; but it is certainly according to the practice of the Court in such cases to consider how the rights of parties appear on a *prima facie* aspect.

"First, on the question of title, the respondents contend that the subjects are vested in a body of trustees, and that that body is divided, and, so far as regards those whose names appear in the infeftment, equally divided. I think that is quite immaterial to the present question. The trustees are all here, and obviously they are divided because some have remained in the Free Church, while others have joined in the union. If it were necessary, it might be pointed out that under clause 7 of the Model Trust Deed, which is incorporated in their title, it is provided that in the event of any trustee 'ceasing to be a member of the said body or united body of Christians,' he shall *ipso facto* cease to have any right to act under these presents, and the trust shall thenceforward be conducted by the other trustees as if the trustee so ceasing were actually dead. True, the respondents say that the local trustees who are among their number have not ceased to be members of the united body of Christians there referred to, and that it is the trustees who are complainers that have done so. *Prima facie*, I think it is just the other way; for I have been referred to the opinions pronounced by a majority of the Lords on appeal in the cases of *Lord Overtoun and Others* and of *Young* v. *Macalister*, which appear to lay down distinctly, as matter of construction of this very trust-deed (the Model Trust), that the union there contemplated must be such as might properly be made without detriment to the distinctive tenets of the Free Church, and that the union founded on by the respondents does not answer that description. Without being *res judicata* against the present respondents, that is a judgment of the highest authority upon the construction of the same Model Trust Deed; and it is,

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tainties at all. It is now said that there has been a Commission issued by the Crown for the purpose of making certain investigations with the view possibly, or we may assume certainly, to the intervention of Parliament. But I do not think that that is a matter which a Court of justice is bound to take into consideration, and I doubt very much whether a Court of justice is even entitled to take it into consideration. I think the sole question before us is, have these reclaimers as the case stands any title so that they can resist meantime a motion for interdict? I think it is quite plain that, following out the judgment of the House of Lords, they have no title, and if they have no title in the ordinary case in a question of possession interdict would follow. There are many cases in which there might be no need for giving interdict, because the want of interdict would not lead to any damage or to anything contrary to the rights of the other parties in the meantime. Here it is quite plain that that is not so. It is quite plain

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I take it, binding on all the Courts, except in a case where some workable distinction can be suggested.

"But after all, when once it is settled, as I hold it to be settled, that the law which is applicable is the law of trusts, it becomes apparent that the practical question is not so much as to the personnel or the title of the trustees, but as to the identification of the beneficiaries. And on this point, I take it that the judgments pronounced on both appeals are *prima facie* conclusive against the respondents. This is very clearly brought out by the circumstance that in the action of declarator it was declared among other things that even the United Free Church trustees hold the general property in the meantime for the Free Church beneficiaries.

"But it is urged for the respondents that however this may be, their case as here stated on the pleadings presents certain important considerations which were not put forward in those previous litigations, and upon which they undertake to shew after a proof that they are in the right. These are (1) that the opinions of the original leaders of the Free Church, when properly collected and weighed, negative the conclusion arrived at by the House of Lords as to the importance of the Establishment principle; and (2) that the title here, being dated in 1886, is not open to the same observations as was the case with the much earlier title founded on in the case of *Young*, and further that many of the original subscribers are still alive, and that their views and the views of the deceased subscribers are known to have been 'in favour not only of the competency but of the expediency of the Union.'

"I assume for the present purpose the relevancy of the respondents' averments on both these topics. But the question is whether they make any such difference in the *prima facie* aspect of the parties' rights as to entitle the respondents to prevail on this question of interim interdict. In my opinion they do not. The first of them involves the proposition that the case on this head was inadequately presented in the previous litigations, and that the present respondents could have done better—so much better as to compel a different decision. Now, that is quite within the bounds of possibility; but there is no such marked probability about it as to impair seriously the strength of the complainers' position at this stage. The other topic, namely, the inquiry into the intentions of the donors, comes more nearly up to what the respondents are in search of; and this is really the only point made which has caused me to hesitate in holding that the complainers' case for interim interdict is unanswerable. I have given every consideration in my power, within the time allowed, to the argument for the respondents on this matter of the wishes of the contributors, and to the full references which were made to the opinions delivered in the House

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here that without an interdict strife and confusion might go on in these places, and I think it is far better to follow the course the Lord Ordinary has taken to prevent that and to bring matters to a point in the meantime. What may happen in the future we do not know, but I entirely agree with the view the Lord Ordinary has taken, that the proper course to settle the matter in the meantime is to grant interim interdict. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD KYLLACHY.—I agree with your Lordship. I am entirely satisfied with the judgment of the Lord Ordinary, and do not desire to add anything to what he has so well said. I am the less disposed to do so because some of the topics with which the Lord Ordinary deals in their *prima facie* aspect may come before us later, and may have to be the subject of argument and decision. As to Sir John Cheyne's Commission, all I need say is that the existence of that Commission cannot, in my opinion, relieve this Court from the duty of dealing with these cases, which are cases competently before us, and of dealing with them just as we should deal with applications for interim interdict in any other cases which come before us.

LORD KINCAIRNEY.—I concur with your Lordship and with the Lord Ordinary. The Lord Ordinary has very carefully considered the question of interim interdict, and I see no reason for disturbing the judgment which he has pronounced.

LORD YOUNG was absent.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—COWAN & DALMAHOY, W.S.—Agents.

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of Lords; and I have been unable to come to the conclusion that the statement of the donors' wishes and intentions is sufficient ground at the present stage for deciding against the complainers in the matter of interim regulation.

"Then it is said that there is about to be intervention by the Executive Government or by the Legislature, and it appears that a Royal Commission is about to be appointed. But all beyond that is quite vague, both as to time and as to the terms of reference. I would gladly have held my hand until this matter takes more definite shape. But neither party suggested that I should on that account postpone deciding the question of interim regulation one way or the other. The only use I was asked to make of it was to accept it as a reason for refusing interim interdict. But it is as yet at too early a stage to furnish me with a reason for doing that.

"I thought that perhaps a knowledge of the local circumstances of the two congregations, and of the facilities for accommodating them, might have some bearing on this question. I have been furnished orally by the parties with their respective views as to numbers and accommodation, with the result that I feel I can draw no safe conclusion in favour of either. The matter is, in my view, so obviously one for arrangement and regulation, especially having regard to the subject-matter in dispute, that it is with great reluctance that I give either party a temporary, and it may be a barren, victory by deciding the question of interim possession. But my reluctance is tempered by the consideration that the complainers made what, from their point of view, appeared to me a reasonable offer of joint use of the subjects, and that this offer was refused without any counter proposal being made."

PETER PRINGLE, Petitioner.—*Constable.* No. 92.

*Process—Proof—Divorce—Proof and Oath de calumnia taken on commission before case called—Defender's objections to competency reserved.*— A naval artificer-engineer, who was the pursuer in an action of divorce, presented a petition in which he stated that the summons in the action had been signeted and served edictally, but could not be called in Court until after the date when the ship upon which he and another material witness were serving was under orders to proceed to sea, and moved the Court to appoint a commissioner to take his oath *de calumnia* and the evidence of himself and the other material witness, the depositions to lie *in retentis* subject to the orders of the Court. The Court *granted* the prayer of the petition, reserving to the defender all objections competent to her to the competency of the petition. Feb. 21, 1905. Pringle.

PETER PRINGLE, artificer-engineer on H.M.S. "Berwick," stationed at Chatham, raised an action of divorce against his wife, Mrs Amelia Annie Russell or Pringle, then or lately residing at 53 Albany Road, New Brompton. The summons was signeted and served edictally on the defender on 20th February 1905, but could not be called in Court before 7th March 1905. 1ST DIVISION.

On 21st February 1905 Pringle presented a petition to the Court in which he set forth the above facts, and stated further that he was a domiciled Scotsman; that he and Alfred Baynton, gunner on H.M.S. "Berwick," were material witnesses in the cause, whose evidence was likely to be lost owing to the ship being under orders to proceed to sea with the Second Cruiser Squadron on 28th February 1905 before the expiry of the *induciæ;* that it was also necessary for the pursuer to emit the oath *de calumnia;* and that the defender had no known agent in Scotland.

The petitioner prayed the Court to appoint the petition to be intimated to the defender; to grant warrant to cite the said Alfred Baynton; to appoint a commissioner to take the petitioner's oath *de calumnia* and the evidence of the petitioner and Baynton; and to dispense with interrogatories, the depositions to lie *in retentis.*

Counsel for the petitioner referred to *Clouston* v. *Morris,* Feb. 15, 1848, 20 Scot. Jur. 228.

THE COURT, being of opinion that the prayer of the petition should be granted, reserving to the defender all objection competent to her to the competency of the petition, pronounced this interlocutor:—"Grant diligence at the instance of the petitioner for citing Alfred Baynton, gunner, H.M.S. 'Berwick,' and the petitioner, necessary witnesses for the petitioner in the action mentioned in the petition, whose evidence, owing to their being about to leave the country, is in danger of being lost; and grant commission to James Adam, Esq., advocate, to take the oaths and examinations of the said Alfred Baynton and the petitioner, and to receive any exhibits and productions made by them in regard to the matters at issue between the parties to the said action, at such time and place as the said Commissioner may appoint, due notice thereof being given to the defender or her known agent, and also to take the oath of the petitioner *de calumnia* in common form: Dispense with the adjustment of interrogatories, and appoint the depositions of the witnesses and productions, if

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any, made by them, to be sealed up by the Commissioner, and immediately thereafter transmitted to the clerk of the process, there to lie *in retentis*, subject to the future orders of the Court or the Lord Ordinary, to be reported *quam primum:* Reserving to the defender all objection competent to her to the competency of the petition."

THOMAS LIDDLE, S.S.C., Agent.

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THOMAS KILLIN AND OTHERS (Pursuers), Respondents.—*Younger—D. Anderson.*
ALEXANDER CLARK WEIR, Defender (Appellant).—*Munro—J. A. Christie.*

*Process — Summons — Competency — Several Pursuers — Community of Interest.*—An action was raised at the instance of four pursuers concluding against one defender for separate sums of damages, on the allegation that the pursuers had been induced to purchase shares in a mining syndicate by false and fraudulent statements made to each of them by the defender at different times and different places, the statements in each case being of a similar nature.

*Held* that the action was incompetent, on the ground that the pursuers had no real and true community of interest.

1ST DIVISION. ON 22d September 1904, Thomas Killin, clerk, 168 West George Street, Glasgow; Finlay M'Fadyen, 79 Robertson Street, Glasgow; Thomas Torrance Crossgrove, 32 Midlothian Drive, Shawlands, Glasgow; and Colin Campbell, 1313 Pollokshaws Road, Glasgow, raised an action in the Sheriff Court at Dumbarton, against Alexander Clark Weir, Woodburn, Helensburgh, in which they sued the defender for separate sums of damages.

The pursuers averred that, on 21st November 1903, the defender, being then resident in South Africa, wrote to the pursuer Killin, bringing under his notice a gold prospecting company, known as the Hex River Main Reef Syndicate;—(Cond. 4) "In or about January 1904 the defender came to this country and called on the pursuer. He then informed him that he had purchased £10,000 of the shares himself, and that the shares were lying in his name with the secretary. He further stated that there was £5000 of the capital of the syndicate lying in the Bank at Johannesburg to meet the cost of boring and testing the ground, and that a bore was in course of being put down, and which was expected to reach the reef in three or four months. As a further inducement to take shares the defender expressed his willingness to pay the expense of an engineer selected by the Glasgow shareholders going from this country to be present when the bore reached the reef and give his report. The defender was introduced to the other pursuers by Thomas Killin in or about said month of February, and made similar statements to them and others, including John Leiper Gemmill, Parklea, Dumbuck, Glasgow, as to his holding in the company being £10,000; that he purchased said shares; that £5000 of the capital of the syndicate was actually in the bank for the purpose before mentioned; that a bore was being put down, and was expected to reach the reef in three or four months. All these statements were false and fraudulent, and were known to be so by the defender, and made by him to the pursuers and others with the express intention of inducing the pursuers and others to purchase

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shares in the concern." (Cond. 5) "The pursuers, believing in the sincerity and truth of the defender's statements and assurances as aforesaid, were induced to purchase from the defender shares in the said syndicate, as follows:—The said Thomas Killin, 100 shares at the price of £100; the said Finlay M'Fadyen, 150 shares at the price of £175; the said T. T. Crossgrove, 150 shares at the price of £150; and the said Colin Campbell, 50 shares at the price of £50."

The pursuers pleaded, *inter alia;*—(1) The pursuers having been induced by the false and fraudulent representations of the defender to purchase shares in the said company, they are entitled to repayment from him of the amounts respectively advanced to him, with expenses.

The defender pleaded, *inter alia;*—(1) The action is incompetent and irrelevant.

On 25th October 1904 the Sheriff-substitute (Blair) repelled the defender's preliminary defences and allowed a proof, and on 9th December 1904 the Sheriff (Lees) adhered to this interlocutor.

The defender appealed, and argued;—The action was incompetent. The four pursuers were suing on different grounds of action.[1] The alleged misrepresentations were made at different times and different places.

Argued for the pursuers;—The action was competent. The false representation alleged was the same in the case of each pursuer, and the separate injuries for which damages were claimed arose from a single wrong.[2] There was clearly community of interest among the pursuers.[3]

LORD PRESIDENT.—This is an appeal from interlocutors of the Sheriffs of Dumbarton, in the action at the instance of Thomas Killin, Finlay M'Fadyen, Thomas Torrance Crossgrove, and Colin Campbell, against Alexander C. Weir, in which each of the pursuers sues for separate sums of money, which they say are due to them in name of damages in respect of loss, which they have incurred owing to having taken shares in a certain syndicate induced by the false and fraudulent representations, as they allege, of the defender. The learned Sheriffs have allowed proof of parties' averments, but on appeal a point has been argued to your Lordships which does not seem to have been mooted in the Sheriff Court, viz., as to the competency of the action in respect that the four pursuers are allied together in suing for separate sums of money in respect of misrepresentations to them by the defender. I find that in an old, but respected, treatise on Forms of Process by Mr Ivory,[4] the rule is stated that, when several unconnected persons have been aggrieved by the same act of the defender, or have a joint interest in the matter libelled, one action in their joint names is perfectly competent, but that cases in which joint action is competent are limited to those of these two descriptions. I do not think the Court has ever departed

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[1] Mackay, Manual of Practice, p. 135; Harkes v. Mowat, March 4, 1862, 24 D. 701; Gibson v. MacQueen, Dec. 5, 1866, 5 Macph. 113; Mitchell v. Grierson, Jan. 13, 1894, 21 R. 367; Fischer & Co. v. Anderson, Jan. 15, 1896, 23 R. 395.

[2] Smyth v. Muir, Nov. 13, 1891, 19 R. 81, *per* Lord Kinnear, at p. 88.

[3] Cowan & Sons, &c. v. Duke of Buccleuch, &c., Nov. 30, 1876, 4 R. (H. L.) 14.

[4] Ivory, Forms of Process, I. 161.

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from that rule. Indeed, so long ago as 1741, an attempt very much like the present seems to have been made in the case of *Gray and Others, His Majesty's Feuars in Orkney*, v. *Sir James Stewart of Burray*,[1] where the Lords found "that different parties could not accumulate their actions in one libel unless they had connection with one another in the matter pursued for or had been aggrieved by the same Act." I think all the cases that were quoted to your Lordships fell quite distinctly under one or other of these two categories. "Had connection with one another in the matter pursued for" means a case of which a very apt illustration can be found in the case of riparian proprietors. They represent property having a joint interest, and it has been held that they may quite appropriately combine themselves in one action to protect their common interest. "Being aggrieved by the same act," finds its illustration in the various cases quoted of actions of slander—where the ground of action is contained in one statement made once and for all implicating several persons and aggrieving them. I cannot find any amplification of these two principles, and I think it is very obvious that, on considerations of expediency, it would be regrettable if any amplification had to be allowed. I ventured to put the case in the course of the argument that if the misrepresentation complained of had been contained in a prospectus published in a newspaper, we might have had hundreds of persons coming together and all joining in one action for damages which they had sustained by this misrepresentation. The truth is that when the pursuers' averments are looked at there is no real and true community of interest. It is said that it was one and the same false representation. But then it was made to different persons, at different times, and to a certain extent at different places, and it is impossible to doubt that the words of the communication used to different persons differed at least a little in particulars, which may or may not have great importance when you come to determine whether these representations were false or not. In these circumstances, I am of opinion that we have no course but to dismiss the action as incompetent.

LORD ADAM.—I entirely concur.

LORD M'LAREN.—I agree in all that has fallen from your Lordship, and in the judgment proposed.

LORD KINNEAR was absent.

THE COURT sustained the appeal, and dismissed the action.

MACPHERSON & MACKAY, S.S.C.—ST CLAIR SWANSON & MANSON, W.S.—Agents.

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Hook v. M'Callum.

MARION WESTON HOOK AND ANOTHER, Pursuers (Reclaimers).—*J. W. Forbes.*
MRS MARGARET M'CALLUM AND SPOUSE, Defenders (Respondents).—*Dunbar.*

*Process—Summons—Competency—Action against wife and husband concluding for one sum of damages for separate slanders—Reparation—Slander.*—In an action of damages for slander at the instance of a female servant

[1] June 5, 1741, M. 11,986.

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against her mistress and the husband of the mistress, the pursuer concluded for decree against the defenders "conjunctly and severally, or otherwise severally or according to their respective liabilities as the same may be determined, to make payment to the pursuer of the sum of £400 sterling."

The pursuer averred a slander uttered in January 1904 by the wife when the husband was not present, and further averred that in February 1904 the husband "received a letter from the pursuer's agent specially stating the charges made by his wife. In his reply this defender repeated the slanderous statements" of his wife. "By this and subsequent letters he adopted responsibility for the statements" of his wife.

*Held* that the action was incompetent, in respect that it concluded for a lump sum as damages for separate slanders, one uttered by the wife and the other by the husband, without any averment of conspiracy or complicity.

*Barr* v. *Neilsons*, 6 Macph. 651, *followed*.

2D DIVISION. LdStormonth-Darling.

IN September 1904 Marion Weston Hook, residing at Wilkieston, Midlothian, with the consent and concurrence of Robert Hook, her father, as her administrator-in-law, raised an action "against Mrs Margaret M'Callum, wife of and residing with James Y. M'Callum, dairyman, 7A Pitt Street, Edinburgh, and the said James Y. M'Callum as administrator-at-law for his said wife, and for his own right and interest,—defenders." The conclusion of the action was that "the defenders ought and should be decerned and ordained, by decree of the Lords of our Council and Session, conjunctly and severally, or otherwise severally or according to their respective liabilities as the same may be determined, to make payment to the pursuers of the sum of £400 sterling," with interest and expenses.

The pursuers averred;—(Cond. 1) " . . . The defender James Y. M'Callum, is a dairyman. He carries on business as such at Pitt Street, Edinburgh, and he resides there. The defender Mrs Margaret M'Callum is his wife. She, in conjunction with her said husband, carries on the said business for their joint interest. She manages all that concerns it at the shop which adjoins the dwelling-house in Pitt Street. In the conduct of their business the defenders employ a number of female servants." (Cond. 2) "On or about 24th November 1903 the pursuer Marion Weston Hook entered the defenders' employment as a domestic servant on a contract of service for six months. . . ." (Cond. 4) "On or about 21st January 1904, in the defender's shop in Pitt Street, the defender Mrs Margaret M'Callum falsely, maliciously, and calumniously stated to the pursuer Marion Weston Hook that she was fit only for gossiping and walking the streets, meaning thereby to accuse the said pursuer of being a person of loose, immoral, and vicious habits, or only fit to be a prostitute." (Cond. 5) "Further, on or about 24th January 1904, in the defenders' dwelling-house in Pitt Street foresaid, in the presence and hearing of the said pursuer's fellow-servants, named Isabella M'Phee and Christina Reid, both then residing at the defenders' dwelling-house foresaid, the defender Mrs Margaret M'Callum falsely, maliciously, and calumniously said of and concerning the said pursuer that she was untruthful and deceitful and that the said two fellow-servants ought not to associate themselves with her, or words of a similar import and effect." (Cond. 6) "On the same date and in the same place the defender Mrs Margaret M'Callum falsely and calumniously said of and concerning the said pursuer that she (the said defender) would lock the said pursuer's trunk, which lay in a bedroom of the house occupied by the said pursuer and one of her fellow-servants,

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so that if her fellow-servants' clothes were amissing it would be known where to find them. By that latter statement the said defender intended to accuse, and did accuse, the said pursuer falsely, maliciously, and calumniously of being a thief or capable of dishonestly secreting and stealing the property of her fellow-servants. At the time she made that slanderous statement the said defender unwarrantably opened and examined the female pursuer's trunk, in the lock of which the key stood at the time. Thereafter she locked the said trunk and placed the key in the shop, all without asking or obtaining the said pursuer's consent." (Cond. 7) "On 25th January 1904 both the pursuers called at the defenders' shop in Pitt Street. Delivery of the trunk referred to was there and then asked from the defenders. They refused to give it, and they called in a policeman, as if the pursuer Marion Weston Hook had been guilty of dishonestly secreting her fellow-servants' clothes or other property not her own in the trunk. The defenders were requested to state on what ground the imputations and accusations against the female pursuer's character had been made as hereinbefore stated. But the defenders refused to explain, and adhered to and refused to withdraw those imputations and accusations." (Cond. 8) "On the said occasions when the defender Mrs Margaret M'Callum slandered the pursuer as aforesaid, she represented her husband in the shop and business. The said statements were made by her of and concerning the said pursuer maliciously and recklessly, with an utter disregard for the pursuer's feelings, and in the knowledge that they were not true. Said statements were false and without any foundation. The defender James Y. M'Callum entirely approved of and adopted his wife's said statements. He was present at said interview on 25th January 1904, and identified himself with the defender Mrs M'Callum's statements and actings. He expressed his approval of the language used by his wife towards the pursuer, and further stated that his wife was justified in examining the trunk in the manner and on the occasion mentioned. In the month of February 1904 he received a letter from the pursuers' agent specially stating the charges made by his wife. In his reply this defender repeated the slanderous statement that the female pursuer was deceitful and untruthful. By this and subsequent letters he adopted responsibility for the statements and actings above condescended on, and adhered to them. . . ." (Cond. 9) "By the foresaid false, malicious, and calumnious imputations and accusations of immorality, untruthfulness, deceitfulness, and dishonesty against the pursuer Marion Weston Hook's character, she has been seriously wounded in her feelings, and her reputation, character, and credit have been greatly injured. The loss, injury, and damage which the pursuers have sustained and will sustain in the premises cannot be estimated at less than the sum sued for. . . ."

The pursuers pleaded;—(1) The defender Mrs M'Callum having falsely and calumniously slandered the pursuer Marion Weston Hook's character as stated, she is liable in reparation therefor. (2) The defender James Y. M'Callum having identified himself with his wife's statements and actings, and having approved of and adopted the same, he is liable in reparation. (3) The said pursuer having, as condescended on, suffered loss, injury, and damage, she is entitled to decree as concluded for, with expenses.

The defenders pleaded, *inter alia*;—(1) The action being incompetent ought to be dismissed, with expenses.

On 15th November 1904 the Lord Ordinary (Stormonth-Darling)

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pronounced this interlocutor:—"Sustains the first plea in law for the defenders, and, in respect thereof, dismisses the action, and decerns: Finds the defenders entitled to expenses," &c.

The pursuers reclaimed, and argued;—A husband was not as a rule responsible for a slander uttered by his wife, but he might be if he identified himself with her in uttering the slander.[1] The husband here was not present when his wife uttered certain of the slanders complained of, but cond. 8 contained a relevant averment that he adopted the slanders which his wife had uttered, and thus identified himself with her in her statements. An issue therefore ought to be allowed in the form allowed in the case of *Jack*.[2] The pursuers, however, were willing that the action should be dismissed as against the husband, and that an issue should be allowed against the wife only. There was nothing in the case of *Barr* v. *Neilsons*[3] against the competency of such a course, which was supported by authority.[4]

Argued for the defenders;—The case was ruled by *Barr* v. *Neilsons*,[3] which had been followed in *Taylor* v. *M'Dougall & Sons*.[5] There were here an averment of slanders uttered by the wife when the husband was not present, and in cond. 8 an averment of a written slander uttered by the husband which the wife was not averred even to have known about. The case of *Jack*[2] was not in point, for there both defenders were present and were alleged to be acting in concert; there was no averment here that the defenders were acting in concert. Abandoning the action as against the husband did not make the action competent against the wife. If the action had been dismissed as irrelevant in so far as directed against the husband,—that was to say, if there was not a relevant averment of a slander uttered by the husband—then the action might have remained a competent action as against the wife, for in that event the only slanders relevantly averred would have been slanders uttered by the wife. That was the explanation of the cases of *Milne*,[6] *Reilly*,[7] and *Baird's Trustees*,[8] on which the pursuers founded. But it was not suggested that cond. 8 did not contain a perfectly relevant averment of a slander uttered by the husband. Consequently, even if the action was dismissed against the husband, it remained an action concluding for a lump sum in name of damages for several disconnected wrongs, with one of which at anyrate the wife was not alleged to have had anything to do; which was just the case of *Barr* v. *Neilsons*.[3]

LORD JUSTICE-CLERK.—We have had a long and interesting debate here. I have come to the conclusion that the Lord Ordinary is right. It is plain that the pursuer by his summons intended to attack both the husband and the wife, who are the defenders in this action, and that he desired to obtain a decree which should cover both. The averments against each are quite separate, and it could not be otherwise, because the slanders com-

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[1] Scorgie v. Hunter, Feb. 22, 1872, 9 S. L. R. 292.
[2] Jack v. Fleming, Oct. 15, 1891, 19 R. 1.
[3] March 20, 1868, 6 Macph. 651, 40 Scot. Jur. 337.
[4] Milne v. Smiths, Nov. 23, 1892, 20 R. 95; Baird's Trustees v. Leechman, Jan. 24, 1903, 10 S. L. T. 515; Reilly v. Smith, May 24, 1904, 6 F. 662.
[5] July 15, 1885, 12 R. 1304.
[6] 20 R. 95.
[7] 6 F. 662.
[8] 10 S. L. T. 515.

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plained of which were uttered by the wife were uttered when the husband was not present. The ingenious mode of bringing him in and making him art and part in the slander said to have been uttered by his wife consisted in taking advantage of what he said or wrote; in this way it is said he adopted the slander uttered by his wife. It appears to me that that is an entire fallacy. If the male defender said or wrote things which shewed that he approved of the slander uttered by his wife when he was not present, the saying or writing of these things might amount to slander by the husband on his own account, but it never could make him participant in a slander uttered by his wife some time before when he himself was not present. The illustration was suggested of a joint assault. If two men attack a third, one hitting him on the head and the other on the shins, they may both be jointly and severally liable for the whole injuries, although it may be quite certain what specific part of the injuries was due to each, yet as the whole *res gestæ* come together when both are present, each is responsible for the whole; but if A is assaulted by B and is subsequently assaulted by C, then plainly there are two separate wrongs, for one of which B is alone responsible, and for the other of which C is alone responsible, and this even although the two assaults are separated by an interval of only ten minutes, and although B and C have the same ground, or supposed ground, of quarrel against A. It would be different if B and C were acting in conspiracy, but there must be specific averments of that. Here there are simply an averment of a slander uttered by the wife when the husband was not present and an averment of a slander uttered on a subsequent occasion by the husband, without any allegation of a conspiracy between the two. The pursuers have now intimated that they have abandoned the action against the husband, but when we look at the averments we have simply a case of different slanders uttered at different times and at different places by each of two defenders. That being so, I think that the action, in accordance with *Barr* v. *Neilsons*,[1] ought to be dismissed as incompetent.

Lord Kyllachy.—If the pursuer's case had been simply that Mrs M'Callum had on certain occasions slandered her, and that Mr M'Callum had identified himself with his wife's slanders so as to make them his own, it could not, I suppose, here be doubted that the action would have been a quite competent action; and further, that it could not have become incompetent merely because the Court on an examination of the averments found that the case against the husband was irrelevant. That is perfectly clear, and involves nothing contrary to the decision in the case of *Barr* v. *Neilsons*.[1] But when we come to examine the case before us it appears that, after averring as against both wife and husband various joint slanders, the pursuer goes on in condescendence 8 to aver as against the husband a separate slander uttered on a different occasion—a slander by the husband alone, and, so far as the statements shew, without any complicity on the part of his wife. The case therefore presented is one of various wrongs committed jointly by two parties, followed by an entirely separate wrong

[1] 6 Macph. 651.

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committed only by one of them, and on that case is rested a conclusion for a lump sum of damages against both parties or either of them. Now, I am afraid that this is just the kind of case to which the rule of the case of *Barr* v. *Neilsons*[1] applies, and that, I think, is enough for the decision of the question before us. I agree that the action as laid is incompetent, and that the judgment of the Lord Ordinary should be adhered to.

LORD KINCAIRNEY.—The case of *Barr* v. *Neilsons*[1] has sometimes seemed to me to present some difficulty, but it is too late to discuss it now. It must be accepted as a conclusive authority, and the question we have to decide is whether it applies in the case before us. If an action for a lump sum is brought against A and B for a wrong done by A and a separate wrong done by B, then the case of *Barr*[1] applies, and the action is incompetent. This is the case we have here. There is an averment of a slander by the wife and an averment of a separate slander on a subsequent occasion by the husband, in which the wife was not participant. The case thus falls under the case of *Barr*,[1] and I therefore concur in your Lordships' opinion.

LORD YOUNG was absent.

THE COURT adhered.

D. HOWARD SMITH, Solicitor—DONALDSON & NISBET, S.S.C.—Agents.

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MRS RACHEL M'DONALD, Pursuer (Respondent).—*Watt, K.C.—Munro.*

JAMES DUNLOP & COMPANY (1900), LIMITED, Defenders (Appellants).—*Campbell, K.C.—Hunter.*

*Reparation—Master and Servant—Negligence—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *subsec.* (2) (*b*)—*Action for reparation by person found not entitled to compensation—Election—Competency*—The Workmen's Compensation Act, 1897, sec. 1, subsec. (2) (*b*), enacts that when the injury is caused by the negligence of the employer, or of someone for whom he is responsible, "nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act."

*Held* that a claimant who had been refused compensation under the Workmen's Compensation Act, 1897, on the ground that she was not a dependant of the deceased workman, was not thereby barred from raising an action of reparation at common law, or under the Employers Liability Act, 1880, against the deceased's employer.

1ST DIVISION. Sheriff of Lanarkshire.

ON 8th October 1903, John M'Donald senior, and his son, John M'Donald junior, miners, in the employment of James Dunlop & Company (1900), Limited, coalmasters, Calderbank, Airdrie, were killed by an accident arising out of and in the course of their employment.

Mrs Rachel M'Vey or M'Donald the wife of John M'Donald senior,

[1] 6 Macph. 651.

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and mother of John M'Donald junior, presented a petition in the Sheriff Court of Lanarkshire, at Airdrie, in which she claimed compensation under the Workmen's Compensation Act, 1897 (1) in respect of the death of her husband, and (2) in respect of the death of her son.

On 30th December 1903 the Sheriff-substitute (A. O. M. Mackenzie) awarded Mrs M'Donald compensation, in respect of the death of her husband, but refused compensation in respect of the death of her son, on the ground that she was not a dependant of her son at the time of his death.

On 30th September 1904, Mrs M'Donald raised an action in the Sheriff Court at Airdrie, against James Dunlop & Company (1900), Limited, in which she sought decree against the defenders for payment of £500 at common law, or alternatively for £197, 18s. 6d. under the Employers Liability Act, 1880, as damages and *solatium* for the death of her son.

The defenders pleaded, *inter alia*;—(1) Pursuer having in the exercise of her option, under section 1, subsection (2) (*b*), of the Workmen's Compensation Act, 1897, elected to claim compensation under said Act from defenders, in respect of the death of her said son (said claim having been disposed of by interlocutor of the Sheriff-substitute, at Airdrie, of date 30th December 1903), the present action is incompetent, and should be dismissed with expenses. (2) The action is irrelevant.

On 15th November 1904 the Sheriff-substitute (A. O. M. Mackenzie) repelled these pleas and allowed a proof.*

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* "NOTE.—(After narrating the facts)—It is argued that this subsection puts the workman or his dependant, in the case of the injury having resulted in death, to his election between the remedy provided by the Act and that which was open to him before the Act came into operation, and that, his election once made, he is barred from going back upon it, even although it turn out that he is not entitled to the remedy which he has selected. In my opinion, this argument is not well founded. If subsection 2 (*b*) be read in conjunction with subsection 1, it is, I think, apparent that the case to which subsection 2 (*b*) refers in the words 'in that case,' is the case of a workman who has a good claim both under the Act and independently of it, and accordingly it is with reference to that case that it gives the workman an option to select which of the two available remedies he prefers. It does not, in my opinion, contemplate the case of a workman or dependant upon whom the Act has conferred no benefit, and cannot fairly be read as meaning that the fact of such a workman or dependant having in error made a claim under the Act is to debar him from a remedy to which he had a right before the Act was passed. A reference to that part of the subsection which gives protection to the employer appears to me to support this view, for what the employer is protected against is not the having claims made against him both under the Act and independently of it, but the being found liable on both heads.

"I do not, however, require to rely on my own opinion of the meaning of the Act, for I think the matter is settled in accordance with the view I have expressed by the case of *Blain* v. *Greenock Foundry Company*, 5 F. 893.

"In that case certain of the children of the deceased William Blain sued his employers for damages on account of his death. In defence it was pleaded, *inter alia*, that one of the pursuers, James Blain, was barred from suing in respect that he had previously made an unsuccessful claim under the Workmen's Compensation Act. This plea was repelled by Lord Kin-

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The defenders appealed, and argued;—The appellant had elected to claim under the Workmen's Compensation Act, and had pursued that claim to a final judgment. She was therefore barred from now proceeding either at common law or under the Employers Liability Act. The policy of the Workmen's Compensation Act was to protect the employer against a double claim, and to provide that a claimant should make his election either to claim compensation under the Act, or to seek the remedy provided by the common law and the Employers Liability Act. Section 1, subsection (4), of the Act of 1897 provided for the converse of the present case, and it had been held in England that when a pursuer had failed in an action of damages against his employer, he could not at a subsequent date initiate independent proceedings for compensation under the Act of 1897.[1] In *Rouse* v. *Dixon*,[2] where it was held that a claim made under the Act of 1897 was not a bar to a subsequent action for damages, the claim for compensation had been withdrawn before the arbiter issued his award. Here the claim had been prosecuted to a final issue. In *Blain* v. *Greenock Foundry Company*,[3] the question now raised was not considered in the Inner-House.

Counsel for the pursuer were not called upon.

LORD PRESIDENT.—In this case I agree with the opinion of the learned Sheriff-substitute, who has in his note expressed the ground of his judgment very clearly. Besides that, I think it is almost impossible to distinguish this case from one branch of the case of *Blain*.[3] The matter there is undoubtedly dealt with by the Lord Ordinary at the end of his note,[4] where he says,—"The pursuer James Blain"—it may be noted that James Blain was one of the pursuers, but was not the principal—"is in a special position, because he made a claim under the former proceedings. But the result was that it was found that he had no title. His claim was not

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cairney, and his interlocutor was affirmed by the Second Division. The ground on which the claim of James Blain under the Act had been rejected was that he had no title, inasmuch as he had been only partially dependent on his father, and there were other claimants who had been totally dependent. His case was therefore identical for all practical purposes with that of the present pursuer.

"The same view has been taken by the Court of Appeal of Ireland—see *Beckley* v. *Scott*, Ir. R. [1902], 2 K. B. 504.

"I was referred to the case of *Edwards* v. *Godfrey*, L. R. [1899], 2 Q. B. 333, as an authority to the contrary. In this case it was held that a workman who had unsuccessfully sued his employer for damages, and who had failed to take advantage of the privilege given by section 1, subsection 4, of the Act of 1897 to have compensation assessed by the Court before which this action was tried, was barred from making any subsequent claim for compensation. The point decided therefore was not exactly the same as that raised in the present action. At the same time it must be admitted that the opinion of Lord Justice Smith is expressed in terms applicable to the present case. But if that decision is an authority for the view maintained by the defender, it is in conflict with the case of *Blain*, and it is the latter case which I am bound to follow.

"I accordingly repel the defenders' first plea in law, and as no argument was submitted in support of the plea to the relevancy, I repel it also."

[1] Edwards v. Godfrey, [1899], 2 Q. B. 333.

[2] [1904], 2 K. B. 628.

[3] June 5, 1903, 5 F. 893.

[4] 5 F. at p. 897.

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repelled on its merits, but his title was denied, and I think his position is therefore not different from that of the other pursuers." That is a decision absolutely in point, and though it is true that no reference was made to this point by the learned Judges of the Second Division when they advised the case, at the same time the interlocutor adhering covers that portion of the Lord Ordinary's judgment as well as the others. And one is fortified by seeing that this was the view taken, though not absolutely necessary for the determination of the case, by the present Lord Chief-Justice in the case of *Rouse* v. *Dixon*,[1] because his Lordship there, after quoting the section, says,[2]—"That seems to me to point out plainly what are to be the consequences of the exercise of his option by the workman. They are, that the employer is not to be liable to pay compensation more than once. That being so, it seems to me that when a claim is made under the Workmen's Compensation Act which cannot be enforced because the case does not come within the Act at all, the right of the workman to make any other claim is not lost." That also is directly in point; and the matter certainly is strengthened when one comes to consider what the claim here is. The liability under the Workmen's Compensation Act is expressed in section 1 in, so to speak, a passive sense. It is said that if an accident arises the employer shall be liable to pay compensation; and then there is a proviso saving the rights at common law of the workman who is injured, and workman, as explained by the interpretation clause which follows, means not only the workman himself but, where he is dead, includes his legal representatives or his dependants or other persons to whom compensation is payable. That, of course, is compensation as provided for in the Act; but the pursuer's action here, in so far as it is a common law action, is an action founded on fault, which, under the law of Scotland, is not an action of compensation but is an action of damages, founded on the old Scottish doctrine which gave an action for damages to certain near relatives of persons who had been killed. I think that, even if the learned Judges in England had come to an opposite decision from what they did, it would be difficult to find this particular right excluded in a Scottish case. But I do not think it is necessary to rest the case on what must be called a specialty arising out of the difference of the law in the two kingdoms. I think it is enough for us that the result is in accordance with what one may call the common sense of the statute, which apparently means that the employer is not liable to pay twice. It is in accordance with the decision of the other Division of this Court in *Blain's*[3] case, and in agreement with the opinion of the Lord Chief-Justice of England.

LORD ADAM.—I am of the same opinion. As I understand, the case arises in these circumstances: The pursuer raised proceedings under the Workmen's Compensation Act for compensation in respect of the death of her husband and her son. She succeeded in getting compensation in that action in respect of the death of her husband, but failed to get compensation for the death of her son, on the ground that she was only partly dependent on him, and therefore not entitled to compensation. She failed to make out

[1] [1904], 2 K. B. 628. [2] [1904], 2 K. B. at p. 631.
[3] 5 F. 893.

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her case, and, having failed to make out her case, now raises the present action of damages at common law and under the Employers Liability Act. It is said that the action is incompetent, because she has made her election of proceeding under the Workmen's Compensation Act, and therefore is barred from proceeding at common law or under the Employers Liability Act. I agree with your Lordship that there is no bar at all. It is quite true that if the option is exercised by a person bringing an action of damages, and the person exercising that option fails in that action, then a claim under the Workmen's Compensation Act must be disposed of by the Court at the same time; and for this reason, as it appears to me, that the whole facts of the case are before the Court upon which the Judge can award compensation; but that is not so in the converse case, and therefore there is no similar provision in the Act for dealing with that case. But I see nothing in that to prevent a claim for damages being made. I also agree with your Lordship that the case has in fact been decided by the case of *Blain*[1] in the other Division. I agree with that decision, and also with the arbiter's views on that case, and with the views expressed by the Lord Chief-Justice in the case of *Rouse*,[2] and I therefore think we should refuse the appeal.

LORD M'LAREN.—I also agree. I think that under the Act the claimant is in a certain state of facts and for certain purposes put to his election, because the language of the Act is that where two grounds of liability exist the workman may either raise an action for compensation under this Act, or may take such proceedings as were open to him before the Act came into force. Now, an alternative is there given, and it cannot mean that he is to do both. Therefore I hold it would be contrary to the Act of Parliament to attempt to carry on the two claims concurrently, with the intention it might be of abandoning one, and proceeding with the one which promised the best results. But then, while an election exists in that case, it does not follow that it is an irrevocable election, and in the absence of any provision to that effect, and keeping in view the explanatory proviso that the employer shall not be liable to pay under both claims, I come to the conclusion that a workman may, if he pleases, abandon the claim first made and fall back on the alternative claim. In a case where the election has been to bring an action for damages, express provision is made that the Court while dismissing the action may proceed to award compensation under the Act, while the converse case is not expressly provided for. The Act of Parliament provides that the employer shall not be liable under both heads, and the language used appears to me to be consistent with a right on the part of the workman to change his ground provided the employer is not thereby subjected to a double liability. A decision on a claim for compensation, which is given by the statute independently of fault, can never be *res judicata* of a claim which is founded on fault. I therefore concur with your Lordships that the decision of the Sheriff-substitute is right.

LORD KINNEAR was absent.

THE COURT refused the appeal.

ST CLAIR SWANSON & MANSON, W.S.—W. & J. BURNESS, W.S.—Agents.

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[1] 5 F. 893. [2] [1904], 2 K. B. 628.

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Wilson v. M'Minnin.

HELEN WILSON, Pursuer (Respondent).—*A. M. Anderson.*
WILLIAM M'MINNIN, Defender (Appellant).—*Donald.*

*Parent and Child—Illegitimate Children—Aliment—Twins—Arrangement between the parents.*—By arrangement between the father and the mother of illegitimate twins each parent took the custody of and supported one of the children. After this arrangement had been in force for about six weeks, the mother brought an action against the father for a yearly contribution towards the aliment of the child in her custody. *Held* that no ground being alleged for disturbing the agreement between the parents, the father was not liable *hoc statu* for the contribution claimed.

2D DIVISION. Sheriff of the Lothians and Peebles.

THIS was an action in the Sheriff Court at Edinburgh at the instance of Helen Wilson, domestic servant, Mayfield, Dalkeith, against William M'Minnin, gardener, Viewbank, Lasswade. On 26th July 1904 the pursuer gave birth to twin illegitimate children—boys—of which the defender admittedly was the father. By arrangement between the parents each took the custody of and supported one of the children. In September 1904 the pursuer brought the present action, in which she prayed for decree against the defender for £3, 3s. for inlying expenses (as to which the defender did not dispute liability), and for the sum of £7 a year for fourteen years as a contribution to the aliment of the child in the pursuer's custody.

The pursuer averred;—"The pursuer is a domestic servant, and after contributing to the maintenance of the child at present with her, she is unable to contribute anything towards the maintenance of the child with the defender."

The defender averred;—(Ans. 4) "Both parties, no doubt, are liable to aliment the children jointly, and any claim the pursuer may have against the defender is met by a counter claim on the part of the defender for the half maintenance of the one he is providing for. The defender is a working gardener, and if the pursuer maintains the child she keeps, and the defender the one he keeps, there will be no necessity for any contribution by either party."

The pursuer pleaded;—(1) The defence is irrelevant. (2) The defender being the father of pursuer's child, is bound to contribute for its aliment, and her inlying expenses for both children.

The defender pleaded that in the circumstances he was entitled to absolvitor.

On 20th October 1904 the Sheriff-substitute (Guy) pronounced this interlocutor:—"Finds that it is not disputed . . . (3) that a few days after the birth of said children the defender obtained the custody of one of them and the pursuer retained the custody of the other; (4) that since then each of the parties has maintained one of the children without contribution from the other; (5) that the defender has never disputed his liability to the pursuer for the amount of the inlying expenses incurred by her: Finds in law that in these circumstances mutual claims for contribution to the aliment of the respective children compensate one another, and that the defender is entitled to be assoilzied *quoad* the second crave of the prayer of the petition: Therefore ordains the defender to make payment to the pursuer of the sum of £3, 3s. sterling, with interest thereon at 5 per cent per annum from 26th July 1904 till payment: *Quoad ultra* assoilzies the defender, and decerns," &c.*

* "NOTE.—The material facts for the decision of the case are not in dis-

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On 9th November 1904 the Sheriff (Maconochie), on appeal, pronounced this interlocutor:—"Having considered the appeal, sustains the same: Recalls the interlocutor appealed against: Sustains the first plea in law for the pursuer: Repels the defences, and grants decree against the defender in terms of the conclusions of the libel: Finds the defender liable in expenses," &c.*

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pute. Illegitimate twin children are born as the result of carnal intercourse between the parties. Both father and mother are equally liable to maintain them. They give effect to that equal burden by each taking a child. Now, the mother wishes to disturb the equality of the total burden which rests upon them by causing the father to bear three-fourths of it while she only bears one-fourth. In the usual case, where only one child is in question, the parent having the custody of the child and expending what is necessary for its maintenance—in most cases the mother—has a right of relief for a half from the other parent as the proper contribution under the liability which rests equally on both parents. Although in most cases the mother has the custody, there seems no reason why, if the father takes the custody, he should not have a right of relief against the mother for her contribution. In the case of *Alexander* v. *Robertson*, January 15, 1883, Guthrie's Select Cases, 2d series, p. 13, decree was given in this Court by Sheriffs Rutherfurd and Davidson against a mother for aliment of an illegitimate child maintained by the father. In the present case, if the mother has a claim against the father for half of the cost of maintenance of one child, that claim is exactly met and extinguished by the claim which the father has against her for her half of the cost of maintenance of the other child. The pursuer's averments as to her ability to maintain the child do not, in my opinion, affect the question. Her action is one of relief, based upon the position that she is maintaining the child."

* "NOTE.—The defender admits the paternity of the child in question, and further admits that the pursuer and he are liable to aliment it 'jointly' (Answer 4). His sole defence is that the pursuer and he arranged that one of them should provide for one child (there happen to be twin illegitimate children), and that the other should provide for the other child. In these circumstances the defender maintains (Answer 4),—'Any claim the pursuer may have against the defender is met by a counter claim on the part of the defender for the half maintenance of the one he is providing for.' The Sheriff-substitute has found in law that the defender is not liable to contribute towards the maintenance of the child which is in the pursuer's keeping, on the ground that the 'mutual claims for contribution to the aliment of the respective children compensate one another.' I do not think that there is any room for the plea of compensation being given effect to. The debt sued for is a debt due not to the mother but to the child (*Clarke* v. *Carfin Coal Company*, July 27, 1891, 18 R. (H. L.) 63, see Lord Watson, p. 68), and the result of sustaining the defender's plea here would be to hold that the parents of an illegitimate child could by a contract entered into between themselves effectually deprive the child of the right to be alimented by both parents. Possibly (I give no opinion on the point) owing to the terms of the agreement averred there may be a question between the parents as to whether the defender is entitled to be repaid any part of the amount which he has expended on alimenting the illegitimate children, but that is a question which cannot, in my opinion, be decided in a case in which a debt due to one of the children is being sued for. I may, in conclusion, refer to the case of *A B* v. *C D*, February 12, 1842, 4 D. 670. There the mother had granted to the father a discharge of inlying expenses, 'and of all claims and demands competent to the said child on account of . . . aliment, due or to become due.' The Court there held that the mother was barred from claiming inlying expenses or past due

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The defender appealed, and argued;—The mother, not the child, was the true pursuer of the action, the claim being one of relief by the mother against the father.[1] Any claim by the mother in respect of the aliment of the child she was supporting was set off by the corresponding claim of the father against the mother in respect of the child he was supporting.

Argued for the pursuer;—A claim by the mother of an illegitimate child against the father in respect of the child's aliment was truly a claim by the child—not a claim of relief by the mother, and an arrangement between the parents could not interfere with the child's claim.[2] The aliment of illegitimate twins was not a *unum quid*, so as to entitle the defender to set off half the aliment of the child in his custody against the pursuer's claim for half of the aliment of the child in her custody. The two claims being each truly on behalf of the particular child could not be set off against each other.

Lord Kyllachy.—In this case I am satisfied with the judgment of the Sheriff-substitute. The case is somewhat peculiar, and the precise question involved has never, so far as I know, come up for decision. The position, I think, is this—twin illegitimate children are born, and an arrangement is come to between the parents that the father shall take one while the other remains with the mother. So far as appears this arrangement has as regards the children's interests worked well, and there has been no change in the circumstances of the parties from the time at which it was entered into—at least it is not alleged that any such change of circumstances has occurred. In these circumstances I do not think that any question arises here such as would arise if the mother became, for instance, disabled and could no longer support or contribute to the support of the child in her custody. There is nothing here to suggest that she is not as well able to support the child now as when she undertook the responsibility. I think, therefore, that as between the parties each is liable for the support of the child, that being the compact between them, and there being, so far as we can see, no reason, at least at present, for disturbing it.

Lord Kincairney.—I agree with the judgment of the Sheriff-substitute, and think it should be returned to as giving effect to what is an equitable arrangement between the parties. I am not sure that I understand the legal grounds of the Sheriff's decision, but it involves the inequitable

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aliment, but refused to hold that the child was barred from raising through its administrator a claim for future aliment. There Lord Medwyn said,—'If this action were for the benefit of the mother alone I should hold it incompetent, but as regards the future aliment of the child I think it is a good claim.' Here no arrears are claimed, and on the authority of that case, and on general principle, it seems to me that with regard to future aliment the claim is good, and that the sole defence stated is irrelevant."

[1] A B v. C D, Feb. 12, 1842, 4 D. 670, 14 Scot. Jur. 264; Thomson v. Westwood, Feb. 26, 1842, 4 D. 833, at p. 841, 14 Scot. Jur. 286; Corrie v. Adair, Feb. 24, 1860, 22 D. 897, *per* Lord Justice-Clerk Inglis at p. 900, 32 Scot. Jur. 377; Buie v. Steven, Dec. 5, 1863, 2 Macph. 208, *per* Lord Neaves at p. 223, 36 Scot. Jur. 103; Den v. Lumsden, Nov. 10, 1891, 19 R. 77.

[2] Clarke v. Carfin Coal Co., Limited, July 27, 1891, 18 R. (H. L.) 63; Fraser, Parent and Child, p. 125.

result of making the father liable for the maintenance of the children to the extent of three quarters, and the mother to the extent of only one quarter. No. 96. Feb. 25, 1905. Wilson v. M'Minnin.

LORD JUSTICE-CLERK.—I agree with the judgment proposed. Of course this arrangement can only continue so long as it is an arrangement between the parties, but the pursuer has not made out any case for disturbing it for the present.

LORD YOUNG was absent.

THE COURT sustained the appeal against the Sheriff's interlocutor of 9th November 1904, affirmed the interlocutor of the Sheriff-substitute of 20th October 1904, and with findings in fact and in law as in the latter interlocutor, of new decerned against the defender for payment of inlying expenses, and *quoad ultra* assoilzied the defender.

GEORGE JACK, S.S.C.—PETER SIMPSON, S.S.C.—Agents.

THE REVEREND GAVIN ELMSLIE ARGO, Pursuer and Real Raiser. ISABELLA JANET ELMSLIE AND ANOTHER, Defenders and Claimants (Appellants).—*A. M. Anderson.* JAMES PAULINE AND OTHERS, Defenders and Claimants (Respondents).—*A. R. Brown.* No. 97. Mar. 4, 1905. Elmslie v. Pauline.

*Process—Mandatary—Multiplepoinding.*—In a multiplepoinding which had been brought in the Sheriff Court to determine a question under a codicil to a will, and in which the holder of the fund *in medio* had been exonered and discharged, two claimants residing in Australia, who had been called as defenders, appealed against a judgment of the Sheriff repelling their claim. The respondents (successful claimants) moved that the appellants should be ordained to sist a mandatary. The Court *refused* the motion.

THE REVEREND GAVIN ELMSLIE ARGO, The Manse, Kincardine O'Neil, brought an action of multiplepoinding as real raiser in the Sheriff Court at Aberdeen, in which he called as defenders James Pauline and others, including Isabella Janet Elmslie and Annie Elmslie, both residing in Melbourne, Australia. The multiplepoinding was brought for the purpose of determining the persons entitled to take under a codicil to the will of the late Rebecca Elmslie, by which she bequeathed to the real raiser a share of residue to be divided by him among her relatives answering to a description therein mentioned. 1ST DIVISION. Sheriff of Aberdeen, Kincardine, and Banff.

By interlocutor, dated 21st October 1904, the Sheriff-substitute (Henderson Begg) of consent held the fund *in medio* to amount to £663, 2s. 5d., and found the holder thereof liable only in once and single payment, and upon consignation entitled to be exonered and discharged thereof, and appointed claims to be lodged.

Claims were lodged, and among others a claim for James Pauline and others, and a claim for Isabella Janet Elmslie and Annie Elmslie.

The Sheriff-substitute, by interlocutor dated 13th December 1904, repelled the claim of Isabella Janet Elmslie, and found the claimant Annie Elmslie entitled, *inter alios*, to a thirtieth of the share of residue in question; but on appeal by the claimants, James Pauline and others, the Sheriff (Crawford) repelled the claims of both Isabella Janet Elmslie and Annie Elmslie, and found the other claimants each entitled to a twenty-ninth share of the share of residue in question. All the claimants were found entitled to expenses out of the fund *in medio*.

No. 97.
Mar. 4, 1905.
Elmslie v. Pauline.

The claimants Isabella Janet Elmslie and Annie Elmslie appealed to the Court of Session.

Upon the case being called in the Single Bills counsel for the respondents (successful claimants) moved that the appellants should be ordained to sist a mandatary, and argued;—In this case the holder of the fund had been exonered and discharged. The claimants were therefore now in the position of ordinary litigants, and the appellants, who were resident in Australia, should be ordained to sist a mandatary. The case of *Gordon's Trustees* v. *Forbes*[1] was distinguished. That was an action brought by testamentary trustees for the distribution of the trust-estate, in which it was probable that expenses would come out of the fund, and the pursuers and real raisers who made the motion for a mandatary had no interest to do so. In the case of *North British Railway Company* v. *White*[2] the question decided was as to the competency of the action, and the dispensation from sisting a mandatary was only *hoc statu*.

Counsel for the appellants were not called upon.

THE COURT refused the motion, and sent the case to the roll.

CLARK & MACDONALD, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

No. 98.
Mar. 8, 1905.
M'Lauchlan v. M'Lauchlan's Trustee.

JAMES M'LAUCHLAN, Appellant.—*Macmillan.*
J. E. MILLIGAN (M'Lauchlan's Trustee) AND OTHERS, Respondents.—*Jameson.*

*Process—Instance—Bankruptcy—Cessio—Withdrawal of Petitioning Creditor—Interlocutor pronounced without sisting party.*—In a petition for cessio the Sheriff pronounced a deliverance ordaining the bankrupt to appear on a specified day for public examination. On the day appointed the petitioning creditor withdrew from the process, and the bankrupt did not appear. M., an agent for other creditors, appeared in Court, but none of them was sisted or otherwise made a party to the process. On M.'s motion the Sheriff pronounced an interlocutor, by which he held the failure of the bankrupt to appear to be wilful, appointed a trustee in the cessio, and ordained the bankrupt to execute a disposition *omnium bonorum* in his favour. In an appeal, the Court *recalled* the interlocutor of the Sheriff, on the ground that at the date it was pronounced there was no party in the process at whose instance a decree could be pronounced.

2D DIVISION. Sheriff of Kirkcudbright.

ON 20th January 1905 Messrs Rowan & Borland, drapers, Newton-Stewart, presented a petition for cessio in the Sheriff Court at Kirkcudbright, against James M'Lauchlan, dairyman, Mersehead, in the Stewartry of Kirkcudbright. On the same date the Sheriff-substitute (Napier) pronounced an interlocutor, whereby, *inter alia*, he appointed the pursuers to publish a notice in the *Edinburgh Gazette* that the petition had been presented, "and requiring defender and all his creditors to appear at ten o'clock forenoon" within the Sheriff Court House, Kirkcudbright, on 3d February 1905.

At the diet on 3d February M'Lauchlan did not appear, and Mr Saunders, agent for the pursuers, stated to the Sheriff-substitute that the pursuers' claim had been settled. The Sheriff-substitute pronounced the following interlocutor:—"Present, William Nicholson jr., solicitor for creditors: The respondent failed to appear after having been duly cited. The Sheriff-substitute holds his failure to appear wilful:

[1] Feb. 27, 1904, 6 F. 455. [2] Nov. 4, 1881, 9 R. 97.

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Ordains the defender to grant a disposition *omnium bonorum* to Mr J. E. Milligan, solicitor, Dalbeattie, who is hereby appointed trustee for behoof of the defender's creditors," &c.*

Against this interlocutor M'Lauchlan appealed to the Court of Session. He lodged a minute, in which he stated that he had paid the pursuers' debt and expenses to Mr Saunders, the pursuers' agent. "Mr Saunders duly intimated to the Sheriff-clerk that the matter had been settled, and on the case being called in Court stated to the Sheriff-substitute that his clients' claims had been satisfied and that he withdrew the petition. Mr William Nicholson junior, solicitor, Kirkcudbright, however, then appeared and stated that he represented a creditor to the extent of £2, 10s. 6d., and desired the petition to be proceeded with. On his motion the Sheriff-substitute pronounced the interlocutor now appealed against."

The trustee appointed in the cessio, and certain unpaid creditors other than Rowan & Borland, having appeared to oppose the appeal, were ordained to lodge answers to the statements in the appellant's minute.

In their answers they admitted generally the truth of the statements in the minute, so far as quoted above.

Argued for the appellant;—The Sheriff had no power to pronounce an interlocutor when there was no one left as pursuer in the petition. Conceding that if a petitioning creditor withdrew, other creditors might take up the process of cessio, still they could only do so by becoming parties to the suit. A right to appear in an action meant a right to appear legally by becoming a party to it in the appropriate manner, it did not mean a right to intervene casually without any procedure at all. The record of the proceedings must shew at whose instance the interlocutor of the Sheriff was pronounced, or at least that there was somebody in the process at whose instance such an interlocutor could be pronounced.[1] (The appellant also argued that the failure of the appellant to appear had not, in the circumstances, been wilful.[2])

Argued for the respondents;—All the creditors of the bankrupt were convened in a process of cessio, and were parties to the process.[3] There was nothing in the statute providing that a creditor appearing should lodge a minute or be sisted as a party, and the record of the proceedings sufficiently indicated, as was the fact, that the interlocutor of the Sheriff was pronounced on the motion of an agent for creditors.

LORD JUSTICE-CLERK.—This is a very peculiar case, and I do not think I have seen one like it before. The facts, so far as ascertained, seem to be that a petition for cessio was presented, and a meeting appointed by the Sheriff at which the bankrupt and all his creditors were required to appear.

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* The Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. cap. 22), enacts (sec. 9),—"If the debtor fail to appear in obedience to the citation under a process of *cessio bonorum* at any meeting to which he has been cited, and, if the Sheriff shall be satisfied that such failure is wilful, he may in the debtor's absence pronounce decree of *cessio bonorum*."

[1] Meikle v. Wilson, May 31, 1884, 11 R. 867; Bankruptcy Act, 1856 (19 and 20 Vict. cap. 79), sec. 34.

[2] Reid v. Somerville & Co., June 6, 1889, 16 R. 751.

[3] Smith v. Marquess of Lothian, Nov. 4, 1884, 12 R. 58.

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But before the date of the meeting the petitioning creditors withdrew and ceased to be the pursuers in the petition, with the result that at the date of the meeting there was nobody who could move anything in it at all. I have looked in vain in the proceedings for anything to shew that anybody appeared to take up the proceedings, even assuming (as I do) that it was competent for anyone to take them up. I find nothing in the proceedings except the statement in one place that a certain gentleman appeared for creditors. Who these creditors were, how many there were, and what their debts amounted to, there is nothing in the process to suggest. The Sheriff-substitute proceeded to hold that the debtor's failure to appear was wilful, and pronounced decree of cessio. So far as the proceedings shew, I must assume that the Sheriff did that *ex proprio motu*. It was not said that he did it on anybody's motion; it was not said that anyone was sisted in the cessio or entered the process by minute or by any of the ordinary ways known in judicial procedure. The Sheriff pronounced the decree of cessio of his own accord, and in my view it was not competent for him to do so. It was competent on the motion of anyone who had right to be there to pronounce such a judgment if he were satisfied that it was the right judgment to pronounce; but if there were nobody there in a position legally to make such a motion, I do not think the Sheriff could pronounce the decree *ex proprio motu*.

But passing this by, the next point is whether at that time the process was in such a condition that the Sheriff could pronounce any judgment in it at all. There was at that time, so far as the proceedings shewed, no instance whatever to support the process, and in any proceedings, civil or criminal, which I have ever seen, if there is no instance, there can be no legal or binding judgment. This by itself is sufficient for the decision of the case.

I am therefore of opinion that the interlocutor of the Sheriff-substitute should be recalled and the case remitted to him to proceed.

LORD KYLLACHY.—I concur. The case being decided on the grounds stated by your Lordship, we are relieved of the necessity of considering whether the failure of the appellant to appear at the meeting was wilful failure in the sense of the statute.

LORD KINCAIRNEY.—I am of the same opinion. I should always be reluctant to recall the judgment of a Sheriff on a point of form, especially in a process of cessio, but I do not think it is possible to allow this interlocutor to stand. The decree pronounced was practically a decree in absence. That is quite right if there is a pursuer in the action. But it can never be right if there is no pursuer; and in this case there was neither a pursuer nor a defender, nor any creditor who had made himself a party to the action. On that ground I agree with your Lordships that the judgment should be recalled.

LORD YOUNG was absent.

THE COURT recalled the interlocutor of the Sheriff-substitute, dated 3d February 1905, and remitted to him to proceed of new.

SIMPSON & MARWICK, W.S.—SCOTT & GLOVER, W.S.—Agents.

No. 99.

Mar. 9, 1905.

Dalziel v. Dalziel's Trustees.

Dalziel v. Henderson's Trustees.

FIRST CASE.

MISS ESTHER BLANCHE DALZIEL, First Party.—*Macphail.*
RALPH CANNAN DALZIEL, Second Party.—*R. S. Brown.*
STONEHEWER PARKER FREEMAN AND ANOTHER (Mrs Esther Dalziel's Settlement Trustees), Third Parties.—*Malcolm.*
JAMES PIPE AND OTHERS (Mrs Esther Dalziel's Testamentary Trustees), Fourth Parties.—*Chree.*

SECOND CASE.

MISS ESTHER BLANCHE DALZIEL, First Party.—*Macphail.*
RALPH CANNAN DALZIEL, Second Party.—*R. S. Brown.*
ARTHUR HENDERSON AND OTHERS (William Henderson's Testamentary Trustees), Third Parties.—*Hunter.*

*Succession—Faculties and Powers—Validity of Exercise of Power—Whether power exercised or not—Partial Invalidity—Exercise by General Settlement—Power to appoint among issue—Appointment to daughter in liferent, with fee to her issue as she should appoint—Power to daughter to give liferent to husband.*—In a deed of settlement by way of indenture between A, a married woman, and trustees, it was, *inter alia*, agreed that the trustees should hold the trust funds in trust for A's issue, at such ages or times not earlier than twenty-one or marriage, in such shares, and in such manner, as she should appoint. In a hotchpot clause reference was made to any "child who or any of whose issue shall take under such appointment."

By her will A bequeathed to other trustees the whole residue of her estate, "including all property over which I have power of appointment," upon trust, after payment of funeral and testamentary expenses, debts, and legacies, to hold for her two children (a son and daughter), or such one of them as should attain twenty-four, or die under that age leaving lawful issue, the daughter's share to be retained and the income paid to her during life, and the capital after her death to be held for her issue, "whether children or remoter descendants," in such manner as she should appoint, with power to her to appoint to her husband, if he survived her, not more than a moiety of the income during his life. *Held* (1) that A by her will intended to exercise, and had exercised, the power of appointment reserved in the settlement; (2) that the exercise of the power was not invalid in respect of its taking the form of a conveyance to other trustees who held other funds, and, *inter alia*, for purposes which could not be satisfied out of the funds which were the subject of the power; (3) that the expression "issue" in the settlement included remoter descendants than children, and that consequently the daughter's issue were objects of the power; (4) that the testatrix had validly exercised the power by giving a liferent to her daughter with a power of appointment of the fee among her issue, and the fee to her daughter's issue as the daughter should appoint; (5) that the daughter's husband not being an object of the power the will was not a valid exercise of the power in so far as it gave the daughter right to provide a liferent to her husband, but that this provision was to be held *pro non scripto*, and did not affect the validity of the exercise of the power otherwise.

A had also under her father's will a power to appoint among her issue "born or to be born during" her life, "or within twenty-one years after her death," with such future or other trusts for their benefit as she should appoint.

*Held* that A had also validly exercised this power by her will except in so far as she gave right to her daughter to provide a liferent to her husband, and in particular, that the exercise of the power was not necessarily invalidated owing to A having given her daughter power to appoint to issue,

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whether children or remoter descendants, without any restriction to issue born within twenty-one years of A's death.

*Trust—Termination—Funds held by trustees under an inter vivos settlement, for issue subject to power of appointment—Power exercised by will—Whether settlement or testamentary trustees to hold fund.*—Where under an *inter vivos* settlement trustees were directed to stand possessed of trust funds for the issue of the settlor, as she should appoint, and this power of appointment was validly exercised by the settlor in her will, by which she directed the whole residue of her estate to be held by her testamentary trustees for certain purposes, *held* that the settlement trustees were in the circumstances bound to pay over the settlement trust funds to the testamentary trustees.

1ST DIVISION. THESE two special cases were presented for the opinion and judgment of the Court upon the question whether the late Mrs Esther Dalziel had validly exercised by her will (1) a power of appointment reserved by her in a deed of settlement by way of indenture between her and certain trustees; and (2) a power of appointment conferred upon her by the will of her father, the late William Henderson. The first special case related to the power reserved in the settlement, and the second to the power conferred in the father's will.

*First Special Case.*—By deed of settlement, dated 4th December 1890, in the form of an indenture between Mrs Esther Dalziel, wife of Andrew Dalziel, chemical manufacturer, Irvine, and Stonehewer Parker Freeman and others, as trustees, on the narrative that Mrs Dalziel had paid to the trustees the sum of £14,105, 12s. 7d. belonging to her as her separate estate, it was agreed that the trustees should retain the trust funds upon trust to invest the same in their names, and should pay the income to Mrs Dalziel during her life, and after her death to her husband, if he survived, so long as he should remain unmarried; "And from and after the death of the said Esther Dalziel and the death or second marriage (which shall first happen) of the said Andrew Dalziel, shall stand possessed of the trust funds in trust for all or any one or more of the issue of the said Esther Dalziel . . . at such ages or times, age or time (not being earlier as to any object of this power than his or her age of twenty-one years or day of marriage), in such shares, if more than one, and in such manner as the said Esther Dalziel shall by deed or will appoint, and in default of such appointment and so far as any such appointment shall not extend, in trust for all the children of the said Esther Dalziel . . . who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, in equal shares, and if there be only one such child the whole to go to that one child; but so nevertheless that no child who, or any of whose issue, shall take any part of the trust funds under any such appointment as aforesaid shall be entitled to any share of the unappointed trust funds without bringing the share or shares appointed to him or to her or to his or her issue into hotchpot and accounting for the same accordingly unless the person or persons making such appointment shall thereby direct to the contrary, and if there be no such child, then in trust for the said Esther Dalziel absolutely."

Mrs Esther Dalziel died on 17th May 1896, predeceased by her husband, and survived by a daughter, Esther Blanche Dalziel, who attained majority on 16th February 1901, and a son, Ralph Cannan Dalziel, who was still a minor.

Mrs Dalziel left a last will and testament, dated 17th December

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1894, by which, after providing for certain legacies amounting in all to £300, and bequests of jewellery, she gave and bequeathed to James Pipe and others as trustees "all the residue of my estate and effects, real and personal, and of what nature or kind soever, and including all property over which I have any power of appointment" in trust. By this will the testatrix provided as follows:—"(5) I direct my trustees, out of the money to arise from the sale and conversion of my said real and personal estate, and out of my ready money, to pay my funeral and testamentary expenses and debts, and any legacies bequeathed by this my will, or by any codicil hereto, and to hold the residue of the said money upon trust, to invest the same . . . and I declare that my trustees shall hold the said investments . . . upon trust for my said two children, Esther Blanche Dalziel and Ralph Cannan Dalziel, or such one of them as shall attain twenty-four years of age, or die under that age leaving lawful issue, and if more than one, in equal moieties, but so that the share of my said daughter shall be retained and held on such of the trusts hereinafter declared concerning the same as shall be subsisting and capable of taking effect. (6) My trustees shall retain the share of my said daughter in the trust fund, upon trust to pay the income thereof to her for her life without power of anticipation during any coverture, and after her death the capital and income of her share . . . shall be held in trust for all or any one or more exclusively of the others or other of the issue of my said daughter, whether children or remoter descendants, at such time, and if more than one, in such shares and with such gifts over and generally in such manner for the benefit of such issue, or some or one of them, as my said daughter shall, whether covert or sole, by deed revocable or irrevocable, or by will or codicil, appoint . . . and I declare that if there should not be any child of my said daughter who, under the trusts, in default of appointment hereinbefore contained, attains a vested interest in her share, then, subject to the trust and powers declared in favour of my said daughter and her husband and issue, her share shall be held in trust for such person or persons as my said daughter shall by will or codicil appoint. Provided always . . . that . . . my said daughter may, . . . at any time after she shall have attained twenty-one years of age, by deed revocable or irrevocable, or by will or codicil, appoint to or in favour of any husband of hers, in case he should survive her during his life, or any less period, one moiety or any less part of the annual income of my said daughter's share of the trust fund. . . ."

The residue of Mrs Dalziel's estate, exclusive of that held by the settlement trustees, amounted to £6516.

Questions having arisen with regard to the disposal of the trust funds under the settlement, the present special case was presented to the Court. The parties to the case were:—(1) Miss Esther Blanche Dalziel, (2) Ralph Cannan Dalziel, (3) the trustees under the settlement, and (4) the trustees under the will.

The questions of law were:—"(1) Do the directions in Mrs Dalziel's last will and testament for the disposal of the residue of the estate referred to therein constitute a valid appointment in exercise of her power under the deed of settlement of 4th December 1890 only in so far as they direct her trustees to hold the funds in trust for her son and daughter, or such one of them as shall attain twenty-four years of age or die under that age leaving issue, and if more than one in equal moieties? or (2) Are the trusts imposed by said last will and

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testament upon the share therein appointed to the first party also valid as in exercise of said power of appointment? or (3) Does the said last will and testament not constitute to any extent a valid exercise by Mrs Dalziel of her said power of appointment? (4) In the event of the first or second question being answered in the affirmative, are the fourth parties entitled to have the fund settled by said deed of settlement, or any and what part thereof, paid over to them by the third parties, to be held and administered for Mrs Dalziel's children in terms of the directions contained in said last will and testament?"

*Second Special Case.*—By his last will and testament and trust-disposition and settlement, dated 30th April 1877, William Henderson, chemical manufacturer, Glasgow and Irvine, who died on 31st December 1880, and who was the father of Mrs Esther Dalziel, referred to in the first special case, conveyed all his estate and effects, heritable and moveable, to trustees for the purposes therein mentioned. Mr Henderson directed that his trustees should stand possessed of the residue in trust for his children; that they should invest the daughters' shares in the trustees' names, and pay the income to each daughter during her life, and that after the death of each daughter they should stand possessed of her share "in trust for all or such one or more exclusively of the others or other, of the issue of such daughter, born or to be born during the life of such daughter, or within twenty-one years after her death, if more than one, in such shares, and with such future or other trusts for the benefit of the said issue, or some or one of them, with such provisions for their respective maintenance and education or advancement, at the discretion of the trustees or trustee for the time being of this my will, or of any other persons or person, and upon such conditions, with such restrictions, and in such manner as such daughter shall, by deed or writing under her hand, with or without power of revocation and new appointment, or by will or codicil appoint; and in default of such appointment, and so far as any such appointment shall not extend, in trust for all or any the children or child living at my death, or born afterwards, of such daughter, who, being a son or sons, attain the age of twenty-one years, or being a daughter or daughters, attain that age, or marry under that age with the consent of her or their guardians or guardian for the time being, and if more than one, in equal shares: Provided always that no child of such daughter, who, or whose issue, shall take any part of the same trust-estate under any appointment made by such daughter in pursuance of the power in that behalf hereinbefore contained, shall, in default of appointment to the contrary, have, or be entitled to any share of the unappointed part of the same trust premises without collating the share or shares appointed to him or her, or to his or her issue, and accounting for the same accordingly."

Mrs Esther Dalziel, a daughter of William Henderson, died on 17th May 1896, survived by the two children mentioned *supra*, p. 546, and leaving a last will and testament, the terms of which, so far as material, are quoted *supra*, p. 547.

Questions having arisen with regard to the disposal of the funds held by the trustees under Mr Henderson's will this special case was presented to the Court.

The parties to this special case were (1) Miss Esther Blanche

Dalziel, (2) Ralph Cannan Dalziel, (3) William Henderson's testamentary trustees. No. 99.

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The following question of law was, *inter alia*, stated:—"(1) Was the power of appointment conferred on Mrs Dalziel by Mr Henderson's last will validly exercised by her in her last will and testament, and if so to what extent?"

After Mrs Dalziel's death a special case had been submitted to the Court by (1) Mr Henderson's trustees, (2) Mrs Dalziel's testamentary trustees, and (3) the tutors and guardians of Esther Blanche Dalziel and Ralph Cannan Dalziel (Esther Blanche Dalziel and Ralph Cannan Dalziel, who were then both minors, not being parties to the case), in which it was decided by the Court, on 5th February 1898 (not reported), that Mr Henderson's trustees were not bound to convey Mrs Dalziel's share of Mr Henderson's trust-estate to her testamentary trustees, but were bound to hold and administer her share subject to the powers and directions contained in her will.

*First Special Case.*—Argued for the first party, Miss Dalziel;—(1) Mrs Dalziel did not by her will intend to exercise, and did not exercise, the power of appointment reserved in the settlement. A power of disposal and a power of appointment were different. The power here was a power of appointment, not a power of disposal. What the testatrix did was to dispose, not to appoint. A power of disposal could be exercised by a general conveyance in trust for purposes, but a power of appointment which required division among the objects of the power could not. Here there had been no appointment among the objects of the power. (2) Assuming that the power had been exercised, it was not validly exercised. There was no power to adject conditions such as had been imposed by the will. Mrs Dalziel could not give her daughter less than a share of the fee. She could not give her merely a liferent.[1] The daughter's issue were objects of the power, but the will contained no appointment to them. It merely gave the daughter a delegated power to appoint among them. This was not a valid exercise of the power. Further, the daughter's husband was not an object of the power, and the power given to the daughter to appoint part of the income to him was *ultra vires*. The exercise of the power was therefore either wholly invalid,[2] or alternatively, (3) it was invalid except in so far as it gave the first and second parties each an equal moiety of the funds. This in the result would have the same effect as if the power had not been exercised. Where the invalid part of the exercise of the power was separable, and after it was read out the power was still completely exercised, which was the case here, then the exercise of the power might be held good, the invalid part being treated *pro non scripto*.[3] The first party therefore maintained that she was entitled to payment of one-half of the funds under the settlement.

Argued for the second party, Ralph Dalziel;—He adopted (1) and (2) of the argument for the first party, and cited *In re Cotton*.[4] The

[1] Lennock's Trustees v. Lennock, Oct. 16, 1880, 8 R. 14.

[2] Baikie's Trustees v. Oxley & Cowan, Feb. 25, 1862, 24 D. 589, 34 Scot. Jur. 338; Warrand's Trustees v. Warrand, Jan. 22, 1901, 3 F. 369.

[3] M'Donald v. M'Donald's Trustees, June 17, 1875, 2 R. (H. L.) 125; Matthews Duncan's Trustees v. Matthews Duncan, Feb. 20, 1901, 3 F. 533.

[4] (1888), 40 Ch. D. 41.

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power if exercised at all had not been validly exercised to any extent.[1] Mrs Dalziel's will not merely conferred benefits on persons not objects of the power, but it conferred only a contingent right upon the second party, who was a proper object. He got nothing under the will if he died before he was twenty-four. Mrs Dalziel could not validly make the second party's right to a share contingent upon his attaining the age of twenty-four. It was impossible to separate the invalid part of the exercise of the power. It was impossible to say what the donor of the power would have done if she had known that she could not validly do what she did. The exercise was therefore wholly invalid, and the second party was entitled to payment of one-half of the funds under the settlement upon attaining the age of twenty-one. *Cattanach's Trustees* v. *Cattanach*[2] and *M'Donald* v. *M'Donald's Trustees*[3] were distinguishable. In these cases the invalid part of the exercise could be separated. Here there was no gift to the son which could be separated from the invalid qualification.

Argued for the third parties, the settlement trustees;—(1) Mrs Dalziel's will was an exercise of the power. A general testamentary deed was presumed to exercise a power of appointment unless something appeared to the contrary. It was not a good objection that the power was exercised by creating a trust and as part of her general disposal of her whole estate.[4] (2) The power had been validly exercised. It was competent to limit the daughter to a liferent. She might have been validly excluded altogether or given merely an illusory share.[5] The fee had been validly disposed of. At least grandchildren were objects of the power. "Issue" was not "children" only, but included also remoter descendants. The power was very wide. As regards the son there was power to postpone to twenty-four. The only limitation as to age was that it was not to be earlier than twenty-one. (3) A delegation of power to appoint was competent under this power. In any view it could not invalidate the exercise of the power. It was an amplification of the gift to the daughter, not a limitation, and the grandchildren were objects of the power. But it was not correct to say that this was a delegation of the power. What was given was a liferent to the daughter coupled with a power of appointment. That had been held to be a valid exercise of powers similar to the present.[6] (4) The funds must continue to be held by the settlement trustees.[7] Mrs Dalziel had no power to bring the settlement trust to an end by conveying away the funds to another set of trustees. The question was practically settled by the decision in the former special case.

Argued for the fourth parties, the testamentary trustees;—They

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[1] Gillon's Trustees v. Gillon, Feb. 8, 1890, 17 R. 435; Baikie's Trustees v. Oxley & Cowan, *cit.* 24 D. 589.

[2] Nov. 28, 1901, 4 F. 205.

[3] June 17, 1875, 2 R. (H. L.) 125.

[4] Mackie v. Mackie's Trustees, July 4, 1885, 12 R. 1230.

[5] Powers of Appointment Act, 1874 (37 and 38 Vict. cap. 37), sec. 1; Neill's Trustees v. Neill, March 7, 1902, 4 F. 636, *per* Lord M'Laren, at p. 640; Lennock's Trustees v. Lennock, *cit.* 8 R. 14; Wallace's Trustees v. Wallace, June 12, 1891, 18 R. 921; Wright's Trustees v. Wright, Feb. 20, 1894, 21 R. 568.

[6] Lennock's Trustees, *cit.* 8 R. 14; Wallace's Trustees, *cit.* 18 R. 921; Wright's Trustees, *cit.* 21 R. 568.

[7] Busk v. Aldam, (1874), L. R., 19 Eq. 16.

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adopted (1), (2), and (3) of the argument for the third parties, and cited *In re Swinburne*[1] and *Dykes' Trustees* v. *Dykes*.[2] With regard to the question which set of trustees should administer the settlement funds, the proper course was that the settlement trust should be brought to an end and the funds handed over to the testamentary trustees.[3] This was undoubtedly what the testatrix intended, and the balance of convenience was all in favour of that course. There was no absolute rule in such cases. The case of *Busk* v. *Aldam*[4] merely decided that the Court in such circumstances had a discretion, and that being so their discretion should here be exercised in favour of the testamentary trustees. As to the previous special case, it was not reported, and the grounds of judgment were not known.

*Second Special Case.*—The first and second parties, Miss Dalziel and Ralph Dalziel, stated an argument similar to that stated for them in the first special case, but the first party conceded that under the power here in question it was competent to restrict her to a liferent. It was further contended that in this case the exercise of the power, if exercised at all, was invalid, because under the power issue born more than twenty-one years after Mrs Dalziel's death were not objects, and under her will power was given to her daughter to appoint among issue irrespective of that limitation.

Argued for the third parties, Henderson's trustees;—They adopted generally (1), (2), and (3) of the argument for the third and fourth parties in the first special case, and cited *Blackburn's Trustees* v. *Blackburn*.[5] With regard to the power specially here in question, it was not a mere power to divide as in *Baikie's Trustees* v. *Oxley & Cowan*,[6] and other cases cited for the first and second parties. The intention was that the donor should have right to dispose of the share subject to the power. "Future or other trusts" were specially authorised. Restriction of the daughter to a liferent with power of disposal was valid under this power. Such a power authorised appointment among grandchildren. The exercise of the power was indeed not wholly valid. The power to appoint to a husband was invalid. The appointment to grandchildren or remoter descendants generally as the daughter should appoint, without restriction to those born within twenty-one years of Mrs Dalziel's death, might or might not include persons not objects of the power as it might turn out. But the parts of the exercise which were invalid were separable, and could be read out, leaving the valid part standing.[7] This was specially the case here where the donee of the power specially provided that the conditions were only imposed so far as capable of taking effect.[8] The provisions as to the daughter's husband, and, if descendants born after twenty-one years were not objects of the power, the provisions in their favour, were incapable of taking effect, and were to be read out.

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[1] (1884), 27 Ch. D. 696.
[2] Nov. 20, 1903, 6 F. 133.
[3] Mackie v. Mackie's Trustees, July 4, 1885, 12 R. 1230; Cowx v. Foster, (1860), 1 J. and H. 30; Ferrier v. Jay, L. R., 10 Eq. 550, at p. 553; Lennock's Trustees v. Lennock, 8 R. 14.
[4] L. R., 19 Eq. 16.
[5] March 20, 1896, 23 R. 698.
[6] 24 D. 589.
[7] Wallace's Trustees, *cit.* 18 R. 921; Wright's Trustees, *cit.* 21 R. 568.
[8] *In re* Finch & Chew's Contract, [1903], 2 Ch. 486.

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FIRST CASE—Dalziel's Trustees.

LORD PRESIDENT.—Mrs Esther Dalziel, a married lady, possessed of separate estate, executed on the 4th December 1890 a deed of settlement in English form (which I shall refer to as the settlement) by which she conveyed a sum of £14,000 odd of her separate estate in trust to three persons. These trustees, who are the third parties to the special case, were to hold the funds for payment of the interest thereof to Mrs Dalziel during her life, and to her husband if he survived her. After the death of Mrs Dalziel, and the death or second marriage of her husband, the trustees were to hold the trust funds—(His Lordship read the direction from the deed of settlement, *supra*, p. 546).

Mrs Dalziel was predeceased by her husband and died on 17th May 1896 survived by two children, Ralph Cannan Dalziel, the second party to this case, and still a minor, and Elizabeth Blanche Dalziel, the first party, who is now twenty-four years of age and unmarried. She left a last will and testament dated 17th December 1894 (which I shall refer to as the will) by which she left to trustees, who are the fourth parties to this case, "all the residue of my estate and effects, real and personal, and of what nature or kind soever, and including all property over which I have any power of appointment."

We are informed that Mrs Dalziel was possessed of estate other than that held by the third parties, to the extent of £6000 odd.

The trust purposes need not be read at length. The trustees are to realise, converting real or heritable estate into cash. They are to pay debts and invest, and then they are to hold upon trust—(His Lordship read the direction in Mrs Dalziel's will, *supra*, p. 547).

The succeeding trust purposes may be sufficiently described by saying that they restrict the daughter's right to a mere liferent, giving the fee to her children or remoter descendants as she may appoint, and with power to her to provide a liferent of a certain amount to a surviving husband.

The first and second parties unite in contending that there has been no valid exercise of the power of appointment. The interest of the second party, the son, is limited to the point that if he can take under the settlement in default of an appointment he will get his moiety when he attains twenty-one, whereas if he takes under the will he has to wait till he is twenty-four. The interest of the daughter, the first party, is more considerable, as it involves the difference between a fee and a liferent.

The first party further contends that even if the will operates as a valid exercise of the power of appointment, yet it is only effectual in so far as it conveys a moiety to the first and second parties, and that the succeeding declarations as to the trusts upon which the first parties' moiety are to be held are *ultra vires* so far as affecting the settled funds, and fall to be disregarded. The practical result of this is to her the same as that sought to be reached by the first contention.

The third and fourth parties unite in resisting the contention of the first and second parties, maintaining that the power of appointment in the settlement was well exercised by the will, and that the trusts of the will

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fall to be administered. They contend as against each other as to which of them are the proper body of trustees to administer the trusts of the settled funds.

It would be unavailing even if it were possible to attempt to set forth a complete analysis of the cases which have been decided on the branch of law involved in these questions, a considerable number of which have been cited to your Lordships. But there are at least two principles which stand clearly out from the decisions, which will, I think, be sufficient to try the contentions of parties in the present case.

The first is that no exercise of a power of appointment can be good in favour of persons who are not objects of the power. This is one of those propositions the mere statement of which would seem to dispense with the need of authority. But there are many cases which are examples of its application, and a good and recent instance of a case to which the first party would wish to assimilate the present may be found in the case of *Neill's Trustees* v. *Neill*,[1] where, under a power given to a liferentrix to appoint the fee to her children, *per stirpes*, in such proportions and subject to such conditions and restrictions as she chose, it was held that an appointment by which she cut down the interest of certain of her children to a liferent and gave the fee to grandchildren was bad, as it made no appointment of the fee except to persons who were outside the power.

The second proposition is that, when an appointment is duly exercised in favour of objects of the power, any further restrictions or stipulations which are sought to be imposed, but which are, upon a just consideration of the terms of the power, *ultra vires* of the person who exercises the power, fall to be disregarded and held *pro non scripto*, but do not invalidate the exercise of the power in favour of the objects thereof. An example of this proposition may be found in the leading case of *M'Donald* v. *M'Donald's Trustees*,[2] where the gist of the matter is set forth in an oft quoted sentence of Lord Chancellor Cairns, which for convenience of reference may be here quoted again,—"From all those cases the plain rule is to be derived, that if you cannot disconnect that which is imposed by way of condition or mode of enjoyment from a gift, the gift itself may be found to be involved in conditions so much beyond the power that it becomes void. But where that is not so, where you have a gift to an object of the power, and where you have nothing alleged to invalidate the gift but conditions which are attempted to be imposed as to the mode in which that object of the power is to enjoy what is given to him, then the gift may be valid and take effect without reference to those conditions."

Turning now to the contentions of parties in the present case, the argument of the first and second parties that there is here no valid exercise of the power of appointment possessed by the late Mrs Dalziel is based on two separate grounds. They say that as a matter of construction the will does not seem to exercise it, because it does not in terms say that it is exercising this power, and further, because it begins with a general conveyance to trustees of all things belonging to the granter, whereas the power did not contemplate a conveyance to other trustees than those who held

[1] 4 F. 636. [2] 2 R. (H. L.) 125.

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under the settlement. As regards the point that the will does not in terms say that it is exercising the power, that has been settled as immaterial by a long series of decisions, beginning, so far as our Courts are concerned, with the case of *Milne;*[1] and when we come to the conveyance to trustees, viewed as a question of construction, in this case it is very hard to say that there was no intention, inasmuch as there are the words, "including all property over which I have any power of appointment." The counsel for the first party were driven to contend that by power of appointment here was not meant power of appointment but power of absolute disposal. The sufficient answer seems to be that it is a safe rule to begin with believing persons to mean what they say; and that in this case that *prima facie* view is not displaced when we find that the testatrix had under two instruments powers of appointment over other property, and had not, so far as brought to our notice, any absolute power of disposal.

The second ground of argument is that apart from construction a conveyance to trustees must be a bad exercise of the power. That must be on the ground that the trustees are not objects of the power. In one sense that is true. But then the conveyance to them is merely formal, the beneficial interest is given to others. Accordingly one is not surprised to find that there is a long series of English decisions in which it has been held that, when the person in right of a power makes a general conveyance to trustees, and imposes on those trustees some duties which obviously cannot be satisfied out of the funds which are the subject of the power, such as, *e.g.*, the payment of the testator's own debts, yet this form of conveyance will not vitiate a proper exercise of the power. An example of the partial application of the same doctrine will be found in our Courts in the case of *Mackie* v. *Mackie's Trustees.*[2] I am therefore of opinion that Mrs Dalziel did intend to and did validly exercise by her will her power of appointment under the settlement. This disposes of the contentions of the second party, the son. There remains the further contention of the first party, the daughter, that the limitations sought to be imposed on her moiety are invalid, and ought to be disregarded. To succeed in this she must shew that, in so far as the will gives rights to the grandchildren, it gives to objects outside the power.

Now, the power says that the funds may be held for "issue" of Mrs Dalziel in such "manner" as she may direct. It is now well settled that the primary meaning of issue includes all descendants—*MacDonald* v. *Hall.*[3] It is true that the context may shew that it is intended in a more limited sense, as was held in *Cattanach's Trustees,*[4] where it was clearly synonymous with immediate children only. But here, so far from shewing a limited sense, the context seems to me to shew clearly the other way; because, in the concluding proviso as to hotchpot, we find the expression "no child who or any of whose issue," an expression which cannot be satisfied without holding that the original term "issue" includes at least grandchildren.

In so far then as the will gives in the "manner" that it confers a life-

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[1] 4 S. 679.
[2] 12 R. 1230.
[3] 20 R. (H. L.) 88.
[4] 4 F. 205.

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rent on Esther Blanche and a fee on her issue, it seems to me not to go beyond the objects of the power.

There remains a power proposed to be given to Esther Blanche to provide a liferent to a possible husband. Such a person would be an object outside the power. But this part of the case comes, I think, clearly within the second general proposition, which I ventured to lay down; and accordingly it may be disregarded without affecting the validity of the exercise of the power in other respects.

There remains the question as between the two sets of trustees brought forward in the special case to which allusion is made in the other case. At the time that special case was presented the beneficiaries were not in the field, and consequently it could not be decided whether there was a proper exercise of the power or not, and accordingly *eo statu* it was better for the first trustees to hold. I think Mrs Dalziel sufficiently indicated by the massing of her funds that she wished her whole moneys to be managed by one set of trustees. I am therefore for giving the testamentary trustees the management of the funds. I do not lay down any general rule. Each case must be judged on its own circumstances. Nor do I think that is at variance with the judgment of the other Division of the Court. On the whole matter I advise your Lordships to answer the questions submitted as follows:—The first in the negative, the second in the affirmative, the third in the negative, the fourth in the affirmative, and to find it unnecessary to answer the fifth question.

SECOND CASE—Henderson's Trustees.

In this case the first and second parties are the same as in the case just disposed of. The third parties are the testamentary trustees of the late W. Henderson, who was the father of Mrs Dalziel, and under whose will there was a fund held for Mrs Dalziel in liferent, over which she had a power of appointment.

The contentions of the parties are really identical with those in the last case, with the exception that here there is no competition of administration between the trustees who presently hold the appointable funds and the testamentary trustees of Mrs Dalziel, because these persons have already had a special case before the other Division of the Court on the subject, in which it was held—and the matter is thereby *res judicata*—that Mr Henderson's trustees, *i.e.* the trustees holding the appointable funds, must continue to hold.

The observations which I made to your Lordships in the previous case, so far as general, and so far as relating to the form of expression used in the will, are clearly applicable to the present. The only question which demands separate treatment will therefore be the argument of the first party seeking to shew that the conveyance effected by the trusts of Mrs Dalziel's will is a conveyance to objects outside the power; and for that purpose it is necessary to look at what the power of appointment was in Mr Henderson's deed. By Mr Henderson's deed his trustees were to divide his property into shares, and to hold the shares for behoof of each of his children. The proviso as to daughters provided that they were to have a liferent and —(His Lordship read the provision in Mr Henderson's deed, *supra*, p. 548).

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This proviso seems to me to be if possible even clearer than the proviso in the last case as shewing that "issue" is not confined to immediate issue, because you have the expression "issue of such daughter born or to be born during the life of such daughter or within twenty-one years after her death." There is further the proviso for the making of "future" trusts for the benefit of such issue. It is said that by the trusts of Mrs Dalziel's will it is possible that Esther Blanche may confer a right on issue who will be born more than twenty-one years after the death of Mrs Dalziel. The answer is that there is no reason that she should do so, and that, if she does, so far it will be an *ultra vires* act; but on the principles already commented on these considerations will never invalidate Mrs Dalziel's appointment. I am of opinion that this case is therefore substantially identical with the last case, and that the questions fall formally to be dealt with as follows:—

To answer the first question by saying that the power of appointment conferred on Mrs Dalziel by Mr Henderson's will was validly exercised by her in her last will and testament, and that the funds held by Mr Henderson's trustees, and subject to such power of appointment, fall now to be held under the trusts declared by Mrs Dalziel's will, and to find it unnecessary to answer the other questions.

LORD ADAM concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was absent at the advising, also concurred.

LORD KINNEAR, who was absent at the hearing, did not take part in the judgment.

THE COURT pronounced the following interlocutors:—

*In the first special case:* "The Lords having considered the special case and heard counsel for the parties, answer the first and third questions therein stated in the negative: With regard to the second question, find and declare that the trusts imposed by Mrs Dalziel's last will and testament upon the share thereby appointed to the first party are invalid as in exercise of the power of appointment reserved to her under the deed of settlement of 4th December 1890, in so far as they purport to confer upon the first party any power of appointment in favour of any husband whom she may marry: *Quoad ultra* find the said trusts are a valid exercise of said power of appointment, and answer the second question accordingly, and answer the fourth question in the affirmative," &c.

*In the second special case:* "The Lords having considered the special case and heard counsel for the parties, find and declare with regard to the first question that the trusts imposed by Mrs Dalziel's last will and testament upon the share thereby appointed to the first party are invalid as in exercise of the power of appointment reserved to her under the last will and testament and trust-disposition and settlement of the late William Henderson, dated 30th April 1877, in so far as they

purport to confer upon the first party any power of appointment in favour of any husband whom she may marry: *Quoad ultra* find that said trusts are a valid exercise of said power of appointment, and answer the first question accordingly," &c.

MACRAE, FLETT, & RENNIE, W.S.—MYLNE & CAMPBELL, W.S.—WEBSTER, WILL, & Co., S.S.C.—CALDER, MARSHALL, & WALKER, W.S.—BRUCE & BLACK, W.S.—Agents.

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MICHAEL BRESLIN, Pursuer (Appellant).—*Watt, K.C.*—*Burt.*
THE CLYDE QUARRIES, LIMITED, Defenders (Respondents).—*Sol.-Gen. Salvesen*—*Christie.*

No. 100.

Mar. 10, 1905.

Breslin v. Clyde Quarries, Limited.

*Reparation—Negligence—Duty to Public—Starting crane without warning and swinging box over horse's head.*—In an action of damages for personal injuries brought by a carter employed by a firm of contractors against a company of quarrymasters, the pursuer averred that when at the defenders' quarries in charge of a horse and bogie, and while he was spragging his bogie, the defenders' craneman suddenly and without warning started a crane, making a great noise and swinging a box over the horse's head, causing the said horse to jump and rear and draw the bogie on top of the pursuer, and that the accident was caused through the fault of the defenders' servants in not warning the pursuer of their intention to start the crane, as was usual in such operations, and in swinging the box near the horse's head; and that the system adopted by the defenders was dangerous in that, although the craneman could not see the pursuer from the crane, the defenders failed to provide a man at the face of the quarry to give warning to pursuer and other workmen. *Held* that these averments were irrelevant.

MICHAEL BRESLIN, carter, Renton, brought an action of damages for personal injuries in the Sheriff Court at Dumbarton, against the Clyde Quarries, Limited, Dumbarton. 1ST DIVISION.

The pursuer averred that on 17th June 1904 he was in the employment of George Manners & Son, contractors, Dumbarton, who had contracted for the conveying of stones from the defenders' quarries to the railway on bogies drawn by horses; that on said date, having led his horse to the quarry face, he proceeded to sprag his bogie, when, as he was doing so, "suddenly and without warning of any kind, the defenders' craneman, Libburn, caused the crane of which he was in charge, and which was standing in a field above the face of said quarry, to commence working, making a great noise, and swinging a box which was attached to the chain of said crane over said horse's head, causing said horse to become restive, and jump and rear, and draw the bogie to which said horse was attached off the rails on top of pursuer, injuring him severely." (Cond. 4) "Said accident was caused through the fault and negligence of the defenders or of their servants, for whom they are responsible, in not warning pursuer of their intention to start working said crane, and in swinging the box attached to the chain of said crane over and near to said horse's head, causing it to become restive. . . . The pursuer relied, and was entitled to rely, on the fact that it is usual in said quarry, as in all well conducted operations of this kind, to give warning by shouting that said crane was about to be started to work. . . . Further, the system adopted by defenders was attended with danger to pursuer and the other workmen, in that the defenders' said craneman was not in a position to see the pursuer from his place on the platform of said

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crane, and defenders ought to have placed a responsible and competent party, which they did not do, at the face of said quarry, either to warn pursuer and the other workmen of the danger owing to the crane being worked, or to inform said craneman of the presence of the pursuer and other workmen in the quarry. Pursuer avers that the defective system of working said crane, and the negligence of defenders' servants in not warning workmen of their intention to start working said crane, have previously caused accidents in said quarry. This was in the knowledge of defenders."

Part of Condescendence 4 above quoted was added by way of amendment after the date of the Sheriff-substitute's interlocutor.

The defenders pleaded, *inter alia;*—(1) The action as laid is irrelevant.

By interlocutor, dated 1st November 1904, the Sheriff-substitute (Blair) sustained the defenders' first plea in law and dismissed the action.*

The pursuer appealed to the Sheriff (Lees), who, after allowing the pursuer to amend his statements, by interlocutor dated 9th December 1904 recalled the interlocutor appealed against, and allowed the parties before answer, and under reservation of all pleas, a proof of their averments as amended.

The pursuer appealed to the Court of Session, and lodged a proposed issue for the trial of the cause by jury.

The defenders maintained that the action was irrelevant, and argued;—It was not said that the horse was within the sweep of the crane. The fair implication was that it was not. It was not alleged that the noise was unusual. The pursuer was bound to have in contemplation that the crane would be worked with the usual noise, and if his horse was liable to be alarmed by such working he ought to have taken precautions for himself.

Argued for the pursuer and appellant;—It was not merely the noise of the crane that alarmed the horse. It was also the swinging of the box near its head. The defenders were responsible in respect that no warning was given, and no man provided to give warning.

Lord President.—In this case I agree with the Sheriff-substitute. I do not think there is a relevant averment of fault. The pursuer is a carter,

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* "Note.— . . . The pursuer avers two things—that no warning was given that the crane was going to start working, and that the system of working was defective.

"There is no averment of negligence in working—only that the pursuer got no warning. I do not think such averment is sufficient. A crane is an essential part of the working of a quarry. He knew that the crane would work, and did work regularly. It is not said it was worked in any unusual manner, or that the man who worked it was inefficient or incompetent. He does not say that he did not understand the manner of working, or that he or his horse were new to the job. Nor does he say what kind of warning he ought to have got. All he says is he got none. This case, to my mind, falls under the category of risks incidental to the employment. No quarry can be properly carried on without cranes. He knew that cranes were and must be used, and it seems to me rather unreasonable to expect a master to shout, 'Look out,' every time he is going to perform a usual and ordinarily harmless function incidental to his business. There are certain occupations which involve a certain amount of risk, and I think this is one of them. . . ."

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the ordinary course of whose business was to take a bogie to the defenders' quarries for the precise purpose of conveying stones from them to the railway. It must be presumed that he was perfectly conversant with the class of noises he would meet with at the quarry. There is nothing said against the defenders, who were strangers to the pursuer, but that the defenders' servants ought to have warned pursuer of the craneman's intention to work the crane, which they did not do. That is not an averment of fault at all. A very sensible view of the case is taken by the Sheriff-substitute in his note, and although from the Sheriff's note we see that further averments were made by way of amendment to meet the criticisms passed on the record by the Sheriff-substitute, I do not think they have been successful in doing so. If this case were allowed to go to trial I do not see what case would not. Any person who was standing at a shop with a horse which was alarmed by a sudden noise from the shop would, in the pursuer's view, have a good action against the shopkeeper. It seems to me that this was just one of those risks which a person looking after a horse was bound to provide against for himself. I think there is here no relevant case, and that the action should be dismissed.

LORD KINNEAR.—I also agree with your Lordship, and with the result at which the Sheriff-substitute has arrived, and the general grounds of his opinion, although I do not agree with all that he has said. We have nothing to do here with common employment or the responsibility of a master to his servant for the safety of his system of working. This is not an action at the instance of a workman in the service of the defender, but of a stranger. For the reasons your Lordship has given I think this case is irrelevant, and should be dismissed.

LORD PEARSON concurred.

LORD ADAM and LORD M'LAREN were absent.

THE COURT recalled the interlocutor of the Sheriff of 9th December 1904, sustained the appeal, and affirmed the interlocutor of the Sheriff-substitute of 1st November 1904.

M'NAB & MACHARDY, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

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MRS MARY M'CABE or KELLY, Pursuer (Appellant).—*Crabb Watt, K.C.—A. M. Anderson.*
JAMES FRASER & COMPANY, Defenders (Respondents).—*Sol.-Gen. Salvesen—Constable.*

*Process—Appeal—Appeal for Jury Trial in action under Employers Liability Act—Competency—Court of Session Act*, 1825 (*Judicature Act*) (6 *Geo. IV. cap.* 120), *sec.* 40—*Court of Session Act*, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 73—*Employers Liability Act*, 1880 (43 *and* 44 *Vict. cap.* 42) *sec.* 6 (1) *and* (3).—*Held*, following *Paton* v. *Niddrie & Benhar Coal Company, Limited*, Jan. 14, 1885, 12 R. 538, that it is competent in an action under the Employers Liability Act, 1880, to appeal for jury trial under section 40 of the Judicature Act and section 73 of the Court of Session Act, 1868.

1ST DIVISION.

MRS MARY M'CABE OR KELLY, widow of John Kelly, labourer, Glasgow, brought an action in the Sheriff Court of Lanarkshire at Glasgow, against James Fraser & Company, Glasgow, in which she

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craved decree for £180, 1s., as due to her by the defenders under the Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), in respect of the death of her husband. The action originally also contained a claim for damages at common law, but this was withdrawn when the case was before the Sheriff (Guthrie).

By interlocutor, dated 17th November 1904, the Sheriff-substitute (Fyfe) allowed a proof before answer *quoad* the claim under the Employers Liability Act; and on appeal the Sheriff (Guthrie), by interlocutor, dated 14th January 1905, adhered.

The pursuer appealed to the First Division of the Court of Session, and proposed an issue for the trial of the cause by jury.

Counsel for the defenders maintained that the appeal was incompetent, and argued;—An appeal under the Judicature Act, section 40, and the Court of Session Act, 1868, section 73, was not competent in a case brought under the Employers Liability Act, 1880. No doubt a different view was expressed by the Judges in the case of *Paton* v. *Niddrie & Benhar Coal Company, Limited.*[1] But that decision was not well founded, and had been questioned,[2] and ought now to be reconsidered. By the Employers Liability Act, 1880, a new right was conferred which was to be vindicated in the Sheriff Court only with a limited right of removal to the Court of Session subject to certain conditions. Where a new right was given, and the method of vindicating it was prescribed, that by implication was the only method authorised. An action brought under the Employers Liability Act, 1880, could therefore only be removed to the Court of Session under section 6 (3) of the Act (Employers Liability Act), in the way and subject to the conditions prescribed by section 9 of the Sheriff Court Act, 1877. The intention of the Legislature was to obviate the hardship to employers of being put to the expense of litigating in the Court of Session against an impecunious pursuer in cases which might properly have been tried in the Sheriff Court. In an appeal under the Judicature Act, if £25 were recovered, the pursuer was entitled to full expenses.[3] There was no object in imposing the condition as to expenses when the case was removed before, or immediately after, the closing of the record, if appeal without any such condition was competent after proof was allowed. This was not a class of case in which any hardship could arise from overruling a previous decision of the Court, and the present case should, if necessary, be sent to a fuller bench in order that the case of *Paton*[1] might be reconsidered. That case, however, was not directly in point here, because the action there was laid at common law as well as under the Employers Liability Act. Counsel also referred to *M'Avoy* v. *Young's Paraffin Company, Limited.*[4]

Counsel for the pursuer and appellant were not called upon.

LORD PRESIDENT.—In this case I think we have no alternative except to follow *Paton.*[1] That case is not distinguishable from the present. Although there was this difference that the action there was laid at common law as well as under the Employers Liability Act, 1880,[5] the only objection

[1] Jan. 14, 1885, 12 R. 538.
[2] Kane v. Singer Manufacturing Co., May 21, 1904, 6 F. 658.
[3] Casey v. Magistrates of Govan, May 24, 1902, 4 F. 811.
[4] Nov. 5, 1881, 9 R. 100.
[5] 43 and 44 Vict. cap. 42.

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taken was because the case had been removed to the Court of Session under the Judicature Act[1] instead of under the Employers Liability Act, 1880,[2] sec. 6 (3), and to that point only the opinions of the Judges were directed. That decision is absolutely binding upon us. I do not say whether it was right or wrong, but I see no reason to doubt that it was right.

It has been brought to our notice that doubts as to the soundness of the decision in *Paton*[3] have been expressed in the Second Division. But although such doubts were expressed the Judges said they were bound to follow it. If the question is to be sent to a larger Court it must come from the Division where doubts as to *Paton's* case[3] have arisen, and not from that in which no doubt has yet been felt as to the soundness of that decision.

LORD KINNEAR.—I quite agree with your Lordship. We have no choice but to follow *Paton*.[3] I have not as yet seen reason to doubt the soundness of that decision. But at all events it is a decision binding upon us.

LORD PEARSON.—I agree for the reasons which your Lordship has assigned.

LORD ADAM and LORD M'LAREN were absent.

THE COURT repelled the defenders' objection to the competency of the appeal, and approved of the issue, and appointed the same to be the issue for the trial of the cause.

CLARK & MACDONALD, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 102.

Mar. 11, 1905.

Anderson v. Morrison.

JAMES ANDERSON, Pursuer.—*Munro—Steedman.*
DONALD MORRISON, Defender.—*W. E. Mackintosh.*

*Process—Proof—Proof on Commission—Jury Trial—Examination of Pursuer on Commission—Postponement of Trial.*—An issue for the trial by jury of an action of damages for slander was adjusted on 30th October 1903. The trial of the action was postponed in July 1904, owing to the inability of the pursuer from ill-health to attend at the trial for examination as a witness. The case was again set down for trial at the Spring Sittings in 1905.

The pursuer moved for a commission to take the pursuer's evidence, and produced a medical certificate which stated that the pursuer was not in a fit state of health to attend the trial, that it was impossible to state when he would be able to do so, but that there was little prospect of his being able to do so within the next twelve months. The defender asked that the trial should be again postponed. The Court *refused* to postpone the trial again, and *granted* the pursuer's motion.

1ST DIVISION.

IN July 1903, James Anderson, carpenter and contractor, Inverness, brought an action of damages for slander against Donald Morrison, tea merchant, Nairn, in which he complained of certain words alleged to have been addressed to him by the defender on 16th June 1903.

An issue for the trial of the cause by jury was adjusted and settled

[1] 6 Geo. IV. cap. 120, sec. 40.
[2] 43 and 44 Vict. cap. 42.
[3] 12 R. 538.

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by the Lord Ordinary (Stormonth-Darling) on 30th October 1903. The case was set down for trial at the Summer Sittings in 1904. In July 1904, counsel for the pursuer moved for a commission to take the evidence of the pursuer, and produced a medical certificate to the effect that the pursuer was suffering from complete mental breakdown, the result of worry and sleeplessness, and was unable to proceed to Edinburgh for examination as a witness. Counsel for the defender moved that the trial should be postponed. The Court refused to allow the pursuer's evidence to be taken on commission, and postponed the trial.

The case was again set down for trial at the Spring Sittings in 1905. On 11th March counsel for the pursuer moved for a commission to take the pursuer's evidence at Inverness, and produced a medical certificate in these terms:—"Inverness, March 8th, 1905.—I hereby certify, on soul and conscience, that Mr James Anderson, contractor, Eastgate, Inverness, is not in a fit state of health to attend the trial in Edinburgh of the action at his instance against Mr Donald Morrison. I cannot state when he will be able to do so, but there is little prospect of his being able to attend trial in Edinburgh within the next twelve months. I am, however, of opinion that his evidence might be taken on commission before a commissioner in this town, and that the adoption of that course would cause his health less injury."

The defender moved that the trial should be postponed.

Argued for the pursuer;—There was little prospect of the pursuer, who was still suffering from nervous breakdown, being able to come to Edinburgh for examination at a trial. The trial had been postponed before, and to insist upon the pursuer's attendance as a condition of the trial going on would amount in the circumstances to a complete denial of justice.

Argued for the defender;—The defender was entitled to have the pursuer present for examination at the trial. This was essential to a proper trial of the cause. If the pursuer was unable to attend, the proper course was to postpone the trial until he was able to do so.

LORD PRESIDENT.—There is a peculiar situation disclosed here, and I think it is clearly a case to allow the motion; indeed, to do otherwise would be tantamount to saying that the pursuer should have no action for the injury alleged to have been done him simply because he has never since been in a sufficiently good state of health to appear in the witness-box. It seems to me that any prejudice arising from his not being here will have to be borne by himself. It might be very desirable to postpone the trial so as to have the pursuer in the witness-box, if there were some prospect of his being able to attend; but seeing the date when the act complained of was done, and that the pursuer has been ill ever since, it does not seem to me that there should be any further delay.

The LORD JUSTICE-CLERK concurred.

LORD KINNEAR.—I quite agree. I take it to be practically conceded that the pursuer cannot be compelled to appear for examination at the trial, for the defender's motion is, not that the action should be dismissed, but only that the trial should be postponed. I do not think that a proper

course, considering the length of time for which the action has been already in Court; and if it is not to be thrown out at once, which is not suggested, the only alternative is that the trial should be allowed to proceed, leaving the pursuer's evidence, if he desires to tender himself as a witness, to be taken on commission. The prejudice which may arise from proceeding at a time when the pursuer cannot go into the witness-box will fall upon himself rather than upon his opponent.

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LORD STORMONTH-DARLING concurred.

LORD ADAM and LORD M'LAREN were absent.

THE COURT granted the pursuer's motion.

STEEDMAN & RAMAGE, W.S.—ARCH. MENZIES, S.S.C.—Agents.

CROOM & ARTHUR, Pursuers (Respondents).—*Campbell, K.C.—Spens.*
D. Y. STEWART & Co., Defenders (Appellants).—*Guthrie, K.C.—Hunter.*

No. 103.
Mar. 14, 1905.
Croom & Arthur v. Stewart & Co.

*Sale — Disconformity to Contract — Right of Rejection — Alternative remedies — Sale of Goods Act*, 1893 (56 *and* 57 *Vict. cap.* 71), *sec.* 11, *sub-sec.* 2.—An engineer contracted to supply and fit up for an ironfounder two mechanical stokers for two boilers at his works. The stokers were fitted up, and in September 1902 the buyer intimated to the seller his rejection of the machines on the ground that they were not conform to contract, but he continued to use them until the end of 1902.

In an action for the price *held*, following *Electric Construction Co., Limited*, v. *Hurry and Young*, 24 R. 312 (1) that the buyer having retained and used the machines for two months after intimating his rejection, he was barred from pleading rejection; and (2) that the buyer after intimating his election to reject the goods was not entitled to fall back on the alternative remedy provided by the Sale of Goods Act of retaining the machines, and claiming damages for the seller's failure to perform a material part of the contract.

2D DIVISION. Sheriff of Lanarkshire.

IN April 1901 D. Y. Stewart & Co., ironfounders, St Rollox, Glasgow, accepted an offer of Messrs Croom & Arthur, engineers, Glasgow, to fit up two mechanical stokers in their St Rollox Works. The conditions of the offer, so far as material to the present case, were contained in a letter by Croom & Arthur, dated 6th February 1901, from which the following is an excerpt:—"We have now pleasure, as requested by your Mr Bowser, in offering to fit up our improved mechanical stoker, delivered and erected, the buyer supplying rough labour and doing any brickwork, for the sum of £85 (eighty-five pounds) per boiler. We guarantee to prevent smoke to the satisfaction of the inspector before receiving payment."

The stokers were fitted in July or August 1901, and were thereafter used by D. Y. Stewart & Co. in their works. After complaints as to the working of the stokers, D. Y. Stewart & Co., in answer to a demand for payment, wrote to the agent for Messrs Croom & Arthur the following letter, dated 11th September 1902:—"Dear Sirs,—Your letter of 11th inst. is before us, and we must say we are greatly surprised at its contents. The mechanical stokers do not fulfil the conditions held out, and if they did, we could not accept them as satisfactory. The workmanship could not be passed over, and if they were otherwise satisfactory that would have to be put

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right. But we have already told Mr Arthur to arrange for their removal, and that if *he* does not we shall do so, and be compelled to consider what claim we shall have to make for the very many expenses he has put us to."

On 26th September 1902 D. Y. Stewart & Co. wrote to Croom & Arthur in the following terms:—"Dear Sirs,—We shall be compelled, in the course of a day or so, to take action in regard to the mechanical stokers supplied by you. As you are already aware, we have been put to enormous cost in the delay in installing the stokers, in the assistance rendered by us in fitting up the stokers, in the innumerable mechanical defects and the continual alterations to the furnace, and, ultimately, in the erection of the chimney to suit your stokers, and otherwise. We now confirm that the stokers must be removed, and we hereby call upon you to arrange for this being done, as we must have our arrangements completed in time for necessary alterations to be made at the New Year holidays."

To this letter Messrs Croom & Arthur did not reply.

D. Y. Stewart & Co. continued to use the stokers until the end of 1902, when they were removed during the New Year holidays.

Meanwhile, on 31st October 1902 Messrs Croom & Arthur had brought the present action in the Sheriff Court at Glasgow against D. Y. Stewart & Co., concluding for payment of £170, being the price of the two mechanical stokers.

The defenders, in addition to defences founded on alleged delay in fitting up the stokers, made the following averment:—"Explained that said stokers were not fitted up till the month of August 1901, and that when fitted up they were defective and did not prevent smoke to the satisfaction of the sanitary inspector. In consequence of the delay and failure to prevent smoke as provided for, the defenders suffered loss and damage greatly in excess of the sum sued for, which loss and damage they plead in extinction of the price of said stokers, and reserve all claims competent to them to sue the pursuers for the balance of the loss they sustained through the pursuers' breach of contract." In explanation of their use of the stokers after September 1902 (which was admitted) the defenders averred:—"Explained that the defenders had no alternative but to use the stokers, in respect they required to enter into other contracts for the purpose of obtaining substitutes therefor, and also to keep their machinery and workmen employed until such time as they could have the stokers in question replaced. Had the defenders not so used the stokers, the damage claimed by them would have been greatly increased. Explained, further, that they never accepted the stokers as conform to contract, and all along intimated that they would not accept them as conform to contract."

The pursuers averred that the failure of the stokers to prevent smoke to the satisfaction of the sanitary inspector was due to the actings and workings of the defenders, and not to the stokers being inefficient for the purpose for which they were originally supplied.

The pursuers pleaded, *inter alia*;—(2) The defenders are barred *personali exceptione*, and by *mora*, from maintaining their defences. (3) The defences are irrelevant and incompetent.

The defenders pleaded, *inter alia*;—(1) The pursuers, having contracted to supply stokers which would prevent smoke to the satisfaction of the sanitary inspector, and they having failed to implement their contract, are not entitled to payment of the price. (2) The

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stokers supplied by the pursuers being disconform to warranty, and the defenders having suffered loss and damage thereby, are entitled to set off the loss and damage so sustained against the pursuer's claim. (3) The pursuers having failed to deliver and fit up the stokers at the time contracted for, and the defenders having suffered loss and damage thereby, the defenders are entitled to plead said loss and damage against the pursuers' claim. (4) The pursuers having contracted with the defenders to supply and fit up stokers which would save fuel, and they having failed to do so, the defenders are entitled to set up the loss and damage they have sustained through such failure.*

Proof was allowed and led. The evidence on the question whether the stokers had been properly used was conflicting. *Quoad ultra* the facts appear from the Sheriff-substitute's interlocutor.

On 29th November 1904 the Sheriff-substitute (Boyd) pronounced the following interlocutor:—"Finds in fact, that by letters between the parties the pursuers contracted to supply and fit up two of their mechanical stokers to two of the defenders' boilers for the sum of £85 each, the defenders to erect the engine and overhead shafting, and the brickwork and rough labour, the pursuers guaranteeing to prevent black smoke to the satisfaction of the sanitary inspector; (2) that the pursuers did supply and fit up the stokers in August 1901, and the defenders used them till the end of 1902; (3) that after their erection the sanitary inspector still complained of black smoke from the defenders' works, but that this was caused, not by defective construction of the stokers, but by improper use of them by the defenders; (4) that the defenders removed the stokers in the end of 1902, and now refuse to pay for them: Finds in law that they are bound to pay for them: Therefore decerns as craved."

The defenders appealed to the Court of Session, and argued;—On the facts it was proved that the stokers were not conform to contract. It was an express condition precedent to the right to payment that the stokers should prevent smoke, to the satisfaction of the sanitary inspector. That condition had not been fulfilled, and therefore the pursuers had no right to payment. That distinguished the case from *Electric Construction Company, Limited*, v. *Hurry & Young*,[1] where there was only a warranty, not a condition precedent to payment. Alternatively the rejection was timeously completed. Machinery of the nature of mechanical stokers could not be taken out without stopping the furnace, and therefore rejection was in time if made as soon as a holiday rendered it possible. The decision in *Electric Construction Company*[1] did not amount to a rule that a purchaser must throw a defective machine out of his works the moment he decided to reject it, regardless of the amount of damage that course would cause. If that was the import of the case it should be reconsidered.

Argued for the pursuers and respondents;—(After an argument on

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* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts (section 11, subsection 2),—"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

[1] Jan. 14, 1897, 24 R. 312.

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the import of the evidence, directed to shew that the failure of the stokers was due to the defenders' actings)—The defenders had failed to distinguish *Electric Construction Co., Limited*, v. *Hurry & Young*.[1] That case was authoritative, and had been followed.[2] There was no substantial difference between a condition precedent to payment and a warranty forming a material part of the contract. In both cases, if the condition or the warranty were not fulfilled, the purchaser had the alternative remedies of rejecting the goods, and treating the contract as rescinded, or keeping the goods and claiming damages.[3] What the authorities already cited established was that he must select his remedy, which in the present case he had failed to do. The undernoted case was also cited.[4]

At advising,—

LORD JUSTICE-CLERK.—The evidence in this case is conflicting, and by no means satisfactory. I do not think it necessary to go into it in detail, and perhaps there are some points in which the Sheriff-substitute's interlocutor may be open to criticism. But in the main I agree with his view that the failure of the mechanical stokers supplied by the pursuers was due not to inherent defects in the design, but to their not having been properly used by the defenders. It is one particular feature in the case that the building work in connection with the fitting in of the stokers was not to be executed by the pursuers, but that the brickwork and the labour connected with it were to be supplied by the defenders themselves, and from the evidence I think it appears that a good deal of the difficulty in obtaining satisfactory working was caused by their mismanagement. Thus one of the most serious difficulties arose in the working of the ram by which the feed of fuel was controlled, and this it is shewn was caused by the setting of the brickwork. This was, of course, of the very utmost importance, as anything that impeded the proper working of the mechanical feed would necessarily be a serious interference with efficiency.

Then, again, what is called the coking arch forms a most important part of the arrangement for securing a satisfactory operation of the furnace. For its purpose was to cause any unconsumed fuel to pass for some distance nearly horizontally over the furnace bed, and thereby expose it to the high temperature which would cause combustion. If the coking arch was defective, the tendency of the smoke would be to rise clear of the heating surface whenever it formed, and this would plainly have two results for evil. Some of it would be caught and lodged on the water tubes, thus diminishing the value of the heating surface, and what was not caught would ascend as wasted fuel, and escape by the chimney in breach of the smoke prevention bye-laws. Yet, on my reading of the evidence, I am satisfied with the Sheriff-substitute's view that this arch, which of course required to be constructed to the specification of the pursuers, was taken down in July 1902, without the pursuers' knowledge and consent, and the defenders thereafter kept the stokers and used them for another six months.

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[1] 24 R. 312.

[2] Lupton & Co. v. Schultze & Co., June 30, 1900, 2 F. 1118.

[3] Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), section 11, subsection 2, quoted *supra*, p. 565.

[4] Dick & Stevenson v. Mackay, May 21, 1880, 7 R. 778.

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I therefore agree with the Sheriff-substitute in his first view of the case, that the stokers did not get such fair play in the hands of the defenders as would entitle them to reject the stokers, even had they done so earlier than they did.

But even if it could be held that this was not a sound view of the evidence of fact, I should still feel compelled to hold that the defence put forward must fail. For I am unable to see any answer to the pursuers' contention that the defenders by retaining the stokers and continuing to use them for a long period after they maintain that they rejected them, have altered their legal position. To me it appears quite certain that the decision in the case of the *Electric Construction Company*,[1] quoted at the debate, is directly applicable to this case, and that as a consequence the defenders cannot now, on the footing that they have retained the goods, claim damages. Their case must be either that they rejected, which they say they did, and therefore are not liable in payment of the price, or that they retained subject to a claim of damages. But if they rejected, as they say they did, in September 1902, then under the case I have referred to they cannot claim damages.

LORD KYLLACHY.—In this case I agree with the Sheriff that the contract between the parties contained a condition or warranty to the effect that the pursuers' apparatus should prevent smoke to the satisfaction of the Glasgow authorities. I also agree with him that this warranty was not fulfilled. I differ from him, however, when he proceeds to find that the failure of the apparatus "was caused not by defective construction of the stokers but by improper use of them by the defenders." As to that I should be of opinion, having done my best to weigh the somewhat unsatisfactory evidence on the subject, that the pursuers have failed to prove that the defenders used the stokers improperly, or that thus or otherwise the non-fulfilment of the condition or warranty was due to their (the defenders') default.

But while so holding, and my conclusion being so far in favour of the defenders, it has still to be considered what was the effect in law of the defenders' continued use of the stokers down to the end of the year 1902—a fact as to which there is no dispute; and as to that I am obliged to say that I cannot distinguish the present case from that of the *Electric Construction Company*,[1] decided by the First Division of the Court in 1897—a decision to which the Sheriff refers, and to which the pursuers appeal. I am not sure that I quite follow the reasoning by which in that case the majority of the Court reached the conclusion that the alternative remedy provided by the Sale of Goods Act of 1893 was barred to the defenders by their previous ineffective rejection. But not being in the circumstances prepared to propose to your Lordships that the point of law there and here involved should be submitted to the whole Court, I consider that, as the two cases are not distinguishable, we ought to follow the decision referred to. In that view I am not prepared to dissent from the judgment which I understand your Lordships propose, viz., that we should affirm the Sheriff-

[1] 24 R. 312.

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substitute's interlocutor. I should have proposed, for the reasons I have explained, that in place of the second paragraph of the Sheriff's third finding in fact, which is I think not well founded, there should be substituted a finding to the effect that the pursuers have failed to establish that the sanitary inspector's complaint was due to any improper working or other default of the defenders, while on the other hand we should alter the finding in law so as to read,—"Finds, however, in law that inasmuch as after intimating their rejection of the pursuers' apparatus in September 1902 the defenders continued to use the same until the end of 1902, they (the defenders) are barred from claiming damages in respect of the apparatus being disconform to contract." But agreeing with the Sheriff-substitute's result I do not think it necessary to dissent from the judgment which your Lordships propose.

The LORD JUSTICE-CLERK intimated that LORD YOUNG, who was absent at the advising, concurred in the judgment proposed.

LORD KINCAIRNEY, not having been present at the hearing, gave no opinion.

THE COURT dismissed the appeal, and found in fact and in law in terms of the interlocutor of the Sheriff-substitute dated 29th November 1904.

JAMES G. BRYSON, Solicitor—ALEXANDER ROSS, S.S.C.—Agents.

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MRS MARGARET M'DONALD OR MITCHELL, Petitioner.—*Dewar, K.C.—J. Macdonald.*
ELIZABETH WRIGHT, Respondent.—*A. M. Anderson.*

*Parent and Child—Custody—Illegitimate Child—Right of mother or her nominee to custody—Petition for custody refused—Custody of Children Act*, 1891 (54 *and* 55 *Vict. cap.* 3), *sections* 1 *and* 3.—*Circumstances* in which a petition by a mother for the custody of her illegitimate child, whom she had entrusted more than seven years before to the care of her cousin, *refused*, on the ground that it was not for the best interests of the child to deliver it to the petitioner or her nominee.

*Observations* by the Lord President upon sections 1 and 3 of the Custody of Children Act, 1891 (54 and 55 Vict. cap. 3).

1ST DIVISION. ON 17th December 1904 Mrs Margaret M'Donald or Mitchell, wife of and residing with John Mitchell, labourer, 4 Niddry Street, Edinburgh, presented a petition, with the consent and concurrence of her husband, for the custody of her illegitimate female child, Elizabeth Aitken.

The petitioner averred that the child was born on 2d June 1897, while she herself was in service at Avontoun House, Linlithgow, that on 2d July 1897 she placed the child in the custody of Mr and Mrs Cunningham, Maddiston, Polmont Station, Stirlingshire, where it remained till July 1904, that in July 1904 the child was at the request of Miss Elizabeth Wright, housekeeper at Avontoun House, sent to reside with her during the holidays; and that Miss Wright had refused to return the child to the Cunninghams, or to give her up to the petitioner.

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The petitioner accordingly craved the Court to find that she was entitled to the custody of the child; and "to ordain the said Miss Elizabeth Wright to deliver up the said child to the petitioner, or to those having her authority . . . to remain in the custody of the petitioner."

Answers were lodged by Miss Wright, in which she narrated the facts as to the child's maintenance and upbringing substantially as they are set forth in the report by the Sheriff of the Lothians,* and averred:—"The respondent is attached to the child, and the child is happy and contented with the respondent. The respondent is in a position to give the child a comfortable home and a good education, and has the intention of doing so. The petitioner is not in a position to attend to the child. It is believed that she is employed in the daytime in a boot factory, and that she is unable to employ any person to look after the child in her absence. The respondent refers to and founds upon the Custody of Children Act, 1891, particularly sections 1 and 3 thereof, and maintains (1) that in the interests of the child the petition ought to be dismissed; and (2) that the said James Cunningham, as *dominus litis*, ought to be found liable to the respondent in expenses."

On 21st January 1905 the Court remitted to the Sheriff of the Lothians and Peebles to inquire into the facts and circumstances of the case set forth in the petition and answers, and to report.*

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* The report of the Sheriff (Maconochie, K.C.) was as follows:—" . . . The petitioner, Margaret M'Donald or Mitchell (aged 34), is a cousin of the respondent, Miss Elizabeth Wright, who has been for upwards of twenty years housekeeper to Mr Henry T. Blair of Avontoun House, Linlithgowshire.

"In 1897 the petitioner, who was then unmarried, had been for about eight years a domestic servant at Avontoun. On 2d June of that year she gave birth to the illegitimate child Elizabeth Aitken. On the day of the birth the respondent went to a law-agent in Linlithgow and arranged for proceedings being taken against George Aitken, the putative father, with a view to obtaining decree of aliment against him, and on 2d July 1897 decree was granted against him ordaining him, *inter alia*, to pay aliment for twelve years at the rate of £6, 10s. per annum paid quarterly.

"Immediately after the birth the respondent and a Mrs Roy, daughter of James Cunningham, Maddiston, Polmont Station, retired mineral worker, and now sergeant in the Salvation Army, went with the consent of the petitioner to see Cunningham, and arranged that he and his wife should receive the child into their house and bring it up, they being paid a sum monthly for its maintenance. About a month afterwards the arrangement was carried out, the child being taken to the Cunninghams by Miss Wright and Mrs Roy.

"The petitioner remained in service at Avontoun till November 1901, and during that time she used frequently to go to see the child.

"When she left Avontoun she went to live with a man Thomas Mackay, who shortly afterwards went as a soldier to the war in South Africa. . . .

"In January 1902, after Mackay had gone away, the petitioner went to Cunningham's house and demanded that her child should be delivered to her. Cunningham refused to give her up, and the petitioner went away. Since then, and until this petition was about to be raised, she has not tried to see the child, has paid nothing towards its upkeep, and has not shewn in any way that she takes any interest in it.

"On February 28th 1902 the petitioner wrote to Messrs P. & P. Miller, solicitors, Linlithgow, who act for the respondent, saying that she would

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Argued for the petitioner;—The mother's right to the custody of her child was inalienable, and the agreement made with Miss Wright was therefore not binding on the petitioner.[1] Nothing had been said against the petitioner's character, but looking to the Sheriff's report as to the locality in which the petitioner was residing, she could not maintain that her present residence was a suitable home for the child. The petitioner accordingly now asked the Court to send the child back to the care of the Cunninghams. [LORD PRESIDENT.—The remit to the reporter was not made on the basis which is now proposed; the inquiry ordered was on the footing that the petitioner should have the custody, not on the footing that the Cunninghams should have it. What the petitioner now asks the Court to do is to give the custody of her child to a nominee of her own, who might give it back to her within a week.] The mother of an illegitimate child was entitled to name the person with whom her child should

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allow the child to remain with the Cunninghams, and that she was sure that Miss Wright would see 'that the child is taken care of, also that it is fed and clothed.'

"In April 1902 the petitioner entered into a formal agreement with the respondent (No. 6 of process), under which the former bound herself, *inter alia*, to allow the child 'to remain as hitherto under the custody of Miss Wright either at Avontoun or elsewhere in the discretion of' Miss Wright.

"In July 1904 the respondent took the child to stay with her at Avontoun during the school holidays, and subsequently refused to allow the Cunninghams to take her back to their house. The child is still at Avontoun, and there is in process a letter from Mr Blair to Mr Miller, in which he states that he quite approves of her remaining an inmate of his house, and that he will 'always be very willing to give Miss Wright any pecuniary aid she may require for the purpose of supplying the child with suitable clothing,' &c.

"In August 1904 the petitioner married her present husband, and is now living with him at No. 4 Niddry Street, Edinburgh.

"So far the facts are not in dispute, but there are two subjects on which, though perhaps they are not of great importance to the decision of the case, it is proper that I should say a few words, as averments with regard to them are made on record and evidence relating to them was led.

"1. Who has paid for the maintenance of the child from its birth to the present time? The evidence with regard to this matter is very contradictory, but after giving it my best consideration, it is, I think, proved (1) that the respondent provided out of her own means at least the greater part of the baby clothes at the time of the birth; (2) that she so paid the whole expense of the action of filiation; (3) that whenever Aitken has failed to pay the whole sum due by him under the decree (and such occasions have been very frequent), the respondent has made up the sum to 10s. monthly. The Cunninghams were to receive £1 per month, and I incline to the opinion that she also paid part of the 10s. a month which the petitioner says she paid up to November 1901. As, however, there are no receipts of any kind produced it is impossible to be certain on this point; (4) that in July 1903 the respondent paid to Cunningham a sum of £9 (being, so far as I can make out, the arrears then due to him), and I see no reason to disbelieve her when she says that all that sum came out of her own pocket, with the exception of a few small sums which were handed to her by Mr Miller as coming from Aitken; (5) Miss Wright says that she paid to Cunningham on another occasion a lump sum of £14. This Cunningham

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[1] Kerrigan v. Hall, Oct. 22, 1901, 4 F. 10.

reside. The child had been well treated by the Cunninghams, and she had been removed from their custody without the consent of the petitioner. Under the Custody of Children Act, 1891, the Court could not deprive the petitioner of the custody of her child unless she had (*a*) abandoned or deserted it, or (*b*) allowed it to be brought up by another person at that person's expense.* The petitioner had not abandoned or deserted her child, and she had contributed towards its maintenance.

Argued for the respondent;—Under the agreement made with the petitioner in 1902 Miss Wright was entitled to the custody of the child as far as the Cunninghams were concerned, and she had done nothing illegal in taking the child to live with herself. The welfare of the child was the main consideration, both at common law and under the statute.[1] It was clear from the Sheriff's report, and from the admission now made by the petitioner's counsel, that she was not

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denies, and in the absence of receipts I cannot arrive at any conclusion on the matter; (6) that since November 1901 the petitioner has paid nothing for the child. It is right, however, to say that she and the Cunninghams swear that when she visited them in January 1902 she offered some payment, but that she was told by Cunningham that he did not wish to receive any further payments either from her or anyone else. On the other hand, as I have said, it is admitted that the Cunninghams accepted a payment of £9 from Miss Wright in July 1903.

"2. With regard to the agreement entered into in 1902: The document speaks for itself, and I would only add that Mr Miller, solicitor, swears that he explained its whole terms to the petitioner, and that it was sent to her for signature, so that, if the document is of any importance at all, it cannot be said that the petitioner signed it without full knowledge of what it contained or acting under any undue influence.

"I saw and spoke to the child in private. In appearance she struck me as looking very delicate, being white and thin, with particularly thin hands. She answered all my questions readily, and altogether she struck me as being decidedly above the average for her years in intelligence. She readily admitted that she had been well treated when living with the Cunninghams, but there can be no doubt that (if her views are of any importance) she is strongly attached to the respondent (whom she calls 'auntie'), and is very anxious to live with her. She evidently is afraid of going to live with her mother, of whom she says, with truth, that she knows nothing. A certificate from Dr James Hunter, M.D., is produced. It is not stated to be on soul and conscience, but it is admittedly genuine, and in an inquiry of this kind I think that I am entitled to receive it, and it is now in process. His opinion does not seem to be based on any prolonged and intimate acquaintance with the child's constitution, but so far as I could gather there is no other doctor to whom she is better known to whom I could apply for an opinion. It is right to add that the Cunninghams said that until the child was about three years old she was delicate, but that since she began to go to school she has not been absent at all on the ground of ill-health, but from what I saw myself (and I am strengthened in my opinion by Dr Hunter's certificate), I think that plenty of fresh air

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* The sections of the Act referred to are quoted in the opinion of the Lord President, *infra*, p. 574.

[1] Sutherland v. Taylor, Dec. 22, 1887, 15 R. 224; Mackenzie v. Keiller, July 6, 1892, 19 R. 963; Campbell v. Croall, July 6, 1895, 22 R. 869; Custody of Children Act, 1891 (54 and 55 Vict. cap. 3), secs. 1 and 3, quoted *infra*, p. 574.

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in a position to give her child a suitable home. The alternative motion now made, to send the child to the Cunninghams, was obviously an afterthought. At the inquiry the petitioner stated on oath that she intended to retain the child in her own custody. If the motion was granted, the Cunninghams might at once hand the child over to the petitioner. The child was being well cared for, and was happy and contented where she was, and the petition should be refused.

LORD PRESIDENT.—This is a petition at the instance of Mrs Margaret Mitchell, the mother of an illegitimate female child, which is presented in order to obtain custody of the child, who is now and has been for some time residing with Elizabeth Wright at Avontoun House, Linlithgow. Miss Wright is a cousin of the petitioner.

Your Lordships remitted to the Sheriff of the Lothians to inquire into the

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and good nourishment are necessary for her health. These things there can be no doubt she would get at Avontoun.

"With regard to the home to which the petitioner says that she is anxious to take the child, I have to report that up to the middle of the first week in February the petitioner was working in a boot factory, for the few days between that date and the inquiry she had ceased to go out to work. She gave no explanation as to why it was necessary for her to work since her marriage until February, and as to why it is unnecessary for her to do so now. She states that she is not pregnant. Her husband is a mason's labourer, and earns 23s. a week when he is working. He does not seem to be a regular worker, and he is known to the inspectors of the Society for the Prevention of Cruelty to Children as a man who is addicted to loafing about the street during working hours. The petitioner was respectably dressed when she attended the inquiry, and there is no evidence suggesting that her present character is bad or even doubtful.

"The house in which the petitioner and her husband live is on the top storey of a common stair, and consists of one room, measuring about 13 feet by 9 feet. That size of room is, it should be stated, certified as satisfying the requirements of the sanitary authorities as a dwelling-place for three persons. The Cunninghams, who are respectable enough looking people, swear that the room is clean looking and well furnished, and Cunningham says that once or twice he got his tea there comfortably. On the other hand, Mr Turnbull, who is a very experienced inspector of the above named Society, deponed that the room is very poorly furnished, with only one bed in it, and that it is, in his opinion, unsuitable as a place in which to bring up a child. That the stair is dark, and that the neighbours are not of a desirable class (the petitioner also admitted that the stair is 'pretty rowdy'). He would not go so far as to say that if he had found a child living there with its own father and mother he would have thought it his duty at once to bring the case under the notice of the society. Mr Picken, the other inspector, who was examined, and who knows the petitioner's husband well, while agreeing with Mr Turnbull in his evidence generally went somewhat further, stating that he found the bedding dirty, and that had he found a child living there even with its own father and mother he would have reported the case with a view to its removal from the parents' custody. This matter seemed to me so important that after reading over my notes I asked Mr Turnbull to come to me privately with a view to supplementing his evidence on the point. He then told me (being still under oath) that the inhabitants of the stair are a very drunken and low lot, and that his society has had a great number of cases of child neglect under consideration from the house. The stair itself is very long, dark and ill ventilated, and it has a bad reputation for assaults, indecent and otherwise, on young girls,

facts and circumstances set forth in the petition and answers, and we have now before us a very full and careful report by the Sheriff.

It appears from the report that the petitioner gave birth to this illegitimate child while in service at Avontoun House in the year 1897. The respondent, who was then housekeeper at Avontoun House, came to the assistance of the petitioner, and made arrangements for the upbringing of the child. She also arranged for proceedings being taken against the father of the child, and a decree for aliment was obtained against him, which he has somewhat intermittently implemented.

The petitioner was not in a position to look after the child herself when it was born, nor at that time was the respondent able to do so, because she was housekeeper in a gentleman's house, and could make no provision for taking in a child of tender years. Accordingly the respondent arranged that the child should be boarded with a Mr and Mrs Cunningham. The child remained with them till July 1904, and they were paid for her maintenance. The payments were made *pro tanto* out of such funds as were received from the child's father, and the balance was supplemented by the respondent. About a year ago the respondent saw her way, with the consent of her master, to take the child into residence with herself, and the child has since remained with the respondent at Avontoun House.

The petitioner, after a somewhat troubled career, is now married to a man in humble circumstances, but of respectable character. He is not in steady employment, nor does he seem likely to be able to provide a settled home for the child, and counsel for the petitioner eventually admitted that it was out of the question to send the child to the present home of her mother and stepfather.

The respondent objects to giving up the child, and the Sheriff has no difficulty in assuring us that the child would much rather remain where she is.

The petition is presented on the ground that the petitioner, as the mother of the child, has the right to her custody. She at first proposed to take the

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taking place there. There is little furniture in the house, only one bed, and generally the room is dirty. The father's reputation is not good so far as sobriety is concerned, beyond that the witness could not speak to his character.

"The last matter on which I think it necessary to say anything is with regard to the averment that James Cunningham is the true *dominus litis*. I do not think that that is proved, though it is evident that he is doing all in his power to assist the petitioner. I am by no means certain that there is not some understanding between him and the petitioner to the effect that in the event of the petitioner obtaining the custody of her child it will be handed over by her to his charge. Cunningham prevaricated and would not give a distinct answer to a question to that effect put by me, and the impression left on my mind was that there was some such understanding. The petitioner, however, swore quite distinctly that it was her intention to retain the child in her own custody, and I venture to think that the case must be decided on that footing.

"I think it right to add that the petitioner never said a word to suggest that it was from any feeling of maternal affection to the child that she was suing for its custody. She gave no explanation of why she had deserted the child in 1901, and she would say nothing as to what measures she was prepared to take for having the child attended to if she were in the future compelled to go out to work."

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child into her own custody, and swore at the inquiry before the Sheriff that such was her intention. But counsel for the petitioner has so far changed her attitude that he now admits that it is impossible to ask for an order for custody by the petitioner, and he asks for an order to retransfer the child to the Cunninghams.

I think it is extremely inadvisable that a change of front of this magnitude should be made in the course of the hearing of a petition for custody, and, in view of the Sheriff's statement, I do not think it is safe to take the facts except as they are presented in the case. There is no security that an order to transfer the child to the Cunninghams might not be disregarded within a few days, and the child taken away by her mother, and therefore I am not disposed to give much heed to this sudden change of front in the course of the petition.

The petitioner has, however, directly raised the question of the powers of the Court under the Custody of Children Act, 1891.[1] The two sections which apply to the present case are the first and third. Section 1 enacts:—"Where the parent of a child applies to the High Court or the Court of Session for a writ or order for the production of the child, and the Court is of opinion that the parent has abandoned or deserted the child, or that he has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child, the Court may in its discretion decline to issue the writ or make the order."

I do not think the facts in this case amount to abandonment or desertion. I think that the words "abandoned or deserted the child" point at the parent leaving the child to its fate. But in this case, although the petitioner did little for her child, she never really abandoned or deserted it, because she knew and approved of the steps which the respondent took for its maintenance.

But then the latter portion of section 1 raises a more delicate question. The words "has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the child," seem to point to some defect in the character of the parent which would render him unfit to bring up the child. The findings of the Sheriff do not establish any moral fault in the petitioner's mode of life at the present time, but they come to this, that she is not in a position to give the child a home in which it can have any great advantages for its maintenance or development.

Section 3 enacts,—"Where a parent has (*a*) abandoned or deserted his child, or (*b*) allowed his child to be brought up by another person at that person's expense, or by the guardians of a poor-law union, for such length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties, the Court shall not make an order for the delivery of the child to the parent, unless the parent has satisfied the Court that, having regard to the welfare of the child, he is a fit person to have the custody of the child."

The same observations apply to subsection (*a*) as to the first part of section 1. The petitioner's counsel, however, argued that this case was not within the terms of subsection (*b*) because the child had not been brought

[1] 54 and 55 Vict. cap. 3.

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up by or at the expense of the respondent. I am of opinion that this is too narrow a reading of the words. I do not read them as meaning that the child must reside continuously in the home of the person who brings it up. I think they apply to the person who makes the arrangements for the board, lodging, and clothing of the child. In the same way the words "at that person's expense" do not mean that every penny of expense is to be paid by the person in question. The true meaning is the common sense meaning, and I think the words apply to the person who practically sees to the bringing up of the child.

Applying that meaning to the present case, I have no doubt that the respondent is the person who brought up the child at her expense. I have no doubt also that the facts of this case fortify that construction. It is evident that the mother practically washed her hands of the child, and left her entirely in the care of Miss Wright. That view is strengthened by the change of attitude adopted by her counsel to-day, which suggests that the present application is really made at the instigation of the Cunninghams.

With regard to the latter part of the section, it was argued that, in so far as there was at the present moment no moral slur upon the character of the petitioner, she must necessarily be a fit person to have the custody of her child. But then the words "having regard to the welfare of the child" must be kept in view. In short all these considerations point to the fact that the question of fitness is one of circumstances and degree.

The petitioner's counsel tried to argue that to refuse the prayer of the petition was tantamount to refusing the right to a mother to settle her child where she preferred when she was not able to take it herself, but we are laying down no such rule. If the mother had come forward with the names of persons of exceptional character who were able to give the child the advantages which she at the present enjoys, we should have respected her claim, but I cannot look upon her decision in favour of the Cunninghams, made somewhat late in the day, as fulfilling these conditions.

Having regard to the welfare of the child, I am clearly of opinion that the case comes under the statute, and that it is for the welfare of the child to remain, as she wishes, with the respondent. I am therefore for refusing the prayer of the petition.

LORD KINNEAR.—I agree, with this qualification, that I desire to reserve my opinion as to the interpretation of the second part of section 1. But the third section, as to the construction of which I agree with your Lordship, is quite sufficient for the disposal of the case, in so far as it depends upon the statute; and I am satisfied, for the reasons your Lordship has stated, that this petition should be refused.

LORD DUNDAS.—The excellent and careful report of Sheriff Macconochie satisfies me that, having regard to the welfare of the child, and the whole circumstances of the case, and to the language of the statute of 1891, this is a petition which the Court ought not to grant but to refuse.

LORD ADAM and LORD M'LAREN were absent.

THE COURT refused the prayer of the petition.

PATERSON & SALMON, Solicitors—JOHN VEITCH, Solicitor—Agents.

No. 105. DAVID WILSON HOGUE AND OTHERS (Mr and Mrs Adam Boyd Boyd's Marriage-Contract Trustees), First Parties.—*W. Thomson.*
Mar. 14, 1905. MRS ELIZABETH BOYD BOYD, Second Party.—*Constable.*
Boyd's Trustees v. Boyd. THOMAS ARTHUR RANDAL HUTCHINSON (Robert Hogue Boyd Boyd's Executor), Third Party.—*Macmillan.*
DAVID WILSON AND OTHERS (Mr and Mrs Hutchinson's Marriage-Contract Trustees), Fourth Parties.—*G. Moncreiff.*

*Succession — Marriage-Contract — Vesting.* — By antenuptial contract of marriage the husband conveyed to trustees £5000 as an alimentary fund for behoof of the family establishment, with power to the trustees to pay over the free income to either of the spouses, and to continue such payments until the death or re-marriage of the survivor; "and upon the death or re-marriage of the said survivor the principal sum or the investments on which it stands shall belong and be made over in equal sums to and among the children equally of the marriage," declaring that the shares of any children who might be minors at the time should be held and administered by the trustees for their behoof until their majority, and that, in the event of the predecease of any of them before majority, their shares should belong to their lawful issue, and, failing issue, should accresce to their surviving brothers and sisters; "in the event of failure of issue of the present intended marriage," the said sum to be at the disposal of the spouses; which provisions in favour of children were declared to be in full satisfaction of their legal rights on the death of their father.

*Held* that a proportionate share of the estate vested in a son who survived the dissolution of the marriage and attained majority but predeceased the survivor of the spouses.

*Marriage-Contract — Assignation of Acquirenda — Estate acquired by Wife after Dissolution of Marriage.*—By antenuptial contract of marriage a wife conveyed to trustees "her whole means and estate which she might acquire or succeed to." *Held* that estate to which the wife succeeded after the dissolution of the marriage did not fall under the clause of assignation of *acquirenda*.

*Wardlaw* v. *Wardlaw's Trustees*, 7 R. 1066, *followed.*

2D DIVISION. ADAM BOYD BOYD of the Yett, Roxburghshire, was married to Miss Elizabeth Curry Hogue, daughter of Robert Hogue, Queen Street, Edinburgh, in 1860, the intended spouses having entered into the antenuptial contract of marriage after referred to.

Adam Boyd Boyd died on 8th January 1870, survived by his wife and by two children of the marriage—Robert Hogue Boyd Boyd, born 2d March 1866, and Ada Boyd Boyd, born 26th August 1867.

In 1893 Miss Ada Boyd Boyd was married to Thomas Arthur Randall Hutchinson, a domiciled Scotsman resident in Newcastle-on-Tyne. At the date of the special case after mentioned, two children were born of this marriage.

Robert Hogue Boyd Boyd died unmarried on 10th June 1902, leaving a last will and testament by which he appointed his brother-in-law Mr Hutchinson to be his sole executor, and bequeathed the residue of his estate to the two children of Mr and Mrs Hutchinson.

In January 1905 a special case was presented for the determination of questions that had arisen on the construction of the antenuptial marriage-contract of Mr and Mrs Adam Boyd Boyd.

The first parties to the case were the antenuptial marriage-contract trustees of Mr and Mrs Adam Boyd Boyd.

The second party was Mrs Adam Boyd Boyd, the widow, who had not married again.

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The third party was Mr Hutchinson, as executor under the will of his brother-in-law Robert Hogue Boyd Boyd.

The fourth parties were the trustees under the antenuptial marriage-contract of Mr and Mrs Hutchinson. By that deed Mrs Hutchinson, then Miss Ada Boyd Boyd, assigned, disponed, and made over to the trustees for the purposes therein mentioned the whole means and estate then belonging to her, and to which she should succeed or acquire right during the subsistence of the marriage.

I. The first question in the special case was, as to whether one-half of the fee of a sum of £5000 brought into his marriage-settlement by Mr Adam Boyd Boyd had vested in his son Robert Hogue Boyd Boyd, Robert having survived the dissolution of the marriage, but having been survived by his mother.

By the antenuptial marriage-contract, Adam Boyd Boyd bound himself to pay (and in fact duly paid) the sum of £5000 to the marriage-contract trustees for the purposes following:—"(First), That the said trustees shall receive, hold, and administer the said sum of Five thousand pounds in their own names, and pay or apply the full annual income or proceeds thereof as an alimentary fund to or for behoof of the family establishment to be created by the said spouses, excluding always the *jus mariti* or right of administration of the said Adam Boyd Boyd, in or over both the said principal sum and the annual income or proceeds thereof, which rights or claims he hereby specially renounces, and also excluding the claims of any creditors of the said spouses, or either of them, and declaring that the said principal sum and interest thereof shall not be assignable by them or either of them to the prejudice of this trust: And further, the said trustees and their foresaids shall have power, and are hereby empowered, either themselves to expend or apply, or else to pay over the said free income or proceeds thereof, to either of the spouses they may from time to time prefer, whose sole and separate receipt shall be their sufficient discharge. . . . (Second), That the said trustees and their foresaids shall continue to make such annual payments to or for the said spouses during the subsistence of the marriage, and to or for the survivor so long as he or she remains unmarried, but not longer: And upon the death or remarriage of the said survivor, the said principal sum, or the investments on which it stands, shall belong and be made over in equal sums to and among the children equally of the marriage between the said Adam Boyd Boyd and Elizabeth Curry Hogue: Declaring that the shares of any that may be pupils or minors at the time shall continue to be held and administered by the said trustees and their foresaids for their behoof until their majority, with power to the said trustees to make previous advances to them or for their behoof to the extent of one-third of their estimated shares, and in the event of the predecease of any of them before majority, their share shall descend and belong to their lawful issue, if any, equally, and failing issue shall then accresce and belong to their surviving brothers and sisters equally, the issue of any such having predeceased in like manner taking their parent's share. (Third), In the event of failure of issue of the present intended marriage, the principal of the said sum, or the investments on which it stands, shall, subject always to the liferent of the survivor, be at the disposal of the said spouses by joint deed or at their respective disposal by separate deeds, each to the extent of one-half thereof, and failing such disposal shall go and

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belong to the said Adam Boyd Boyd and his heirs or next of kin," which "provision above written, conceived in favour of the child or children who may be born of the said intended marriage, it is hereby declared shall be in full satisfaction to them of all bairn's part of gear, legitim, portion-natural, executry, and everything else that they could claim or demand by and through the decease of the said Adam Boyd Boyd, excepting what he may think fit to bestow of his own goodwill."

The third party maintained that one-half of the above-mentioned sum of £5000 vested in Robert Hogue Boyd Boyd, he having survived the dissolution of his parents' marriage: the fourth parties maintained that no right in the said sum could vest in any person till the death or remarriage of Mrs Adam Boyd Boyd, the surviving spouse.

II. The other question raised in the special case depended on the following further provision of Mr and Mrs Adam Boyd Boyd's marriage-contract:—"For which causes and on the other part the said Elizabeth Curry Hogue, with the consent of the said Robert Hogue, her father, hereby dispones, assigns, and makes over to the said trustees and their foresaids her whole means and estate, heritable or moveable, which she may acquire or succeed to by the death of her father, or by or from any other person or persons, to be held by them in trust—(First), For behoof of herself and her said intended husband, and the survivor of them, in liferent for their liferent use allenarly; and (Second), For behoof of the child or children of the marriage in fee, to be equally divided among them if more than one."

In January 1882, Mrs Boyd succeeded to £230 from Miss Wilson (who died in 1881), an aunt of Mrs Boyd, and in August 1889 to £1711 from Mr Wilson (who died in 1872), an uncle of Mrs Boyd. Both these sums were paid to Mr and Mrs Boyd's marriage-contract trustees.

With regard to these sums Mrs Boyd, the second party, maintained that as they came to her after the dissolution of her marriage they did not fall within the clause of assignation of *acquirenda* in her marriage-contract, and she called upon the marriage-contract trustees, the first parties, to pay them to her. The first parties maintained that these sums fell within the clause of *acquirenda*, and that they were bound to administer them as part of the marriage-contract funds. In this contention the third and fourth parties concurred.

The questions of law were:—"(1) Was the estate inherited by Mrs Elizabeth Curry Hogue or Boyd Boyd from her aunt and uncle as aforesaid carried to the first parties under the clause of assignation of *acquirenda* in her marriage-contract? or, Does it fall to be paid to the second party free of the marriage-contract?"[1] Then followed two questions which, in view of the judgment of the Court, it is unnecessary here to set forth. "(4) Did one-half of the fee of the estate brought into the marriage-contract settlement by Adam Boyd Boyd vest in his son, the deceased Robert Hogue Boyd Boyd on his survival of the dissolution of the marriage between his parents?"[2]

[1] *Cited at the hearing on this question by the second party:*—Wardlaw v. Wardlaw's Trustees, July 7, 1880, 7 R. 1066; Russell's Trustees, June 30, 1887, 14 R. 849.

[2] *Cited at the hearing on this question by the third party:*—Forbes v. Luckie, Jan. 26, 1838, 16 S. 374; Rogerson's Trustees v. Rogersons, March 10, 1865, 3 Macph. 684, 37 Scot. Jur. 343. *By the fourth parties:*—Richardson's Trustees v. Cope, March 8, 1850, 12 D. 855, 22 Scot. Jur.

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LORD KYLLACHY.—In this case I see no reason for postponing vesting beyond the dissolution of the marriage and the majority of the respective children. I am of opinion that all the presumptions are in that direction, and that there is no particular difficulty upon the language of the settlement in giving effect to these presumptions.

There are several points in favour of vesting—(1) This is a marriage-contract in which the children's provisions are declared to be in full of legitim; (2) apart from the widow's liferent and the children's fee there is no ulterior destination or trust purpose, or at least no ulterior destination or trust purpose which is not plainly referable to failure of children before the dissolution of the marriage; and (3) even as between and among the children of the marriage there is no destination over except one expressly described as applicable to failure before majority.

On the other hand, there is absolutely no unfavourable point except this, that the gift of the fee is expressed as a gift to take effect at the death of the widow. And I am unable to hold that that is at all a conclusive circumstance or one which can be allowed to outweigh the other considerations to which I have just adverted.

As to that matter and the case generally, the decisions in *Forbes*[1] and *Rogerson*[2] are, I think, sufficient authorities. The latter was no doubt a case in which there was a dissent by Lord Justice-Clerk Inglis, but, on the other hand, it was a case very much more unfavourable than the present to vesting before payment. For there was there not only a gift expressed as here to take effect at the death of both spouses, but there was also what was at least capable of being read as a destination over to take effect as between the children failing survivance of both spouses.

I think therefore the fourth question in the case may be answered in the affirmative.

With regard to the first three questions, it appears to me that this case is within the principle of the cases of *Wardlaw*[3] and *Campbell* (*Russell's Trustees*),[4] and the other cases cited at the discussion, and that the first question falls to be answered in the affirmative in terms of its second alternative, and being so answered the second and third questions are superseded.

The LORD JUSTICE-CLERK and LORD LOW concurred.

LORD YOUNG and LORD KINCAIRNEY were absent.

THE COURT answered the second alternative of the first question in the affirmative; answered the fourth question in the affirmative; and found it unnecessary to answer the other questions in the case.

NISBET, MATHISON, & OLIPHANT, S.S.C.—MACKENZIE, INNES, & LOGAN, W.S.—SIBBALD & MACKENZIE, W.S.—Agents.

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374; Buchanan's Trustees v. Buchanan, May 26, 1877, 4 R. 754; Bryson's Trustees v. Clark, Nov. 26, 1881, 8 R. 142; M'Alpine, March 20, 1883, 10 R. 837.

[1] 16 S. 374.
[2] 3 Macph. 684.
[3] 7 R. 1066.
[4] 14 R. 849.

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JAMES HINTON ROBERTSON AND OTHERS (Robertson's Trustees), Pursuers (Reclaimers).—*Hunter—Wark.*
JOHN WILSON BRUCE, Defender (Respondent).—*Cooper, K.C.—M. P. Fraser.*

*Property—Right of Access—Servitude over property—Prescriptive Possession.*—Before 1830 a self-contained house in Glasgow, bounded on the south by Bath Street, from which it entered, and on the west by Wellington Street, was divided into two houses, one containing the ground floor and the other the upper floor. An annex containing a stair to the upper floor was added to the north end of the house with a door to Wellington Street. In 1830 the proprietor conveyed the upper floor to A, "with access thereto by a street door from Wellington Street," and in 1831 conveyed the remainder of the property to B. After the division of the property the stair was used solely by the proprietors of the upper storey. In 1904 X, who was in right of the property conveyed to B, brought a declarator that the staircase was his property, and that the proprietor of the upper storey, and successor in title to A, had no right to make structural alterations on it.

The Court (*rev.* judgment of Lord Kincairney) *granted* decree, holding (1) that by the disposition of 1831 the property in the staircase was conveyed to B; (2) that A only obtained a servitude of access over it; and (3) that the prescriptive possession by him and his successors could not turn a right of access into a right of property.

*Property—Building Restriction—Contravention by other feuars—Acquiescence.*—The disposition of the upper storey of a tenement, dated in 1830, conveyed a piece of ground at the back, subject to the restriction that no building of any kind in the back-ground should be higher than 12 feet. In 1904 the owner of the said upper storey proposed to build on the piece of ground a building exceeding 12 feet in height, and the owner of the remaining portion of the tenement objected. It was proved that the other back-greens in the street, which were all held from the same superior and subject to the same restriction, had been built over without objection, and that the objector had expressly assented to a similar building on the back-green of the house next door. *Held* (*aff.* judgment of Lord Kincairney) that the restriction was no longer binding.

2D DIVISION. Lord Kincairney.

PRIOR to 1830 a self-contained house in Glasgow, bounded on the south by Bath Street and on the west by Wellington Street, with an entrance from Bath Street, was divided into two houses, the upper floor and the lower floor, an annex being built to the north end facing Wellington Street, with a stair leading to the upper floor.

In 1830 Alexander Campbell, the proprietor of both houses and of 1042 square yards of ground on which the houses were built, disponed the upper flat to Nathaniel Stevenson "together with access thereto by a street door from Wellington Street" with a plot of ground adjoining Wellington Street.

In 1831 Campbell disponed to A. G. Lang the 1042 square yards with the exception of the subjects conveyed to Stevenson.

In 1904 Robertson's trustees, Lang's successors, raised an action against John Wilson Bruce, Stevenson's successor, concluding for declarator (1) that the pursuers had a right of common interest in the defender's subjects, and that the defender was not entitled to erect any new buildings thereon of a height exceeding 12 feet, and particularly that he was not entitled to erect buildings in a back court forming part and pertinent of his property; and (2) that the staircase No. 144 Wellington Street, Glasgow, belonged in property to the pursuers,

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subject only to a right of access in favour of the defender. There were also conclusions for interdict.

The following narrative of the titles to the respective properties is taken from the opinion of the Lord Ordinary (Kincairney):—

"The disposition to Lang bore to convey to him an area of ground consisting of 1042 square yards and 6 square feet, bounded on the north by the centre of a meuse lane, on the south by the centre of Bath Street, on the east by property belonging to Robert Craig, and on the west by the centre of Wellington Street. But from this conveyance there is the following exception:—'Excepting the second or upper flat of the said tenement situated on the north side of Bath Street and east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining to Wellington Street, which belongs as part and pertinent to the said second or upper flat, all as then possessed by William Buchanan conveyed by me to Nathaniel Stevenson.'

"The subject excepted in favour of Stevenson is thus described in the disposition by Campbell to him:—'The second or upper flat of the tenement situated on the north side of Bath Street and east side of Wellington Street, together with access thereto by a street door from Wellington Street, and the cellarage on the sunk floor and plot of ground adjoining to Wellington Street, which belongs as part and pertinent to the said second or upper flat, all as then possessed by William Buchanan, which tenement was erected upon all and whole the area or piece of ground consisting of 1042 square yards and 6 square feet, or thereby.'

"The disposition in favour of the defender's predecessor contains this clause, by which, the pursuers say, there was constituted a real burden on the property sold:—'Declaring always, . . . that for the utility and ornament of the house to be erected on the said steading of ground, and of the other houses forming the compartment or division to which it belongs, these presents are granted with and under the following provisions, regulations, and conditions:— . . . *Quarto.* No building of any kind in the back-ground shall be higher than 12 feet from the level of the ground to the ridge of the roof thereof: it being understood, however, that the west front of the lodging to be erected on the steading of ground above described, that is, its front to Wellington Street, may be built upon as high as to correspond with the height of the other lodgings built upon the compartment to which it belongs.'"

With reference to the staircase referred to in the second declaratory conclusion of the summons the defender averred;—(Ans. 1) "Explained that such stair and staircase are and can only be entered from Wellington Street, and have been exclusively, uninterruptedly, and peaceably used, enjoyed, and possessed by the defender and his predecessors in title for more than forty years as their own exclusive property, or in any event as a part and pertinent of the property now possessed by the defender as after mentioned. Said staircase and stair form and have been so used as an access, not only to said upper flat, but also to the cellarage and to the back-ground belonging to the defender. The said staircase does not give access to any property other than the defender's, and is part and portion of the 'second or upper flat' now his property as after described. In or about the year 1871, the predecessor of the defender fitted up on the landing of

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With reference to the staircase referred to in the second declaratory conclusion of the summons the defender averred;—(Ans. 1) "Explained that such stair and staircase are and can only be entered from Wellington Street, and have been exclusively, uninterruptedly, and peaceably used, enjoyed, and possessed by the defender and his predecessors in title for more than forty years as their own exclusive property, or in any event as a part and pertinent of the property now possessed by the defender as after mentioned. Said staircase and stair form and have been so used as an access, not only to said upper flat, but also to the cellarage and to the back-ground belonging to the defender. The said staircase does not give access to any property other than the defender's, and is part and portion of the 'second or upper flat' now his property as after described. In or about the year 1871, the predecessor of the defender fitted up on the landing of

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said staircase a water-closet for the use of his premises. The pursuers or their predecessors acquiesced in the formation of such water-closet, and neither the pursuers nor their predecessors have at any time challenged the formation or continued existence of such water-closet."

With reference to the restriction on building above quoted the defender averred;—(Ans. 7) "At that date, 1822, this part of the estate of Blythswood was entirely residential in character, and the conditions referred to were inserted for the benefit of the superior and of Thomas Burns and John Forrest. The pursuers have no title to enforce them. Since said date any restrictions contained in the titles, if applicable to the plot of ground on which the defender proposes to build, have been infringed in the knowledge and with the acquiescence of all persons interested therein, by the other feuars or proprietors, including the pursuers, on the estate of Blythswood, of which said plot forms part, and in the immediate neighbourhood of the property in question, and in particular in the compartment in which said property is situated, not only in regard to the height and construction of the buildings, but also in the uses to which they are to be applied. There are and for many years have been numerous steam-engines used in buildings on the part of said estate to which said restrictions apply, in contravention of the stipulations in the titles, all without objection. In the property immediately adjoining the defender's property there is a large steam-engine in use. Further, the pursuers themselves, or their predecessors in title, have by an agreement, a copy of which is produced, entered into with the owners of the adjoining property, agreed to a departure from the terms contained in the titles. They have also, in particular, infringed the terms of the restrictions on which they found in the present action by erecting on the subjects contained in their title a back building of greater height than is allowed thereon by the titles, and, in any event, considerably exceeding 12 feet in height. Said building is occupied as a stable, also in contravention of the stipulations in pursuers' titles. The property in question is situated in a busy commercial quarter of Glasgow. Originally the properties in the immediate neighbourhood were used as dwelling-houses, but with the growth of the city of Glasgow the whole character of the district has changed. The dwelling-houses have been converted into commercial premises, in which various trades involving the use of steam and other machinery are carried on, business premises, offices, hotels, Turkish baths, &c. Back-greens have also been built over, and buildings of greatly increased height, far exceeding 12 feet, or the height of the defender's proposed buildings, have been erected. In particular this has taken place in the 'compartment' referred to, of which said plot of ground forms part."

The pursuers pleaded, *inter alia*;—(3) The pursuers as proprietors in the same tenement with defender having a common interest in said back-ground with the defender and the use proposed to be made by the defender of said back-ground being injurious to said interest and in violation of the law of the tenement, decree of declarator and interdict should be granted as concluded for with respect to said back-ground. (4) The defender having proposed to erect upon said back-ground buildings which are in violation of the restrictions contained in the titles thereof, which restrictions the pursuers have an interest to enforce, decree of declarator and interdict should be granted

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in terms of the conclusions of the summons relative to said back-ground. (5) The defender having no right of property in the stair and staircase, but merely a right of access thereby to the upper flat of the present tenement, is not entitled to make any alterations upon said staircase, and should be interdicted from so doing.

The defender pleaded, *inter alia*;—(3) The plot of ground in dispute having been disponed to the defender and his authors, either in absolute property or as part and pertinent of the upper flat of the property in question, the defender has the sole right of property therein. (4) The defender's authors and the defender having enjoyed the exclusive possession and use of said stair and staircase and plot of ground for more than forty years continuously and uninterruptedly under a title flowing from the common author of the defender and pursuers, have acquired the sole right of property therein by positive prescription. (5) The pursuers being unable to qualify any right, title, or interest, to object to the defender's proposed buildings, the defender should be assoilzied. (6) There being no valid or binding restrictions now existing enforceable by the pursuers, prohibiting the defender from erecting the proposed buildings, the defender should be assoilzied. (7) The pursuers are barred by their own actings, and by the actings of their predecessors in title and by acquiescence, from interfering with the defender in the erection of the proposed buildings, and the defender should accordingly be assoilzied.

Proof was allowed and led. The import of the evidence was that the staircase, which was not a part of the house as originally designed, but had been added before 1830, had been always used by the defender and his predecessors substantially as stated by him in the averments quoted above, and that access to it could only be obtained by them. With regard to the building restrictions, John Martin, writer, Glasgow, a witness for the defender, deponed,—"I have known the district for about thirty years. As regards their surroundings, there has been a considerable change during that period. Private dwelling-houses have been converted into business premises, warehouses, offices, and shops all round. (Q.) And have the pursuers themselves consented to alterations on the property immediately to the east of them? (A.) Their predecessors did. It was Mr Dunlop who started a departure from the building restrictions in that feu-contract. The pursuers have homologated that. The pursuers' predecessors consented to a tenement four storeys in height being erected on the back-ground of the property immediately to the east. That is in contravention of the building restrictions, which limited the height of buildings to 12 feet at the back, and two and-a-half storeys at the front. The building restrictions have been disregarded so far as regards both front and back buildings. On the pursuers' own back-ground there is a stable, which I think is 16 or 17 feet high, but I did not measure the actual height." Similar evidence was given by other witnesses for the defender, and no evidence to the contrary was led by the pursuers.

On 20th December 1904 the Lord Ordinary pronounced the following interlocutor:—"Repels the first, second, fourth, fifth, and sixth pleas in law for the pursuers: Assoilzies the defender from the conclusion for declarator of property in the staircase mentioned on record, and from the conclusion for declarator of right to prevent the defender from erecting any buildings on the ground described as part and pertinent of the upper flat specified on record of a greater height

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* "OPINION.—(After the narrative of the titles quoted above)—This action has been raised by the owners of the subjects first described against the owner of the subjects described secondly; and the conclusions with which it is necessary to deal are these,—(1) for declarator that the pursuers are entitled to prevent the defender from erecting on the ground described as part and pertinent of the upper flat disponed to Stevenson, and belonging to the defender, that is to say, on the area marked 'Back Court' on the plan No. 6 of process, any buildings of a greater height than 12 feet; (2) for declarator 'that the staircase No. 144 Wellington Street, Glasgow, belongs in property to the pursuers . . subject only to a right of access in favour of the defender and his successors to the upper flat of the tenement and the cellar entering thereby, and that the defender or his foresaids are not entitled without the pursuers' consent to make any alterations on the said staircase.'

"There are other conclusions, but I understood they were not pressed, and consider it unnecessary to decide them.

"The questions then are these two,—Are the pursuers entitled to decree of declarator (1) that they are proprietors of the staircase, and (2) that the defender is not entitled to erect buildings of a certain height on the area marked 'Back Court' on the plan No. 6 of process?

"The staircase is not mentioned in the titles, but it is fully described in the proof. It is certainly built on part of the 1042 square yards and 6 square feet, which are described in the pursuers' title; and is, therefore, included in that title, if it be not excluded by the exception, and the question, therefore, is, whether it can be held to be included in the exception.

"It is a staircase which is entered from the street door in Wellington Street, mentioned in the title. It has thirty-one steps, and leads to 'the second or upper floor,' conveyed by the disposition by Campbell to Stevenson. By the same door access is had to the defender's back-ground and cellarage. The staircase was probably built when the tenement, originally a single house, was converted into two houses about 1828 or 1830 or thereby. It was not a part of the original building, but is a building which has been added to the original building.

"It would not have been of any use as a part of the original building, and is admittedly of no use at present to the pursuers. It leads to no part of their tenement or ground. But it is absolutely essential to the defender, who has no other access to his upper flat, and by whom and his predecessors it has been used for that purpose for more than forty years. The access to the staircase is by the door in Wellington Street. That door was frequently shut, and people desirous of reaching the upper flat were in use to pull a bell, which communicated with an interior door to the flat at the top of the staircase, when the outside door was opened, if shut, and the visitors to the upper flat were admitted to the staircase. No one but the owner of the upper flat had the means otherwise of getting access by the outside door except by means of a key. There is no doubt at all that the possession and use of the staircase had, since it was built, been altogether with the defender and his predecessors. The pursuers have never taken any benefit from it, or incurred any expense in connection with it.

"But such reasoning is open to question, and it must be admitted that it is not easy to hold that the staircase is included in or described by the words of the disposition.

"It was argued that the words in the defender's title, 'with access thereto,' that is to the upper flat by a street door from Wellington Street, were adverse to the defender's case, and tended to shew that his right in the staircase was a right of access, not of property. But it seems to me that the argument may be turned the other way, for the words are that the access is by a door, not by a staircase, and it might be argued that they im-

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The pursuers reclaimed, and argued;—(1) It was clear from the titles that the property in the staircase was in the pursuers. All the defender had was a right of access. If that were so, no amount of possession would turn the servitude right of access into a right of property,[1] and all the possession shewn to have been had by the defender here was attributable to access, not to property.[2] In *Taylor* v. *Dunlop*,[3] which was a case relating to the same house, the Judges were clearly of opinion that the staircase belonged to the predecessors of the pursuers. (2) The restriction on building was part of the law of the tenement, and could be enforced by the pursuers, even although similar restrictions had not been enforced in the neighbourhood. It was a negative servitude in their favour, which could not be lost *non utendo*.[4]

Argued for the respondent;—(1) The proof shewed exclusive use of the staircase by the defender and his authors. The titles did not

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ported that, when once a man had passed the access, he was within the subject itself, and therefore it might be suggested that the staircase was part of, and was included in the upper flat.

"I do not say that there is much in that suggestion, but it seems to support the view that these descriptions are far from clear, and admit of a reference to usage in order to interpret the title; and if once resort is had to usage, as interpreting the title, no question remains, because the usage is all one way; and I think that the words are susceptible of the meaning, although it must be admitted to be strained.

"The pursuers referred to the case of *Taylor* v. *Dunlop*, 1st November 1872, 11 Macph. 25, which was an action between the predecessors of the present parties about this very property. It did not, however, relate to the staircase, but to the roof of this upper flat. The question in this case was not debated or stated. But the titles were before the Court, and certainly the Lord President expressed the opinion that the pursuers' predecessor was the proprietor of the staircase, and that the predecessor of the defender was not; although I do not think that the other Judges expressed that opinion. But in that case there was no proof, and the Lord President's opinion was only an opinion on the titles without any reference to the facts which have been brought forward in this case as interpreting the title; and, if the titles only were looked to, and the facts were not inquired into, there could be no hesitation in preferring the pursuers' title. But when the history and structure of the building and the possession and use of it are taken into consideration, I hold that the primary meaning of the language is displaced, and that it may receive an interpretation in accordance with the facts.

"As to the other point, namely, the declarator that the pursuers are entitled to prevent the defender from erecting buildings of a greater height than 12 feet on their back area, I understand that that is the only part of the more complicated conclusion on which the pursuers ask a decision. I have quoted in my opinion the clause in the disposition on which it is founded, and I must admit that I fail to understand it, having in view the qualifying clause as to the frontage to Wellington Street and the fact that the buildings along Wellington Street and Bath Street are high buildings, much higher than 12 feet. The clause is an old one taken from the earlier titles of 1822 or thereby, and, since that date, there appears to have been a great many tenements erected in that locality. I do not feel warranted in saying that the provision is ineffectual on account of these buildings, but I

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[1] Leck v. Chalmers, Feb. 3, 1859, 21 D. 408, 31 Scot. Jur. 223.
[2] Walker's Trustees v. Learmonth & Co., Nov. 17, 1824, 3 S. 288.
[3] Nov. 1, 1872, 11 Macph. 25, 45 Scot. Jur. 24.
[4] 1 Bell's Prin. sec. 984.

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expressly mention the staircase, or at least were ambiguous on the subject, and therefore the ownership of it must be determined by the possession.[1] That was unquestionably with the defender. The grant of a right of access meant an access to the stair over ground the *solum* of which belonged to the pursuers. (2) It was settled law that building restrictions of the kind now in question could not be enforced if the breach of similar conditions in subjects in the same street and derived from the same superior had been acquiesced in by all concerned.[2]

At advising,—

LORD JUSTICE-CLERK.—In this case there are two questions (first) as to the rights of the defender in regard to a staircase and the building in which the staircase is erected, and (second) as to the rights of the defender in relation to a back court of his premises, the dispute being as to whether he is entitled to erect certain buildings on it.

On the first question my opinion is that there is no right of property in the defender to the staircase or the annex to the dwelling-house which contains it. What the defender has by his title is a right of access to his house on the upper flat through a door opening from the street and by the stair inside the doorway. This of itself is adverse to the idea of his having a property right. For the gift of a right of access into and through a structure seems on the face of it to be inconsistent with the subject through or over which the access is given being the property of the person to whom the access is conceded. The concession is one quite unnecessary, and I think practically unintelligible in such a case, the person who confers the right in so doing asserting a right of property in himself, and the person accepting it tacitly confessing that without it he has no right.

The attempt was made to interpret the grant as referring only to a right to enter the door from the street on the footing that the granter of the right had the sole right to the *solum* of the street, and that therefore access to the door could not be had unless it was conceded by the pursuers. This seems to me to be a suggestion which has nothing to commend it except its ingenuity, and it does not, as I think, agree with the terms used in the title.

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am of opinion that the declarator asked differs materially from the provision in the defender's title, and is not warranted by it.

"The case is full of minute and intricate details which have a bearing on the main question. But it would be out of the question to examine them minutely in this opinion. I have done my best to consider and understand them, but I can do no more than indicate the main grounds of my judgment.

"On the whole I am of opinion that declarator cannot be pronounced affirming the pursuers' right of property in the staircase,—it is not essential that I should pronounce any judgment as to the defender's right,—and that the titles do not warrant the decree of declarator asked, that the pursuers are entitled to prevent the defender from building on the area specified buildings above 12 feet high."

[1] Magistrates of Perth v. Wemyss, Nov. 19, 1829, 8 S. 82; Earl of Fife's Trustees v. Cuming, Jan. 16, 1830, 8 S. 326; Cooper's Trustees v. Stark's Trustees, July 14, 1898, 25 R. 1160; Macdonald v. Newall, Nov. 16, 1898, 1 F. 68.

[2] Campbell v. Clydesdale Bank, June 19, 1868, 6 Macph. 943, 40 Scot. Jur. 539; Fraser v. Downie, June 22, 1877, 4 R. 942; Liddall v. Duncan, July 12, 1898, 25 R. 1199; Stewart v. Bunten, July 20, 1878, 5 R. 1108; Johnston v. The Walker Trustees, July 10, 1897, 24 R. 1061.

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If these views be sound then it appears to be plain that there can be no setting up of a title by the defender upon any plea of possession. Any possession the defender has had is attributable directly to the grant given to him, and cannot therefore be ascribed to any supposed grant of a different kind evidenced by the possession which has not in any way gone beyond the bounds of the express grant.

The other question—namely, whether the defender can be restrained from building over his back court has, I think, been rightly decided by the Lord Ordinary. The clause in the title on which the objection is founded may be somewhat obscure, but so far as it can be interpreted, I am of opinion that it cannot be founded on effectually to support the pursuers' case. It is a clause which is brought from the older titles, to the whole ground at this place, and imported into this one, and is one intended to operate a general restraint upon the building powers of feuars in that street. One thing seems plain enough, that the clause was in no way intended as a restriction applying separately and exclusively to the site with which it deals. Its whole tenor is against that idea. The clause had to be inserted in respect of the obligation in the granter's own title, in order that the steading divided off might be in the same general position as regarded restriction on building as the other steadings.

If this be so, the only remaining question is whether the clause is now operative so as to entitle the pursuers to insist on it against the defender. Now, it is certain from what we have seen in the case that the greater part if not all of the Bath Street properties have now buildings erected on the back-greens, and the pursuers themselves have been parties to the ground at the back of the next adjacent steading being occupied by buildings. This, as it seems to me, is conclusive of the case under the decisions which were referred to by the defender during the debate.

I would therefore move your Lordships to recall the interlocutor of the Lord Ordinary, to find for the pursuers on the declarator and interdict in regard to the staircase, and to assoilzie the defender from the conclusions of declarator and interdict in regard to the back-ground.

LORD KYLLACHY.—In this case, upon the first question which was argued, viz., the question as to the property of the staircase (or rather of the staircase building), I am unable to agree with the Lord Ordinary. I do not myself see that there is any ambiguity in the defender's title. It, I think, quite clearly excludes the staircase and the building or annex which contains it. The defender is, I think, expressly confined to a right of access to his upper flat by the staircase, or—what comes to the same thing—by the door of the building which leads to the staircase and opens on to the street. And I do not, I confess, see how it is possible that a person should be given a right of access through a structure which is his own property, or by or through a door which is part of that structure, and is thus also his own property. Neither do I see how the defender's title can be read as applying merely to a right of access to the door mentioned over the half of the street which he says is not included in his title. That is, I think, a very extreme suggestion, not I observe accepted by the Lord Ordinary. It is not in accord with the language of the title; and it is also open to this observa-

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tion, that if the staircase was carried by the title as a pertinent of the upper flat, there would seem to be no reason why the *solum* of the street *ex adverso* should not also be carried.

This being so—the construction of the title being clear—it appears to me that there is no room for inferences as to the right of property sought to be drawn from the evidence as to the possession. A servitude—a right of access—can never by any amount of possession be converted into a right of property. Nor—assuming that the defender's authors did in fact have what they call exclusive use of this staircase—can right of exclusive use—as distinguished from a right of property—be constituted or recognised under our law—*Leck* v. *Chalmers*.[1]

I am therefore of opinion, in conformity with the views expressed, substantially I think, upon this very question by the Judges of the First Division in the case of *Taylor* v. *Dunlop*,[2] that the pursuers are entitled to decree of declarator with respect to the property of the staircase in terms of the conclusion of their summons.

As to the other question—the question as to the defender's right to build over the back court—I agree with the Lord Ordinary's conclusion. I am not sure that I agree that the clause in the title which is said to constitute the restriction is unintelligible. But if intelligible, I agree that it is only intelligible in a sense which is fatal to its subsistence. It is quite plain that the clause in question—the clause against erection of buildings on the back-ground—was not introduced for the first time upon the division of the original steading in 1830, or introduced with any special reference to that division. It was simply a repetition, such as the previous titles required, of a restriction affecting not merely the steading divided, but the neighbouring steadings in Bath Street. And therefore the question comes really to be *quo intuitu* was it repeated in 1830? Was it repeated by way of making it an independent condition, forming in a special sense part of the law of the newly divided tenement? or, was it repeated simply as one of the conditions applicable to all the steadings in that part of Bath Street? It is in this view, as it appears to me, that the terms of the clause which the Lord Ordinary holds to be unintelligible are important. For I think they are intelligible to this extent that they are at least inconsistent with the idea that the restriction in question was adopted with special reference to the division in 1830 of Mr Campbell's steading. If that had been meant, I think it impossible that the clause would have been expressed as it is expressed, viz., as imposing a restriction upon the back-ground of steadings (not already erected but) "to be erected." Taking the clause as we have it, it must I think be taken that it was inserted by Mr Campbell simply because under his title it required to be so inserted under pain of nullity, and with no further or other purpose than that of bringing the two divided subjects into the same position with the undivided steading and the adjacent steadings in Bath Street.

But then if that be so, can there be any doubt upon the evidence that the restriction in question has been discharged by acquiescence, just in the same way as if, for instance, Mr Campbell had remained proprietor of the

[1] 21 D. 408. [2] 11 Macph. 25.

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original steading, and the present question arose between him and some of his neighbours? I am, I confess, unable to see that there can be much doubt on that subject. For not only does it appear—unless I wholly misunderstand the evidence—that the whole or most of the steadings in this division of Bath Street have had their back-greens built over, contrary to the common restriction, but the house next door to the pursuers' on the east—a house certainly subject to the same restriction—has had its back ground quite recently built over, and so built over not only with the tacit but with the express consent of the pursuers. I cannot in these circumstances see how a judgment in the pursuers' favour on this part of the case can be reconciled with the well-known class of decisions beginning with *Campbell* v. *Clydesdale Bank*,[1] and including, amongst many others, *Fraser* v. *Downie*,[2] and *Liddall* v. *Duncan*,[3] or with the law as laid down in those cases and in such cases as *Bunten*[4] and *Johnston*.[5]

The LORD JUSTICE-CLERK intimated that LORD YOUNG concurred.

LORD KINCAIRNEY, not having heard the argument, gave no opinion.

THE COURT recalled the interlocutor of the Lord Ordinary, decerned for the pursuers in terms of the conclusions of the summons in so far as relating to the staircase, and assoilzied the defender from the conclusions in so far as relating to the back-ground.

J. & J. GALLETLY, S.S.C.—L. M'INTOSH, S.S.C.—Agents.

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ANGUS MACKINNON AND OTHERS, Pursuers (Appellants).—*Johnston, K.C.—Trotter.*

DONALD MACDONALD AND OTHERS, Defenders (Respondents).—*Wilson, K.C.—Sandeman.*

*Process—"All Parties not called"—Interdict between crofters on same estate as to taking seaware—Landlord not called—Crofters Holdings (Scotland) Act*, 1886 (49 *and* 50 *Vict. cap.* 29).—In 1903 crofters, who were in the occupation of their crofts at the passing of the Crofters Holdings (Scotland) Act, 1886, and whose rents were fixed by the Commissioners under the Act in 1889, brought an action against certain neighbouring crofters who held of the same landlord, for interdict against the defenders infringing rights which the pursuers averred that they possessed, as pertinents of their crofts, of taking seaware from the seashore (belonging to the common landlord) in the neighbourhood of the crofts. The defenders' crofts were not in existence at the passing of the Crofters Holdings Act, 1886, but were formed out of two farms under the powers of the Congested Districts (Scotland) Act, 1897. The pursuers averred that they were entitled to take seaware to the extent to which they had been in use to take it at the date when their rents were fixed; and that the defenders were not entitled to take it to any greater extent than the two tenant farmers had been in use to take it at that date. They averred that the defenders were now taking more than the farmers had been in use to take. The pursuers did not produce any written contract, estate regulation, or finding of the Crofter Commission defining the extent of seaware to which they were entitled. The defenders stated that they had the authority of

[1] 6 Macph. 943. [2] 4 R. 942. [3] 25 R. 1199.
[4] 5 R. 1108. [5] 24 R. 1061.

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the landlord for taking seaware as they had taken it, and pleaded "All parties not called," in respect that the landlord had not been called as a defender.

The Court *sustained* the plea and *dismissed* the action.

*Question per* Lord Kyllachy, whether pertinential privileges of the kind claimed by the pursuers, held by crofting tenants at the passing of the Crofters Holdings Act were then or are now of the nature of legal rights, or were not then, and are not now, rather (apart from express title falling under some recognised legal category) privileges held necessarily at the landlord's pleasure, and subject always to estate regulations.

2D DIVISION. Sheriff of Inverness-shire.

IN this action for interdict, raised in the Sheriff Court at Lochmaddy in March 1903, the pursuers, Angus Mackinnon and others, and the defenders, Donald Macdonald and others, were all crofters in North Uist, under Sir Arthur John Campbell-Orde of Kilmory, Baronet, proprietor of North Uist.

The pursuers were the whole crofters of the townships of Malaglate and Middlequarter in North Uist. Prior to the passing of the Crofters Holdings (Scotland) Act, 1886,[1] they or their predecessors were tenants of their respective holdings upon a yearly tenancy; thereafter they held upon the tenure created by that Act, and their rents were fixed by the Crofter Commissioners in 1889.

The defenders were crofters on the farms of Sollas and Grenitote. At the passing of the Crofters Holdings Act, 1886, each of these farms was let to one tenant farmer, there being no crofter on either farm, and they so continued down to 1898. In 1898 both farms were broken up into crofts, and at Martinmas 1898 the defenders became respectively tenants of these crofts in virtue of agreements between the defenders, the trustees of the late Sir John W. P. Campbell-Orde, Baronet, and the Commissioners under the Congested Districts (Scotland) Act, 1897.[2]

The prayer of the action was in substance to have the defenders interdicted from taking away seaware from the shore *ex adverso* of certain parts of North Uist except to the extent of certain specified shares of said seaware, and from interfering with the pursuers "in the lawful exercise of their undoubted right to cut or collect and carry away" seaware from the said shore to the extent of certain specified shares.

The pursuers averred:—(Cond. 3) "The pursuers, or their predecessors, were, at the date of the passing of the Crofters Holdings (Scotland) Act, 1886,* the crofters in possession as tenants of the crofting lands of Malaglate and Middlequarter, and held, along with their holdings, and inseparable therefrom, certain rights of seaware for the purpose of obtaining manure for the arable ground of their holdings." The pursuers then made averments as to the shares of seaware belonging respectively to the townships of Malaglate and Middlequarter, and the farms of Sollas and Grenitote. (Cond. 4) "By

[1] 49 and 50 Vict. cap. 29.

[2] 60 and 61 Vict. cap. 53.

* The Crofters Holdings (Scotland) Act, 1886 (49 and 50 Vict. cap. 29), sec. 12, subsec. 2, enacts, *inter alia*:—"It shall be competent for the Crofters Commission to draw up a scheme regulating the use by crofters on the same estate of seaweed for the reasonable purposes of their holdings, peat bogs, and heather or grass used for thatching purposes, and to include the charge for all these in the fixed rent."

Sec. 12 belongs to a group of sections under the heading "Enlargement of holdings."

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the operation of the Crofters Holdings (Scotland) Act, 1886, the pursuers were confirmed in, and obtained an inalienable right to said shares in the seaware, tangle, and other growth or substance thrown upon the seashore *ex adverso* the lands condescended on, as parts and pertinents of their holdings, . . . and they cannot be deprived therefrom so long as they continue tenants of their holdings under said Act. It is averred that, when having fair rents fixed for their holdings by the Crofters Commission in the year 1889, it was expressly stated to the Commissioners, and admitted as correct by the late Sir John William Powlett Campbell-Orde, Baronet, the then proprietor of North Uist, that the pursuers had the rights to seaware and tangle as condescended on on said shore as part of their holdings, and their rents were accordingly fixed on that footing, and still remain as then fixed. The curtailment of their right of seaware and tangle would seriously depreciate the value of the pursuers' holdings, and render same next to valueless as agricultural subjects, and any interference with this right cannot fail to be to the serious hurt of the pursuers." (Cond. 5) "The farms of Sollas and Grenitote were in 1898 cut up into crofters' holdings. . . . The new crofting tenants of Sollas and Grenitote took up and exercised the right to seaware and tangle exactly as such had previously been possessed by the farms of Sollas and Grenitote respectively, as set forth in condescendence third hereof; and the defenders continued so to exercise said right down till the 5th day of February 1903." (Cond. 6) "In or about the beginning of February 1903 the defenders, without consulting the pursuers, made a new division of the seashores in question, and of the share of seaware and tangle thrown thereon, under which the Grenitote defenders took possession on 5th February 1903 of certain shores (part of pursuers' rights) over which they had not previously exercised any seaware or tangle rights or control, and collected and removed the seaware and tangle therefrom, and the Sollas defenders enlarged and extended their right by collecting and removing a greater share of seaware and tangle than they had right to take from the seashore they had an interest in, while at the same time the defenders refused to allow the pursuers to exercise their undoubted lawful right of collecting and carrying away seaware and tangle from certain parts of the seashore, or to allow them access thereto. The action of the defenders was illegal and unwarrantable, and was persisted in in defiance of the protests of the pursuers."

The defenders in answer averred;—(Ans. 3) " . . . The claims and rights of parties, in the obtaining of seaware for the manuring of the arable ground of their holdings, has been stated to the defenders, by or on behalf of the landlord, to be, and is in accordance with division thereof, made on or about 16th March 1861 on behalf of the then landlord" by his factor, "a certified copy of which is herewith produced and referred to." (Ans. 5) " . . . The new crofting tenants of said farms [Sollas and Grenitote] were entitled to and took up on the authority of the landlord the right of seaware and tangle, as such had previously been possessed by the occupants of said farms, also they exercised that right to the extent which in their judgment they for the time being saw fit."

The pursuers pleaded, *inter alia*;—(2) The pursuers having from time immemorial exercised the right of gathering, collecting, and carrying away the seaware and tangle and other substance *ex adverso* of the lands of North Uist, as set forth, as a right attached to their

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holdings, and said right being vested in them in virtue of the provisions of the Crofters Holdings (Scotland) Act, 1886, they are entitled to continue the exercise thereof. (3) The defenders having no right to any share in the seaware and tangle thrown upon the seashore *ex adverso* of said lands, other than as condescended on, cannot extend or enlarge upon their rights without the pursuers' consent, or deprive the pursuers of any part of their rights, and the pursuers are entitled to interdict against them as craved.

The landlord was not called as a defender, and the defenders in consequence pleaded;—(2) All parties not called. The defenders further pleaded, *inter alia*;—(5) The pursuers' averments, so far as material, being unfounded in fact, the defenders should be assoilzied, with expenses.

On 5th August 1903 the Sheriff-substitute (Campbell) *hoc statu* repelled, *inter alia*, the second plea in law for the defenders, in so far as preliminary, reserving its effect on the merits, and before further answer allowed a proof. The import of the evidence led at the proof sufficiently appears from the interlocutor and note of the Sheriff (C. N. Johnston, K.C.).

On 23d July 1904 the Sheriff-substitute pronounced the following interlocutor:—"Finds (1) That the pursuers . . . and their predecessors were, at the date of the Crofters Holdings (Scotland) Act, 1886, in occupation of their crofts or holdings, with certain rights or privileges of winning seaware for manurial purposes, as previously defined and apportioned by the landlord; but (2) that they have failed to prove that they or their predecessors in said crofts had or exercised the rights to seaware according to the divisions or in the proportions as claimed and condescended on from time immemorial, or at the date of said Act; and that they have also failed to prove that the fair rents of their crofts or holdings were fixed by the Crofters Commission on the footing that they had or exercised those rights as condescended on . . . (4) that it is not proved that defenders have refused to allow pursuers to collect and carry away such seaware and others as they had a duly recognised and legal right to collect and carry away, or deprived pursuers of any part of such rights: Therefore sustains the fifth plea in law stated for defenders; refuses the prayer of the petition . . . and assoilzies defenders from the conclusions of the action, and decerns: Finds pursuers jointly and severally liable to defenders in expenses: Allows," &c.

On appeal the Sheriff (C. N. Johnston, K.C.) pronounced this interlocutor:—"Recalls the Sheriff-substitute's interlocutor of 23d July 1904: Finds (1) that the defenders are tenants of certain holdings in the island of North Uist formed out of the farms of Sollas and Grenitote, and occupy their holdings under and in virtue of agreements entered into by and between them and the trustees of the late Sir John William Powlett Campbell-Orde, Bart., of North Uist, and the Congested Districts (Scotland) Commissioners in 1898; (2) that the defenders enjoy as a pertinent of their holdings certain rights of winning seaweed on certain portions of the shore of the estate of North Uist; (3) that the defenders have exercised, and propose to exercise, these rights at the places, in the manner, and to the extent pointed out to them by the estate factor; (4) that the pursuers are crofters in the township of Malaglate and Middlequarter on the said estate adjoining the said farms of Sollas and Grenitote; (5) that the pursuers claim as pertinents of their crofts certain joint rights

along with the defenders of winning seaweed on the said portions of the shore; (6) that the extent of pursuers' rights is not fixed or defined by any written contract, judicial decree, or finding of the Crofters Commission, or by any written estate regulations upon which pursuers found, and that the pursuers have failed to prove that it is fixed or defined by any immemorial usage; (7) that the pursuers base their claims upon (*a*) the state of possession at the date of the passing of the Crofters Act; (*b*) an alleged modification thereof under a verbal arrangement with the factor in 1888; (*c*) the state of possession when their fair rents were fixed in 1889; (*d*) the state of possession subsequent thereto; and (*e*) the alleged disability of the proprietor, in respect of the foregoing considerations, to make any re-arrangement or now to enforce any estate regulation of older date: Finds in law that the grounds of claim upon which pursuers rely cannot conveniently be adjudicated upon in the absence of the proprietor, and that the defenders, in the absence of the proprietor, ought not to be called upon to answer or discuss them with the pursuers: Therefore sustains the second plea in law for the defenders: . . . Dismisses the action, and decerns: Finds the pursuers liable, jointly and severally, to the defenders in expenses: Allows," &c.*

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* "NOTE.—This is a deplorable litigation. In its slow and sullen flight it has gathered round it a process of portentous magnitude, and its consequences must, I fear, be ruinous to some of the parties concerned. In view of the expense which has been entailed, and the time and trouble which have been expended, I should have been very reluctant to dispose of the case upon the plea of 'all parties not called' had I seen my way apart from that plea to reach a result different from that at which the Sheriff-substitute has arrived. Whilst, however, I might not have adopted all his inferences, I should have come to the same conclusion as he has reached had I thought that it was necessary or proper to dispose of the case on its merits in the absence of the landlord—in other words, I should have found that the pursuers, whatever their rights and remedies, had not made out their case *as laid*. As, however, I think that the landlord ought—perhaps in any case, but certainly in view of the circumstances disclosed in the pursuers' proof—to have been called as a defender, I do not think it proper or in the interests of the pursuers themselves to ignore the plea in which the defenders still insist of 'all parties not called.'

"In these circumstances, I ought in strictness to say no more. But in view of the nature of the case and the peculiar position of the parties, I think that it may be convenient for them if I should indicate the view which I take of certain aspects of the case. In the absence of the landlord I can do so only provisionally.

"The defenders entered upon their holdings in 1898, and for some years they were busy erecting buildings, &c., and were therefore not in a position fully to cultivate their lands or to use all the seaware to which, as they now say, they are entitled. Accordingly, pursuers and defenders were each able to take all they wanted without mutual interference. In the year 1903, however, the defenders were in a position to use more, and, in these circumstances, a question arose between them and the pursuers as to the measure of their respective rights. The defenders, as was proper, communicated with the estate factor, and asked him what seaware they were entitled to. By letter, dated 29th January 1903 (No. 121), the factor gave to the defenders the particulars of what, in his view, was the authoritative estate division of the seaware between the respective townships interested, sending them a copy of the division as made by the factor in 1861. The defenders shewed this letter to the pursuers or to some of their representatives, and

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The pursuers appealed. At the hearing the argument was confined to the defenders' plea of all parties not called.

Argued for the pursuers;—It was not necessary that the landlord should be called, as this was a purely possessory action between two sets of tenants.[1] The landlord had no interest to be called; in any event, any judgment in the present action would not be *res judicata* against him. The fair rents paid by the pursuers were fixed after taking into consideration the amount of seaware which the pursuers and their predecessors were in use to get, and so long as these fair rents continued to be paid and the landlord did not go to the Crofters Commission, as he was entitled to do, to have the rents readjusted, the pursuers were entitled to secure their possession of the seaware by interdict, as in a question with the defenders, without bringing the landlord into the process. Neither the pursuers nor the defenders were ordinary tenants, and the landlord had really very little interest

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claimed right to no more than the factor thus pointed out to them. In these circumstances, the pursuers raised the present action of interdict. Whatever may be the legal rights of the matter as between the pursuers and the landlord, the conduct of the defenders appears to me not open to any observation, and it would certainly be a great hardship if they had to bear the expense of litigating the matter. It may be that they would have been bound to meet the pursuers, if the latter had had any written title defining the extent or the limits of their rights, but they have produced nothing of the kind, and the grounds to be noticed presently upon which they rest their claim, whether well founded or not, are quite inappropriate for trial between them and the defenders.

"At the date of the passing of the Crofters Holdings Acts of 1886, the pursuers were crofters in possession, as yearly tenants, of holdings to which were attached certain rights of taking seaware for manurial purposes. The measure of the exercise of this right, as regards locality generally, and as between different townships and farms, on certain stretches of shore in which they had joint rights, was matter controlled by estate regulations, which might be altered from time to time, or which the parties, by mutual arrangement, might temporarily vary. The last division by the estate seems to have been made in 1861, and the estate authorities still regard that as the binding rule in the event of an appeal to them. It does not appear clear, however, that this division was ever strictly observed in practice, but I have little doubt that if at any time after 1861 a serious difficulty had arisen, and the matter had been referred to the estate authorities, they would have treated the 1861 division as binding and authoritative so far as they were concerned, until it should have been deliberately altered. It is suggested that this allocation of 1861 was altered at a verbal interview with the factor in 1888, or rather—for the pursuers do not admit that the 1861 division ever existed except in a tentative scroll—that a new allocation, superseding that which had been observed in practice, was made in 1888. It appears to me, however, that what the factor did in 1888 was not to make any new allocation to be recognised in future by the estate, but to arrange a *modus vivendi* by which the farmer's willingness to oblige the crofters by giving them more than they were entitled to was to be reconciled with the avoidance of quarrels between the crofters and the cottars on the farms.

"In the view which I take the crofters, upon the passing of the Crofters Holdings Act in 1886, became crofters with a right to certain holdings, and, as a pertinent thereto, the right—*not* of taking seaweed in perpetuity

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[1] Earl of Galloway v. Magistrates of Wigtown, July 8, 1870, 8 Macph. 959, 42 Scot. Jur. 562; Mackay's Manual of Practice, p. 222.

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in the manner in which this seaware was apportioned between the pursuers and the defenders. In any case, the action ought not to be thrown out, as the Sheriff had done, after a proof had been led and much expense incurred. The landlord ought to have an opportunity of sisting himself.

Argued for the defenders;—The Sheriff's judgment sustaining the plea of all parties not called was well founded. The pursuers' case was that under the Crofters Holdings Act they had an inalienable right, as a pertinent of their holdings, to certain specific shares of the seaware in question. Neither of the Sheriffs had sustained the pursuers' case, but if the Court, on a consideration of the proof, took the opposite view, that judgment would be to the prejudice of the landlord. Technically, no doubt, such a judgment would not be *res judicata* against the landlord, but it would be a judgment of the Court,

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at the exact places which happened to be assigned to them in 1886, but—of taking seaweed subject, as had been the case in the past, to the estate regulations for the time being, or subject to the terms of any scheme adjusted by the Crofter Commission. That, as I conceive it, is still the nature of their tenure.

"The pursuers found strongly upon the proceedings before the Crofter Commission in 1889,* when their present rents were fixed. They maintain

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* At the proof in the present action Mr P. B. MacIntyre, one of the Crofter Commissioners deponed:—"I am aware that Sir John Orde lodged a general statement with regard to the estate of North Uist. (Shewn No. 9 of process)—I suppose that is it. That statement contains the words 'that a plentiful supply of seaware is available without any other cost than carting,' and it was our understanding in connection with North Uist that there was a plentiful supply of seaware. We took that into consideration in fixing fair rents. I was the Commissioner on the fixing the fair rents in Middlequarter and Malaglate. . . . I cannot tell you what the shares of the crofters were; there were no definite rights before us at all. We just took the general statement of a plentiful supply in the absence of any complaint, and there was no complaint made. I would say a plentiful supply of seaware is necessary in that part of the country to the proper working of the holding. Without a plentiful supply the crofts would not be of the same value. . . . You may take it that, whatever that right was, the seaware possession taken into consideration was the state of the seaware possession exercised by the crofters at the date of fixing the fair rents, and that the value of a plentiful supply of seaware for manuring the holdings was included in the consideration in fixing these rents; there was no complaint made as to the want of seaware, wherever they got it. . . . I do not remember anything having been said about rules and regulations regulating the rights of crofters in Middlequarter and Malaglate to seaware; there was no demand for rules and regulations as to seaware there. . . . Cross.—When I fixed the fair rents in 1889, I fixed these rents on the assumption that there was a plentiful supply of seaware. We assumed that from the general statement and from the fact that there was no complaint. In the absence of any complaint we always understood that they got all the ware they wanted. In fixing these rents there was no inquiry as to the quantity of seaware that could be got, or inquiry as to where the seaware was got."

Sheriff Brand, the chairman of the Commissioners, deponed, *inter alia*, —"Seaware and peats are necessities of existence in these places. (Q.) Is seaware a necessary manure for the holding and an important factor in the value of the holding? (A.) The holding could not be carried on without seaware."

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with all the authority of a judgment of the Court, which the landlord would have to meet in any proceedings that he might afterwards take. The landlord had a distinct interest in this matter, for he had given away to the defenders something that, if the pursuers were right, he was not entitled to give, so that he would or might be liable in damages to the defenders. If a landlord were alleged to have granted inconsistent rights to each of two tenants under ordinary leases, it would certainly as a rule be necessary that the landlord should be a party to any proceedings for the determination of the question, and the present parties were practically in the same position as ordinary tenants. If, indeed, the pursuers had produced a written title of some sort accurately defining the rights which they claimed, it might be that that would entitle them to a possessory judgment as in a question with the defenders, but it was clear on the evidence that the pursuers had failed to produce such a title. The findings of the Crofter Commissioners fixing the fair rents of the pursuers' holdings in 1889 did not define the extent of the pursuers'

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that these rents were fixed with reference to the particular rights which they now claim. I do not think, however, that the evidence shews that this was the case, that the nature and extent of these rights were ever brought under the cognisance of the Commissioners, or that the Commissioners recognised certain definite rights in the matter as belonging to the crofters, and as independent of estate regulation from time to time. It does, however, appear to me to be clear that the rents were fixed upon the footing that the pursuers had (as *de facto* they were then enjoying) a sufficient supply of seaware. It may very well be, therefore, that if they are not now afforded a sufficient supply, that would be a good reason for a revision of their rents. Pursuers go further, and hold that the state of possession which is the measure of their permanent rights as crofters is the state of possession when the fair rents were fixed. I am, I confess, unable to adopt this view.

"Upon the basis, however, that the pursuers are entitled to a sufficient supply for their holdings either in perpetuity or so long as the present rents remain unaltered, I am unable, upon the evidence, to affirm that they have not been left a sufficient supply. I think the proof leaves that an open question. There are strong general statements upon both sides, but there is no independent or precise evidence.

"I am not satisfied, however, that the recent changes may not involve some hardship upon the pursuers, although I am satisfied that the present action is not the remedy open to them. Circumstances have changed. Whatever may have been the recognised allocation before 1898, the pursuers were doubtless made welcome to all that they required after the needs of the two farms were supplied. Under the new condition of things far more must be required for the new settlements than was needed for the two farms. According to Mr M'Kenzie, the factor, the matter is a *vital* one for the new settlers. If there is not enough to go round, it must also be a *vital* one for the pursuers. If there is plenty for all, then it is difficult to see what interest the pursuers had to undertake the very serious burden of this case. If there is not plenty for all, then the old hereditary crofters are being prejudiced by the creation of these new settlements. It may be that an ample supply is left to the pursuers, and that, as is suggested by one or two witnesses for the defenders, they are a cross-grained, litigious body of men. I have not materials to be able to form a judgment upon that matter. The circumstances of the case, however, suggest that the creation of new settlements is a matter which requires much careful thinking out in detail before it is undertaken."

rights in this seaware, or even affirm that they had any such rights. No doubt the fact that there was a good supply of seaware was kept in view by the Commissioners in fixing the amount of the rents, but there was nothing in the proceedings of the Commissioners to deprive the landlord of his right to reallocate the seaware with the result possibly that the pursuers would have a good case for having their rents lowered by the Commissioners.

On 16th February 1905 the Court pronounced the following interlocutor:—"Sist the cause meantime to allow the landlord to sist himself as a party to the cause, adopting the proof already led, and direct the pursuers to make intimation to him accordingly."

The landlord intimated that he did not desire to sist himself as a party. The Court then made avizandum.

At advising,—

LORD JUSTICE-CLERK.—On 16th February this case was continued in order to give the landlord an opportunity, if he desired, of sisting himself to the process and adopting the proof already led. Intimation was made to him accordingly, but he has not chosen to enter appearance. In these circumstances I think we ought to affirm the judgment appealed against.

LORD KYLLACHY.—I concur in thinking that we must affirm the Sheriff-principal's interlocutor. And I may say I do so with less reluctance because I greatly doubt whether, even if the landlord had appeared and adopted the proof, any final or really useful decision could have been obtained under this action. It would, whatever might have been decided, have, I am afraid, been always open to either party to bring a declarator so as to try over again and determine finally the question of right. What I really regret is that the present action was not at an early stage sisted of consent so as to enable such a declarator to be brought.

As it is, the present action is, I think, well ended and out of Court. And the only thing I should like to add is this, that I hope if the pursuers should contemplate further legal proceedings they will at least consider whether pertinential privileges of this kind held by crofting tenants at the passing of the Crofters Act were then or are now of the nature of legal rights; or were not and are not rather (apart from express title falling under some recognised legal category) privileges held necessarily at the landlord's pleasure and subject always to estate regulations. I express, of course, no opinion on that or any other question involved, but it does occur to me to doubt whether crofters in the pursuers' position have, if deprived of such privileges, any other redress than that of having their fair rent revised by the Crofters Commission on the first opportunity which the Act gives for that being done. Until such opportunity offers, the Crofters Commission may not under the Act have power to interfere. But, if not common knowledge, it is at least generally supposed that on the joint application by both parties, or even on the application of the landlord, they, the Commissioners, frequently do settle and regulate such matters, generally at inconsiderable cost and in a quite satisfactory manner.

LORD JUSTICE-CLERK.—Lord Adam desires me to say that he concurs in the result of the judgment proposed.

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I wish to add that I entirely agree with what has fallen from Lord Kyllachy as to the inexpediency of further legal proceedings. It would be a lamentable thing if any additional expense were to be incurred which might practically mean the ruin of many of those interested.

LORD KINCAIRNEY not having been present at the hearing gave no opinion.

LORD YOUNG was absent.

THE COURT dismissed the appeal, and affirmed the interlocutor of the Sheriff appealed against; found in fact and in law in terms of the findings in fact and in law in the said interlocutor; of new dismissed the action, and decerned.

MALCOLM GRAHAM YOOLL, S.S.C.—ARTHUR MORGAN, Law-Agent—Agents.

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ATKINSON & WOOD, Pursuers (Respondents).—*M'Lennan—Graham Stewart.*

MRS EUGENIE FAIRWEATHER OR MACKINTOSH, Defender (Reclaimer).—*A. J. Young—W. Thomson.*

*Jurisdiction—Forum non conveniens—Sist of action to preserve arrestment on dependence—Arrestment on dependence.*—In an action by one Englishman against another who had estate in Scotland, a plea of *forum non conveniens* was sustained. The pursuer, however, moved the Court to sist the action to enable him to preserve arrestments on the dependence till he should raise and follow forth an action in England. The Court (*rev.* judgment of Lord Stormonth-Darling, Ordinary) *refused* the motion and *dismissed* the action.

*Hawkins* v. *Wedderburn*, March 9, 1842, 4 D. 924, 14 Scot. Jur. 336; and *Fordyce* v. *Bridges*, June 2, 1842, 4 D. 1334, 14 Scot. Jur. 447, *distinguished*, and *opinions* that in a case where these decisions were directly in point they would require to be reconsidered.

1ST DIVISION.
LdStormonth-Darling.

ATKINSON & WOOD, tailors, carrying on business at 63 English Street, Carlisle, brought an action in the Court of Session against Mrs Eugenie Fairweather or Mackintosh, wife of and residing with the Reverend John Mackintosh at 77 Scotland Road, Stanwix, near Carlisle, and the said Reverend John Mackintosh for his interest, The pursuers concluded for payment of £48, 5s. 2½d., being the price of goods purchased from them by the defender Mrs Mackintosh. Arrestments *ad fundandam jurisdictionem* had been used against the defender Mrs Mackintosh.

The defender Mrs Mackintosh lodged defences, and pleaded, *inter alia*;—(1) No jurisdiction; and (2) *Forum non conveniens.*

The pursuers used arrestments on the dependence of the action.

The pursuers averred that the defender Mrs Mackintosh was possessed of considerable separate estate in Scotland.

No action to recover the debt sued for had been brought in England.

On 18th January 1905 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"The Lord Ordinary having heard parties and considered the cause, in respect the first plea in law for the defender is not insisted in, repels the same: Sustains her second plea in law: Sists further procedure for six months, in order to give the pursuers time, if so advised, to raise and follow forth an action in the English Courts, and grants leave to reclaim."

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The defender Mrs Mackintosh reclaimed, and argued;—The plea of *forum non conveniens* having been sustained, the action must be dismissed.[1] If the pursuers raised an action in England and obtained decree, their proper course was to proceed under the Judgments Extension Act, 1868.[2] They could not get decree conform in this action. There was no conclusion for decree conform. The arrestments used on the dependence would be of no use. The case of *Hawkins* v. *Wedderburn*[3] was distinguishable. There an action had already been instituted in England, and the action in Scotland was insisted in solely for the purpose of attaching heritable estate in Scotland pending the decision of the action which was proceeding in England. Here the object of the action was to have the case tried in Scotland, and there was no action at present depending in England.

Argued for the pursuers and respondents;—An action should only be dismissed on the plea of *forum non conveniens* if the pursuer had as ample a remedy in the foreign Court.[4] It was impossible on the dependence of an action in England to arrest funds in Scotland. A pursuer who had competently raised an action in England, was entitled to bring an action here on the same matter for the purpose of attaching funds in Scotland.[5] The object of having this case sisted and not dismissed was to impound the funds till the pursuer obtained a decree in an action to be brought in England. It made no difference whether the English action had been brought already or not, if the position was that the defender had funds in Scotland, but the question on the merits had to be tried in England, as the pursuers now conceded here that it must be. The principle was that a party was entitled to raise and keep up an action for the purpose of securing ultimate payment, although the question on the merits had to be tried elsewhere.[6] In the case of *Hawkins*,[3] diligence on the dependence was not used immediately on the bringing of the action. The pursuer here might still bring an action for decree conform. He would require no further arrestment to enable him to satisfy his decree when he got it. If he got a decree he could bring a furthcoming on the arrestments on the dependence of this action. In the case of *Sim* v. *Robinow*,[7] there was no question as to arrestments.

At advising,—

LORD PRESIDENT.—This is an action at the instance of a firm of tailors of Carlisle against a Mrs Mackintosh, residing at Stanwix, near Carlisle, to recover a sum of money, the price of goods supplied by them. Among other pleas taken by the defender is one of "*Forum non conveniens*," and that plea has been sustained. The case would no doubt have been dismissed by the Lord Ordinary, but that meanwhile the pursuers had arrested on the dependence of the action, and asked that it should not be dismissed

[1] Sim v. Robinow, March 17, 1892, 19 R. 665, *per* Lord Kinnear at p. 669.

[2] 31 and 32 Vict. cap. 54.

[3] March 9, 1842, 4 D. 924, 14 Scot. Jur. 336.

[4] Williamson v. North-Eastern Railway Co., Feb. 28, 1884, 11 R. 596, *per* Lord Rutherfurd Clark, at p. 600.

[5] Hawkins v. Wedderburn, March 9, 1842, 4 D. 924, 14 Scot. Jur. 336; Fordyce v. Bridges, June 2, 1842, 4 D. 1334, 14 Scot. Jur. 447.

[6] Hawkins, *cit. per* Lord Justice-Clerk, 4 D. at p. 944.

[7] 19 R. 665.

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but sisted. The avowed object was to have the advantage of such arrestment at a later stage of their proceedings, and was in order that, when it should be necessary to put in force the decree to be obtained in the action about to be raised in England, the defender's property here should be found intact. As authority for this position we were referred to the case of *Hawkins* v. *Wedderburn*,[1] a decision of the whole Court, and also that of *Fordyce* v. *Bridges*[2] in the same volume of the reports. If this case were precisely on all-fours with that of *Hawkins*,[1] I would be of opinion that, looking to the great weight of the opinions of the minority in that case, this one should be sent to a larger Court in order that that decision should be reconsidered, in view of the difference created by the passing of the Judgments Extension Act, 1868.[3] But this case is not on all-fours with that of *Hawkins*,[1] for there there was in England a living case. Here there is none. Here it is only said that the pursuers intend raising an action in England. Now, I am not prepared to push the case of *Hawkins*[1] one step further than it goes. I think that the defender's plea of "*Forum non conveniens*" having been sustained, the action should be dismissed, and I am therefore for recalling the interlocutor of the Lord Ordinary reclaimed against.

Lord Kinnear.—Two preliminary pleas are stated for the defender. The first is "No jurisdiction." The second is "*Forum non conveniens*," which is equivalent to "*Forum non competens*," and it means that of two Courts having jurisdiction, it is proper that the case should be tried in one and not in the other. There is no doubt as to the first plea. Arrestments *ad fundandam jurisdictionem* were laid on in respect of which this Court undoubtedly has jurisdiction. But it is now finally decided that the other plea has been rightly sustained, and that the action ought not to proceed here, but in a Court in England, which is the proper *forum* both of the pursuers and the defender. It would seem to follow of logical necessity that the action should be dismissed. It has been decided that it is not to go on in this Court. I cannot see why, if it has been decided that the action is not to be sustained, it should nevertheless be kept alive in order to give the pursuer the benefit of a diligence in security which the law of the *forum* to which he is bound to resort will not allow him. The law and practice of this country enables the pursuer to arrest on the dependence of an action in this Court, but if this Court refuses to entertain the action, I know of no authority and no legal principle to suppert an arrestment in Scotland on the dependence of an action in a foreign Court.

I should therefore have had no difficulty in dismissing the action, and I understand that your Lordship in the chair would have had none either, if it had not been for the case of *Hawkins*.[1] I agree that if that case were directly applicable we should be bound either to follow it or to send this case to seven Judges to consider whether the case of *Hawkins*[1] is still a binding authority in view of the provisions of the Judgments Extension Act.[3] I should certainly not be inclined to decide that question without

[1] March 9, 1842, 4 D. 924. [2] June 2, 1842, 4 D. 1334.
[3] 31 and 32 Vict. c. 54.

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sending it to be considered by a larger Court. But the decision in *Hawkins*[1] is not directly in point. The plea taken there was not "*Forum non conveniens*," but "*Lis alibi pendens*." That plea could not possibly be stated in the present case, because there is no action depending in England, and besides proceedings in a foreign Court do not constitute *lis alibi pendens* in the proper sense. The cases are therefore distinguishable. I think the pursuers are entitled to found upon the reasoning of the majority of the Judges in *Hawkins*[1] in support of their contention that an action may be entertained for the purpose of authorising diligence, although it ought not to be entertained on the merits. But there is a difference between the authority of judicial reasoning on a point on which judgment has not actually passed, and the authority of a decision. The decision is binding upon us, but I am not prepared to hold that the Court is bound by all that was said in the course of delivering judgment.

LORD PEARSON (read by the Lord President).—This is an action on a contract between two parties, both of whom are resident and (so far as appears) domiciled in England. The contract sued on was made and performed in England; the law applicable to that contract is admittedly the law of England; and I read the pursuers' averments as implying that there is no obstacle to their having the case tried in England in the County Court (for which it seems well adapted), or, if they prefer it, in the High Court of Justice.

It is not disputed that jurisdiction in this Court has been well founded by arrestment. But the defender pleads "*forum non conveniens*," and the Lord Ordinary has sustained that plea, and sisted procedure for six months to give the pursuers time, if so advised, to raise and follow forth an action in the English Courts. The defender objects to the sist of procedure, and maintains that, as the plea of *forum non conveniens* has been sustained, the action should be dismissed. Dismissal is perhaps the course most usually adopted when that plea is sustained, but the procedure to be followed is to a certain extent in the discretion of the Court.

In the present case the pursuers, in supporting the six months' sist granted by the Lord Ordinary, rely (1) upon the fact that the separate estate belonging to the defender as a married woman is in Scotland, in the hands of two trustees who are solicitors in Aberdeen, and (2) on two cases reported in the 4th volume of Dunlop, *Hawkins*[1] and *Fordyce*,[2] which they say are authorities for keeping this action in Court until the pursuers have raised their action in England and have obtained decree in it. The avowed purpose is, that the pursuers, by arresting on the dependence of the present action, may secure a fund to answer the English decree for payment, if and when they obtain it. I know of no authority in the law in Scotland which goes the length of sustaining a summons in this Court, raised avowedly for that limited purpose, unless the action or suit is already in dependence in England at the time the Scotch action is raised. Certainly, neither *Hawkins*[1] nor *Fordyce*[2] is an authority for that proposition. In the latter case, the opinion of Lord Justice-Clerk Hope, which may be regarded as expressing

[1] 4 D. 924. [2] 4 D. 1334.

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the doctrine at its highest, distinctly says that it is the dependence of the suit in England which gives jurisdiction in Scotland, to the effect of securing the defender's property for the ultimate safety of the pursuer. For my part, while giving all due obedience to the principle laid down by a majority of the whole Court in *Hawkins*,[1] I am not prepared to take a step further in the same direction, which we should be doing if we were to sustain the present action to the limited effect of enabling the pursuers to secure funds to answer a decree to be pronounced in an English proceeding not yet begun. On reading the Lord Ordinary's note in the case of *Hawkins*,[1] I was under the impression that the case of *M'Master*,[2] to which he refers, was an instance to the contrary, as the first of the two actions there was raised in Scotland. But on a perusal of that case it appears that it differed entirely from the case now in hand, and really has no bearing on the question now raised. In particular, there was no question at all as to arrestment on the dependence.

I am therefore for dismissing the action.

Lord M'Laren having been absent at the hearing did not take part in the judgment.

Lord Adam was absent.

The Court recalled the interlocutor reclaimed against, and dismissed the action.

Gunn & Mulcaster, S.S.C.—J. Douglas Gardiner & Mill, S.S.C.—Agents.

No. 109.

Mar. 17, 1905. Freemen of Prestwick v. Provost, Magistrates, and Councillors of Prestwick.

Hugh Boyd and Others (Freemen of Prestwick), Petitioners (Appellants).—*Johnston, K.C.*—*Hunter.*
Provost, Magistrates, and Councillors of Prestwick, Respondents.—*Clyde, K.C.*—*Horne.*

*Sheriff—Jurisdiction—Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 27—*Declarator of patrimonial right in burgh lands by Freemen—Burgh—Burgh of Barony—Police Burgh.*—The Burgh Police (Scotland) Act, 1892, enacts:—Section 27—"(1) Where, by the operation of this Act, the right to elect the municipal authority is transferred and taken away from the existing body of electors, and any dispute arises as to whether any right or privilege exercised by all or any of such is a public or a private and patrimonial right, such dispute shall be decided by the Sheriff, but an appeal shall lie to the Court of Session. (2) Nothing contained in this Act shall affect the patrimonial rights of any body of feuars at the passing of this Act administered by the Town-Council of any burgh or barony."

*Held* that this section did not give the Sheriff jurisdiction in an action brought by the freemen of a burgh of barony, which had been formed into a police burgh, for declarator that the freemen had a private and patrimonial right in the property of the burgh of barony.

1st Division, Sheriff of Ayrshire.

Prestwick, in Ayrshire, was an ancient burgh of barony holding of the Prince and Steward of Scotland, the territory of which consisted of about 700 acres of land. Down to 1900 the council of the burgh was elected by the thirty-six freemen thereof. In 1901 a petition was presented to the Sheriff of Ayrshire in terms of the Burgh Police

[1] 4 D. 924. [2] 12 Shaw, 731, 6 Jurist, 394.

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(Scotland) Act, 1892,[1] and the Town Councils (Scotland) Act, 1900,[2] for the purpose of having Prestwick formed into a police burgh. The petition was granted, and a council was elected in terms of the Acts mentioned and constituted in November 1903.

The right to elect a council having thus passed from the freemen, questions arose between them and the new corporation as to their rights in the burgh territory.

In April 1904, John Boyd and others, freemen of Prestwick, on behalf of themselves and the thirty-six freemen of the burgh of Barony of Prestwick, presented a petition in the Sheriff Court of Ayr against the Provost, Magistrates, and Councillors of the burgh of Prestwick, in which the petitioners prayed the Court:—"To find and declare that the petitioners have a private and patrimonial right in the property of the burgh of Barony of Prestwick, and the whole revenues derived therefrom, and in particular (1st) . . . that the whole revenues derived from the feu-duties formerly administered by the burgh of Barony of Prestwick for behoof of the petitioners, together with the whole casualties of superiority effeiring thereto, are the property of the petitioners, that it is a private and patrimonial right vested in the petitioners, and that they are the sole parties beneficially interested therein: (2d) . . . That the whole minerals underneath the Prestwick freedom lands, and reserved to the freemen in the feu-rights and dispositions of the Prestwick freedom lands, are the property of the petitioners, and that it is a private and patrimonial right vested in the thirty-six freemen of Prestwick as joint owners of the said minerals: (3d) . . . That the whole minerals underneath the Prestwick lands other than freedom lands, so far as reserved to the burgh in the feu-rights and dispositions in favour of the feuars, are vested in the petitioners, and that it is a private and patrimonial right, and that the petitioners are the sole parties beneficially interested therein: (4th) . . . That the burgh hall of Prestwick, which was erected by the petitioners by private subscription, is the sole property of the petitioners as joint owners thereof:" and (5), (6), (7), and (8) that certain parcels of land described in the prayer were "the property of the petitioners."

It appeared from the condescendence that the subjects in question were of greater value than £50 by the year, or £1000.

The petitioners founded upon section 27 of the Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55).[3]

The respondents lodged defences, and pleaded, *inter alia*;—(2) No jurisdiction.

On 13th October 1904, the Sheriff-substitute pronounced this interlocutor:—"Finds in fact that, as appears from the petition and condescendence lodged for the pursuers . . . the value of the heritable subjects in dispute in the present action largely exceeds 'the sum of £50 by the year, or £1000 value': Finds in law that, in terms of the Sheriff Courts (Scotland) Act, 1877,[4] section 8 (1), the Sheriff Court has no jurisdiction to entertain the present action, and that the same is incompetent in this Court: Accordingly sustains the second plea in law stated for the defenders, and dismisses the action," &c.

The petitioners appealed to the Court of Session, and argued;—The questions raised by the petition were just such questions as were

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[1] 55 and 56 Vict. cap. 55.
[2] 63 and 64 Vict. cap. 49.
[3] Quoted in rubric.
[4] 40 and 41 Vict. cap. 50.

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contemplated by section 27 of the Burgh Police (Scotland) Act, 1892.[1] Such questions generally involved property of small value, but in any case the rights of all parties were adequately safeguarded by the right of appeal. The rights and privileges referred to in the section did not require to be rights and privileges which had been exercised by the electors "as such." It might be that the word "exercised" was not quite accurately used, but as used it was applied to "rights" as well as "privileges," and as applied to rights it must mean "enjoyed."

Argued for the respondents;—This was really a declarator of a heritable right of property. Such a question was not contemplated by section 27 of the Burgh Police (Scotland) Act, 1892. The rights claimed were not rights "exercised" by the electors of the burgh of barony as such. The use of the word "exercised" shewed that the section did not apply to such rights as were claimed here. Further, the claim was not that the property in question should be held by the burgh for behoof of the freemen, but that it belonged in property to the freemen themselves. It was highly improbable that Parliament should have intended to give the Sheriff privative jurisdiction as to all questions of heritable right arising as the result of the adoption of the Burgh Police Act, 1892.

At advising,—

Lord M'Laren.—The case raises some interesting questions as to the rights of the freemen of this ancient burgh of barony, in relation to the burgh property. But the only question with which we are concerned is that of jurisdiction. The action was instituted in the Sheriff Court of Ayrshire. The Sheriff-substitute by his interlocutor of 13th October 1904 (appealed from) has held that the Sheriff Court has no jurisdiction to entertain the action, and I (in common with your Lordships who heard the case) am of opinion that this finding is well founded, and that the action was rightly dismissed.

The argument for the appellants is founded on the 27th section of the Burgh Police (Scotland) Act, 1892,[1] which provides (subsec. 1)—(His Lordship quoted the subsection).

Now, it is common ground that by the operation of the Burgh Police Act, 1892, the right to elect a Town-Council was taken away from the freemen of Prestwick, and that in the execution of that Act and the Town-Councils (Scotland) Act, 1900, Prestwick has been formed into a Police Burgh of the ordinary type. The question then remains whether the rights which are sought to be established in favour of the freemen by the declaratory conclusions of this petition are rights or privileges of the nature indicated in the 27th section, and appropriated by that section to the jurisdiction of the Sheriff?

The conclusions of the petition are (1) that the revenues derived from feu-duties and casualties of superiority "are the property of the petitioners"; (2) that the minerals underneath the Prestwick freedom lands "are the property of the petitioners," as joint owners thereof; (3) that the minerals underneath the Prestwick lands, other than freedom lands, "are vested in the petitioners; (4) that the town hall is the "property of the petitioners,"

[1] Quoted in rubric.

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as joint owners, and (5, 6, 7, and 8) that the parcels of land there described are the property of the petitioners. The 9th and only other conclusion is a conclusion in the usual form for expenses.

The petition is then neither more nor less than a declaratory action to establish heritable rights of property in the persons of the thirty-six freemen of Prestwick and their heirs, against the present administrators of that property, viz., the Town-Council of Prestwick.

It may be that the freemen in a competent action will be able to prove their right to these estates, which, according to the Sheriff-substitute's note are of very great value, but I do not find in the language of the 27th section evidence of the intention of the Legislature to transfer the decision of questions of heritable right from the ordinary Courts to a Court of summary jurisdiction, whose methods of procedure are left wholly undefined. The questions to be decided summarily by the Sheriff are described in the 27th section as disputes as to "whether any right or privilege exercised" by the old electors is a public or a private right. I do not think that any lawyer or landed proprietor in speaking of the purchase of a mineral estate or estate of superiority would describe it as the exercise of a right or privilege, and I therefore conclude that Parliament in using these words meant to refer to franchises or privileges, and not to property.

It is not necessary to elaborate the point, because it is only a question of the meaning of ordinary words in a section of an Act of Parliament which may not be quite clear, but are certainly not technical. But I desire to point out that there is more than mere form at stake in this question. If this declaratory action is rightly instituted in the Sheriff Court, then the findings of this Court on questions of fact will be final, but in an action of declarator raised in the Court of Session our findings in fact would not be final. It is plain enough that the rights claimed by the petitioners must depend to some extent on fact, and the defenders have a legitimate interest to insist that the case shall not come before the Court in such a form as may interfere with their right of appeal. I therefore suggest that we should dismiss this appeal and affirm the judgment of the Sheriff-substitute.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT not having been appointed at the date of the hearing took no part in the judgment.

THE COURT pronounced this interlocutor:—"Find in terms of the findings in fact and in law contained in the interlocutor of the Sheriff-substitute, dated 13th October 1904: Affirm the said interlocutor, and of new dismiss the action, and decern: Find the pursuers liable, jointly and severally, in the expenses of the appeal."

KINMONT & MAXWELL, W.S.—ALEXANDER BOWIE, S.S.C.—Agents.

No. 110.
Mar. 17, 1905.
Cadell v. Allan.

HENRY MOUBRAY CADELL, Complainer (Reclaimer).—*Clyde, K.C.—Constable.*

CHARLES EDWARD ALLAN AND ANOTHER, Respondents.—*Campbell, K.C.—Chree.*

*Church—Glebe—Designation of Glebe—Excambion of Glebe—Effect of Decree of Presbytery sanctioning excambion of Glebe.*—Where a glebe is excambed the title to the new glebe flows from the excamber, and the decree of the Presbytery completing the title is not a judicial determination, but merely gives the sanction of the Presbytery to the transaction, and impresses the land given to the minister with the character and status of a glebe.

*Property—Title—Competition of Title—Glebe—Boundary—Foreshore—Minerals under Foreshore.*—In exchange for an old glebe, a new glebe bounded by the sea was acquired by excambion in 1817. The new glebe had originally formed part of a portion of the barony of Grange, known as the 24 acres.

In 1613 the 24 acres bounded by the sea had been feued by the proprietor of Grange to Bruce, the coal being reserved by the granter. In 1643 the granter obtained a Crown charter of resignation which contained a grant of the coal in the foreshore as a separate estate. In 1673 the proprietor of Grange, in consideration of a money payment, granted a charter of novodamus conveying the 24 acres (without reservation of the coal) to Bruce's successor, who in the same year took infeftment upon a precept contained in the charter.

In 1904 the right of the minister to the coal in the foreshore *ex adverso* of the glebe was challenged by the proprietor of Grange in a process of interdict brought by him against the minister's mineral tenants.

The complainer founded on the Crown charter of resignation of 1643, which contained a grant of the minerals in the 24 acres as a separate tenement, and contended that the charter of novodamus of 1673 merely gave of new what was given in the feu-contract of 1613.

The mineral tenants in answer founded on the novodamus of 1673 as conveying the coal in the 24 acres from the proprietor of Grange to Bruce's successor.

*Held* that the charter of novodamus of 1673 included the coal, and contained a valid grant by the proprietor of Grange of the 24 acres, without reservation, and that therefore the proprietor of Grange had no title to challenge the minister's right to the coal in the foreshore *ex adverso* of the glebe.

1st DIVISION. Lord Kincairney.

ON 30th March 1904 Henry Moubray Cadell, proprietor of the lands and barony of Grange, in the parish of Borrowstounness and Carriden, Linlithgowshire, brought a note of suspension and interdict against Charles Edward Allan, Stormont Castle, Strandtown, Belfast, and Robert Thomson Walker, mining engineer, Borrowstounness, who were the tenants under a mineral lease granted in 1902 by the minister of the parish of Carriden, with consent of the Presbytery, of the minerals in the glebe.

The prayer of the note craved the Court to interdict the respondents "from sinking pits or mines into, and from working, removing, or otherwise interfering with, the coal situated beneath the foreshore *ex adverso* of the minister's glebe of the parish of Carriden, in the county of Linlithgow."

The complainer averred that he held a continuous series of titles to the lands and barony of Grange, dating from a charter of resignation and novodamus granted by King James VI. in favour of John Hamilton, eldest son of Mr John Hamilton of Grange, dated 15th December 1615.

No copy or extract of this Crown charter was in existence, but the signature signed by the King at Newmarket on 15th December 1615,

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and registered in the Register of Signatures on 26th December 1615, contained a grant in favour of the said John Hamilton, his heirs and assignees, *inter alia*, of "all and sindrie coillis alsueill gryt as small now being or that sall happin to be fund and win in onie tyme cuming in the sey alsueill within as without the flude thairof perteneing to his Majestie and to the of his hienes croune be the actis of Parliament & lawis of this realme quhaireuir the samen ar or may be fund foiranent the haill boundis meithis and merchis of the landis of Grange Murehouss Littill Carriden and Stakkis with thair pertinentis or onie pairt or pairts thereof perteneing to the said Johne Hamiltoun lyand within the Srefdome. of Linlithgow with speall. and full power and libertie and preuiledge to the said Johne Hamiltoun and his foirsaids To serche seik and caus be serchit socht fund and win coil heuchis in the sea ane or mae alsueill within as without the sey flude foiranent the boundis of the landis abonespeit. with the pertinentis and to brek the grund for that effect in sic pairtis as thay sall think expedient and to use all ingeynis neidfull for wyning of the said Coilheuchis and thairupon and upon the haill coillis gryt and small to be win thairin to dispone at thair pleasr. in all tyme cuming."

The complainer further produced a precept under the Signet for the Crown charter of 1615 in favour of John Hamilton, dated 15th December 1615, and recorded in the Register of the Privy Seal, which contained a description in Latin similar to that in the signature.

An extract was also produced from the Crown Treasury Books, shewing payment of composition on John Hamilton's entry to Grange.

The complainer further produced a Crown charter of resignation, confirmation, and novodamus, dated 21st August 1643, which confirmed, *inter alia*, a previous Crown charter erecting the lands of Grange into a barony, and contained a grant of the coals *ex adverso* of the lands of Grange, Muirhouse, and Little Carriden," "within as well as without the seaflood."

It was admitted that the words "*ex adverso* of Muirhouse and Little Carriden" covered the portion of foreshore in dispute.

The complainer averred that he and his predecessors had proved and worked the coal beneath the foreshore *ex adverso* of his lands from time immemorial, but he did not aver that he had proved or worked the coal under the foreshore *ex adverso* of the glebe.

The respondents averred that successive ministers had been in use to exercise all right of ownership over the foreshore *ex adverso* of the glebe. "In particular, they have sold and used gravel therefrom, and constructed and used saltpans, and kept boats thereon."

The original glebe of Carriden was designed by the Presbytery of Linlithgow in 1629 out of the lands of Grange. In 1630 the Presbytery sanctioned an excambion of the glebe for other lands of Grange. In 1650 the Presbytery designed grass lands for the minister. In 1817 another excambion of the glebe was sanctioned by a decree of Presbytery, which set forth that "the sea is to be considered the boundary of the new glebe on the north." The excamber on this occasion was Sir George Hope of Carriden, and though, as it turned out, he was not at that time proprietor of the lands given in exchange, he subsequently acquired them in 1833 by a contract of excambion, with entry as at Martinmas 1817, with the true proprietor, the Duke of Hamilton.

The history of these various transactions with regard to the glebe is fully set out in the opinion of the Lord President.

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The respondents, with the view of shewing that the complainer had no title to the minerals as a separate estate, founded upon (1) a feu-contract dated 3d March 1613, by which Sir John Hamilton of Grange feued to Sir George Bruce of Carnock, 24 acres of arable land of Muirhouse and Little Carriden (from which the present glebe was got by the excambion of 1817), which were described as bounded by the sea on the north;* and (2) a charter of confirmation and novodamus of the same 24 acres, dated 11th July 1673, and granted by John Hamilton in favour of Sir Walter Seaton, who had come to possess the 24 acres. This charter of novodamus bore to be granted for a money payment and other good causes and considerations. It contained a grant of new of the 24 acres without any reservation of the coal, but it contained the clause quoted below,† which was founded upon by the complainer as importing a reservation of the coal by reference to the feu-contract of 1613.

The charter contained a precept of sasine, upon which infeftment was taken.

It was admitted that the new glebe obtained by excambion in 1817 was taken out of the "24 acres of arable land of Muirhouse and Little Carriden."

The respondents also founded upon a Crown charter, dated 1629, in favour of the Marquis of Hamilton, which contained a grant of the coals *ex adverso* of the whole barony of Carriden, of which the lands of Grange, Muirhouse, and Little Carriden, originally formed a part. The respondents were, however, in the opinion of the Court, unable to connect themselves with this title.

The respondents also relied upon a disposition of the 24 acres, dated in 1736, by John Hamilton of Grange, in favour of Robert Mirrie, but the Court was of opinion that this disposition conveyed the superiority of the lands only.

The complainer pleaded;—(1) The complainer having, under his

* The feu-contract contained the following clause:—"And notwtstanding of the setting in fewferme of the saids tuentie four aikeris of land in maner abonementioned wt. liberteis of making of herbereis & poirtis in maner foirsaid It is speciallie provydit heirby that it salbe lesum to the said Sr. Jon. his airis & assignayis to win coillis & coilhewis stane querrellis & to mak schell lyme vpoun the boundis of the said twentie four aikeris of land in all tyme cuing. except in theis pairtis & placeis of the samy qr. the saids salt pannis girnell houss herbereis bulwarkis & vyis warkis abonespeit. salhappin to be biggit & planttit the said Jon. his foirsaids alwayis refoundand & payand to the said Sr. George his airis and assignayis all damnage intest. & skaith that he or they salhappin to incur be casting of mynis wying of coillis coilhewis and wyning of stanes vpone the aikeris foirsaids."

† "And with power to make the following works as follows in the common language:—'To make open water waiffers, closemynes, cast langschotts and water passages' within any part of the said lands of Grange, Little Carriden and Muirhouse, which can in any way whatever promote the winning and digging of the said coals of Bonhard, and the transportation thereof to the sea and land through the said lands or any part of the same, and to place 'water engines or works upon any of the saids mynes, for conveying and drawing water' from the aforesaid coals and coalheuchs in all time coming, upon the express provisions introduced in favour of the late Sir John Hamiltoun of Grange, Knight, and his heirs and successors, especially mentioned in the contract and disposition of the said acres of lands by the said late Sir John Hamiltoun to the late Sir George Bruce of Carnok, knight."

titles, the sole and exclusive right to the coal beneath the foreshore and bed of the sea *ex adverso* of Carriden glebe, is entitled to interdict, as craved. (2) The respondents having unlawfully interfered with the complainer's rights, interdict should be pronounced as concluded for, with expenses. (3) The *prima facie* right to the coal in question being in the complainer, interim interdict should be granted.

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The respondents pleaded, *inter alia*;—(1) No title to sue. (2) All parties not called. (3) The complainer's statements are irrelevant. (6) The respondents' working of the coal under the foreshore being in virtue of a lease from the owners thereof, the note should be refused.

A proof was allowed, and led. The facts disclosed at the proof with regard to possession of the foreshore *ex adverso* of the glebe by successive ministers of Carriden related mainly to the removal of stones, gravel, and sand, for various purposes connected with the glebe, and the receipt of payments by the ministers for sand and gravel removed by other persons.

On 16th December 1903 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Repels the second plea in law for the respondents; finds that the complainer has not proved that he has right to the coal beneath the foreshore of Carriden glebe; repels the pleas in law for the complainer; sustains the sixth plea in law for the respondents; refuses the note, and decerns."*

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* "OPINION.—This is an action brought by Mr Henry Moubray Cadell, proprietor of Grange, concluding for interdict against the respondents working the coal beneath the foreshore of the glebe of the parish of Carriden, which is situated on the south side of the Forth, a short way below Bo'ness. The complainer does not claim the foreshore itself, but only the coal under it. In the suspension he also claims the coals under the bed of the sea, but the respondents stated that they had no lease of these coals, and had never intimated any intention of working them, and, in these circumstances, the complainer does not now press for interdict with regard to these coals. The respondents are lessees of the minister of Carriden and plead in his right; so that the question in the case is whether the minerals under the foreshore of or opposite to the glebe belong to Mr Henry Moubray Cadell under a title of property or to the minister as a portion of the glebe. The question is, to my mind, very difficult, and the title put forward by the complainer is involved and intricate.

"There seem to be two questions—(1) as to the minister's title, which it will be convenient to take first as being the simpler, and (2) as to the complainer's title.

"The minister's right, on which the case of his lessees the respondents depends, rests, of course, on the deed of designation of the glebe. The glebe of Carriden was designed in 1630, but the glebe so designed is not the present glebe, because an excambion or new designation was effected in 1817, on which new designation this question depends. After stating the heritors present or represented, and among them the ancestor of the complainer, and setting forth the procedure, the minutes of the presbytery bear that certain persons duly appointed had valued 'the minister's glebe at Carriden' (the old glebe) 'proposed to be given in exchange for the lands of Cuffabouts, &c., belonging to Sir George Hope of Carriden' (the new glebe), that they had found them of the same value, and that the presbytery had decreed that the old glebe should belong to Sir George Hope, 'and that the glebe shall consist of the parks immediately to the north and east of the church and churchyard of Carriden, the park lying to the south of the same usually called Cuffabouts, the park lying between the same and Pease-

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The complainer reclaimed, and argued;—The complainer's title to the barony of Grange was unimpeachable. The Crown charter of 1615 was not in existence, but the signature and precept for the charter had been produced, as well as the receipt for a payment of composition. There had also been produced a Crown charter of 1643. These titles contained a grant *per expressum* of the coal under the foreshore *ex adverso* of the barony lands, and it was admitted that the glebe originally formed part of the barony. The complainer and his predecessors had worked coal under the foreshore in different parts of the barony, though not *ex adverso* of the glebe. No doubt a portion of the barony, known as the "24 acres," had been feued out in 1613, but the coal had been specially reserved and formed into a separate tenement.[1] The absence of an express reservation of coal in the charter of novodamus of 1673 could not affect the previous reservation,[2] but in any event the clause [3] in the charter of 1673

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hill on the south, the triangular piece of ground lying between them and the road to Linlithgow on the west, amounting in all to 11 acres and 367 decimal parts of an acre, which shall be enjoyed by the present minister of Carriden and his successors in all time coming.' The minute, at the end of it, bears, 'It is at the same time expressly and particularly to be understood, though there is a dyke now erected between the northermost park and the road along the shore, that the sea is to be considered as the boundary of the new glebe on the north, and the minister of Carriden for the time being to be entitled to all rights and privileges connected with the same.'

"Since that date the glebe so designed has been regarded and dealt with as the glebe of the parish, and the former glebe has been regarded as having ceased to be so. No one has questioned the designation, and I think it is not questioned now.

"It may be that the proceedings in carrying through this designation were blundered. It bears to proceed on an exchange between the minister and Sir George Hope; but it does not appear from the titles produced that Sir George was proprietor of the lands stated to be excambed. These lands seem to have belonged to the Duke of Hamilton. This mistake passed unnoticed for a considerable time, but when it was discovered a contract of excambion was entered into between the Duke of Hamilton and Sir George Hope, apparently for the purpose, and certainly with the effect, of rectifying this mistake, whereby the Duke conveyed to Sir George the lands which had been declared to form the glebe. This was no doubt a considerable irregularity; but still I think it must be held to have been corrected by this excambion, whereby any flaw in the title to the new glebe, if there was one, was corrected, and, as the procedure passed without objection, I think it must be held that the glebe was effectually constituted. It has not been challenged, and no proposal has been made to attempt to reduce the proceedings, and I therefore regard it as the duly erected glebe of Carriden, and no question remains except as to its construction and effect.

"I understand that the measured space, 11·367 acres, does not include any part of the foreshore, and that if the foreshore be added it will be in addition to that measurement, and the complainer maintains that it cannot be supposed that it was intended in that way to increase, probably by as much again, the extent of the glebe; but I do not think that the mere

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[1] Dunlop v. Duke of Hamilton, May 13, 1885, 12 R. (H. L.) 65.

[2] Hope v. Hope, Feb. 20, 1864, 2 Macph. 670; Duke of Argyle v. Campbell, July 9, 1891, 18 R. 1094, *per* Lord Rutherfurd Clark, at p. 1103; Campbell's Trustees v. Corporation of Glasgow, March 20, 1902, 4 F. 752.

[3] Quoted *supra*, p. 608.

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imported a reservation of the coal by reference to the charter of 1613. The complainer's title to the coal in question was therefore sufficient until someone with a better title appeared.[1] The respondent's only title was the glebe. A glebe consisted of arable and grass lands, and it was incompetent to design foreshore or the coal under it as a glebe.[2] It was not competent to design a servitude[3] nor a right of salmon-fishing.[4] In *Gilmour* v. *Sutherland*[5] the circumstances were special, and no designation was produced. Further, a decree of Presbytery sanctioning an excambion had not the effect of an original designation. The decree merely impressed the excambed land with the character of a glebe, and confirmed the excamber's title to the old glebe. In particular the decree could not take anything except from a willing granter, nor could it transfer property which did not belong to the excamber.[6] In the present case the coal under the foreshore did not belong to the excamber, because it had been reserved in the

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addition of the foreshore can be held as a material addition to the extent of the glebe. It was truly (apart from the minerals) a piece of waste ground of very slight value, and the addition of it would have added very little to the value of the glebe but for the minerals. But I do not think it open to me to speculate on the intention of the designers of the glebe. I must give effect to the express, distinct, and emphatic expression of their intention, that in any case the sea is to be the boundary of the new glebe, and I think it must therefore follow that the foreshore is of necessity included in the glebe, because it is well settled that a boundary by the sea includes the foreshore.

"Whether the minerals under the foreshore were included in the glebe is a different question. But I am of opinion, on the whole, that they must be included. Probably little was known about them at the date of the designation, and nothing is said about them in the minute or the valuation. The glebe above the sea was valued without taking the minerals into account, and I can see no sufficient reason for treating the minerals in the foreshore differently. It may be that it was a piece of good fortune for the minister to find the minerals in the foreshore, or under his glebe, but I think they were part of the glebe which was designated, and that the designation cannot be interfered with.

"I am therefore of opinion that the minerals under the foreshore of the glebe are a portion of the glebe.

"If the minister have right to the minerals under the foreshore as part of his glebe, and if the designation of the glebe is not reduced, I am disposed to think that it must receive effect, and that it affords a sufficient defence to the respondents whatever the complainer's title may be.

"But without going into any close examination of the numerous titles

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[1] Magistates of Culross v. Geddes, Nov. 24, 1809, Hume's Dict. 554.

[2] Lord Reay v. Falconer, Nov. 14, 1781, M. 5151; Minister of Newton v. Heritors, 1807, M. *voce* Glebe, App. 6.

[3] Presbytery of Selkirk v. Duke of Buccleuch, Nov. 9, 1869, 8 Macph. 121, at p. 126.

[4] Ogston v. Stewart, March 26, 1896, 23 R. (H. L.) 16, at p. 21.

[5] July 20, 1900, 38 S. L. R. 561.

[6] Nairn v. Tweedie, 1605, M. 5143; Fraser v. Robertson, 1791 (unreported); Dalrymple v. Callander, July 11, 1827, 5 S. 935; Linning v. Baillie, 1709, M. 5145; Stewart v. Lord Glenlyon, May 20, 1835, 13 S. 787; Dalhousie's Tutors v. Minister of Lochlee, June 27, 1890, 17 R. 1060; Bain v. Lady Seafield, July 15, 1887, 14 R. 939; Wallace v. University Court of St Andrews, July 20, 1904, 6 F. 1093; Duncan's Parochial Ecclesiastical Law (ed. 1903), 468; Connell on Parishes, 383, 428.

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feu-contract of 1613. The respondents were unable to connect themselves with the Crown charter of 1629,[1] and the disposition in favour of Robert Mirrie[2] carried nothing but the superiority.[3] The respondents had not proved possession even of the surface of the foreshore by the minister, but in any event possession of the surface could not give a prescriptive right to the coal beneath the foreshore in competition with an express right to the coal as a separate tenement.[4]

Argued for the respondents;—The minister of Carriden had a good title to the foreshore and the coal under it. The terms of the designation of 1817 included the foreshore,[5] and in any event possession of the foreshore by successive ministers since 1817 had been proved.[6] The right of a minister to his glebe extended *a cœlo usque ad centrum*. It was competent to design foreshore as part of a glebe as well as coals and minerals[7] and salmon-fishings.[8] The minister's right to the glebe was not affected by the fact that the decree of 1817 was not an original designation, but followed upon an excambion.[9] The

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which have been produced, the print of which I have gone over several times, I am at least not satisfied that they make out the complainer's case. In the first place, I am not satisfied that they express a title to the minerals under the foreshore as different and separate from a title to the foreshore. I am not satisfied that, in any case, they give a title to minerals apart from the lands under which they lie. If that be so, then I do not think that they give a title to the foreshore opposite the glebe or the minerals under it (the point now in question). Clearly they do not, because it clearly enough appears that that foreshore belonged to the Duke of Hamilton. I do not discover that the lands of Grange, Muirhouse, Little Carriden, or Stacks formed part of the lands designed as glebe, or that any part of the foreshore of the new glebe ever formed part of the foreshore of Grange, Muirhouse, Little Carriden, or Stacks.

"I observe that 24 acres, part of the lands of Muirhouse and Little Carriden, to which so many of the titles refer, and the bearing of which on the case was not clear to me, I say I observe that these 24 acres were acquired by the Duke of Hamilton in 1742, and were, I suppose, the lands or part of the lands given in excambion to the minister on the occasion of the designation. But I cannot find any satisfactory proof that Mr Cadell was ever proprietor of any part of the lands given in excambion or of the foreshore, which then became part of the glebe, or of the minerals under that foreshore."

[1] *Supra*, p. 608.

[2] *Supra*, p. 608.

[3] Fleeming v. Howden, Nov. 6, 1868, 7 Macph. 79; Orr v. Mitchell, March 20, 1893, 20 R. (H. L.) 27.

[4] Lady Crawfurd v. Bethune, July 10, 1821, 1 S. 115; Lady Crawfurd v. Durham, June 2, 1826, 4 S. 665; Forbes v. Livingstone, Nov. 29, 1827, 6 S. 167, at p. 173, 3 Ross' Leading Cases, 409; Young v. North British Railway, Dec. 8, 1885, 13 R. 314, aff. Aug. 1, 1889, 14 R. (H. L.) 53.

[5] Campbell v. Brown, Nov. 18, 1813, F. C.; Culross v. Dundonald, 1769, M. 12,810; Culross v. Geddes, Nov. 24, 1809, Hume's Dict. 554.

[6] Young v. North British Railway, Aug. 1, 1889, 14 R. (H. L.) 53, *per* Lord Watson.

[7] Minister of Newton v. Heritors of Newton, 1807, M. *voce* Glebe, App. 6; Heritors of Kirkmabreck, March 25, 1861, 24 D. 1456; Dunward, Petitioner, Jan. 27, 1886, 23 S. L. R. 322.

[8] Gilmour v. Sutherland, July 20, 1900, 38 S. L. R. 561.

[9] Minister of Falkland v. Johnston, 1793, M. 5155; Officers of State v. Brunner, July 11, 1826, 4 S. 832, June 29, 1831, 9 S. 838; Dalrymple v.

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designation had remained unchallenged for eighty years, and the complainer's objection, now made for the first time, that the coal under the foreshore did not belong to the excamber, came too late.[1] The excamber had, however, a right to the coal. The reservation in the feu-contract of 1613 was ineffectual for want of proper specification, and was merely a personal right which was not inserted in the charter of novodamus of 1673.[2] In any event the novodamus of 1673 carried the coal, as it had not been reserved.[3] Further, the complainer had not produced a good title to the coal. The charter of 1615 had not been produced, and the complainer must prove the tenor of that deed if he desired to found on it.[4] As regards the Crown charter of 1643, founded upon by the complainer, the coal had already been given out before that date to the Marquis of Hamilton by the Crown charter of 1629.[5] The disposition of 1736 by John Hamilton of Grange in favour of Robert Mirrie[6] also carried the coal.[7] The fact that the complainer had worked coal under the foreshore in other parts of the barony was of no avail. The coal in question had been taken out of the barony, and a barony title could not cover as a pertinent anything outside the barony.[8]

At advising,—

LORD PRESIDENT.—This is an action of suspension and interdict directed by Henry Moubray Cadell, proprietor of the estate of Grange, against two gentlemen who have sunk coal pits in the foreshore *ex adverso* of the glebe of Carriden, in the county of Linlithgow, in which he seeks to have them interdicted from continuing to work the coal underneath the foreshore.

The complainer rests his title to object upon an express grant of the coals *ex adverso* of the lands of which the glebe forms part, which he deduces through a long series of titles, commencing, as he alleges, with a Crown charter of 1615. He does not allege any property in the foreshore itself, nor does he say that he has ever worked the coal at this particular place, although he does say that the express title to the coal is erected with other subjects into the barony of Grange, and that at other places of the barony of Grange he worked the coals therein.

The respondents produce a lease from the minister, with consent of the Presbytery, of coals lying under the foreshore *ex adverso* of and forming, as they allege, part of the glebe, but they do not allege that, prior to their own workings, there has been any working of the coal by the minister or his predecessors.

The Lord Ordinary has refused the note of suspension, and it is against

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Callander, July 11, 1827, 5 S. 935; Lockerby v. Stirling, June 25, 1835, 13 S. 978; Presbytery of Selkirk v. Duke of Buccleuch, Nov. 9, 1869, 8 Macph. 121; Bain v. Lady Seafield, July 15, 1887, 14 R. 939.

[1] Crawford v. Maxwell, 1724, M. 10,819; Williamson v. Mercer, 1789, 2 Hailes, 1062; Panmure, &c. v. Halkett, &c., June 29, 1860, 22 D. 1357.

[2] Liddall v. Duncan, July 12, 1898, 25 R. 1119.

[3] Stair, ii. 3, 15; Ersk. Inst. ii. 3, 23; Harvie v. Stewart, Nov. 17, 1870, 9 Macph. 129.

[4] Shaw v. Shaw's Trustees, June 13, 1876, 3 R. 813.

[5] *Supra*, p. 608.

[6] *Supra*, p. 608.

[7] Earl of Breadalbane v. Jamieson, June 16, 1875, 2 R. 826.

[8] Lord Advocate v. Hunt, Feb. 11, 1867, 5 Macph. (H. L.) 1.

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his judgment that the present reclaiming note is taken. The effective part of the Lord Ordinary's judgment consists in sustaining the respondents' sixth plea in law, which is in the following terms: "The respondents' working of the coal under the foreshore being in virtue of a lease from the owners thereof the note should be refused." It is true that the Lord Ordinary in the course of his note also says that he is not satisfied that the complainer has made out a title which would include the coal at all, and that he in consequence repels the whole of the complainer's pleas. But he does not go with any minuteness into the progress of the titles produced by the complainer, merely contenting himself with the statement that he is not satisfied that the complainer has on this matter made out his case. I think, therefore, that I am not doing him injustice when I say that the true ground of his judgment must be sought in the following passage:—"I am therefore of opinion that the minerals under the foreshore of the glebe are a portion of the glebe. If the minister have right to the minerals under the foreshore as part of his glebe, and if the designation of the glebe is not reduced, I am disposed to think that it must receive effect, and that it affords a sufficient defence to the respondents, whatever the complainer's title may be."

Before I proceed to examine this conclusion at which the Lord Ordinary has arrived, it is necessary that I should set forth in some detail the circumstances connected with the history of the glebe in question.

On page sixty-four of the joint print of documents there are to be found sundry excerpts from the minutes of the Presbytery of Linlithgow, which shew that on 16th July 1628, Mr Andro Keir, the minister of the church of Carriden, "craved a visitation and presented before the brethrein ane precept for designation off his manse and glebe from the Archbishop direct to the moderator, Mr Jhone Gibbesonn and Mr Thomas Spitall." The designation was duly appointed to take place on the 24th July, and accordingly on the 24th July we have a minute detailing the proceedings therein observed.

They were of a most formal character. After a sermon which treated of the duty and dignity of ministers, Mr Andro Keir was duly examined as to his doctrines, discipline, and conversation. These matters having apparently been found satisfactory, there was then produced a procuratory from the Archbishop. Upon this procuratory being read, public inquiry was made in presence of the whole gentlemen of the parish who were present as to whether anyone could testify "whether there was any vicarage or parsonage lands within the parish, or where any glebe appertaining to the kirk of old did lie." No testimony to the effect that there existed any such old glebe or church lands presently belonging to the benefice being forthcoming, the brethren signified to the gentlemen present that, according to the Act of Parliament and the precept direct from their Ordinar, they would take a course for the designation of the said manse and glebe before the third Thursday of November next, and that upon the nearest kirk land. This "course" or investigation seems to have been duly made, and on 18th February 1629 the parishioners interested are again convened to hear the formal designation of the glebe which had been selected. On 4th March 1629 we have this entry, "This day ane report is maid of the designation

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of the gleib off Cariddenn out off the landis off Grange neirest to the said kirk."

The precise situation of the glebe thus formally designed in 1629 we do not know. It must have been designed out of kirk lands for, as I shall have occasion to point out, it was not possible to design a glebe out of any other. The kirk lands which were chosen were those which were nearest to the kirk and seem to have been part of the lands of Grange. It is, however, immaterial what was the precise position of that glebe because of the events which are now to be detailed. Following the excerpts from the Presbytery records, we find that, on 3d March 1630, John Gibson in name of Sir John Hamilton of Grange proceeds to offer certain other lands of his, which he represents as being much nearer and contiguous to the church of Carriden than the lands originally designed, and he intimated that, if it was found that lands which he was now offering in exchange for the lands originally designed were not of the same value, he would be willing to submit to the arbitration of three or four honest skilled men of the parish, who should add as much more to the lands he was presently offering as would make the two parcels of land equal in value. The lands thus offered by Sir John were obviously lands nearer, as he says, and more commodious for the minister, but not having been church lands could not have been designated under the Act of Parliament under the original designation. This offer was entertained by the brethren with the advice of the minister, and they accordingly ordered a disposition and resignation of so much land to be made *ad remanentiam* and presented to them, that they "after advice finding it expedient may design it, and that thereafter a letter of excambion be made and subscribed by the Archbishop in favour of the said Sir John." Accordingly, on 17th March 1630, we find that this disposition and resignation of 4 acres 3 roods of the land of Little Carriden belonging to Sir John Hamilton of Grange, subscribed by the said Sir John, the fiar of Grange, and Alexander Bruce of Alvath for his interest, who had a certain part of the lands in feu-farm, was presented to the brethren, and they, being contented and satisfied therewith, ordained the moderator, Mr John Gibson, conform to a commission given him by the Archbishop, to go down in the afternoon and to design the said 4 acres 3 roods of land for the manse and glebe to Mr Andrew Keir. Then, on the 31st of March, we have another entry, that the moderator had reported that he had designed according to order, and that instruments were taken in the hands of a notary-public, and that Mr Andrew Keir had been put in possession of the manse and glebe by John Henderson in name and behalf of Sir John Hamilton and Alexander Bruce, conform to a procuratory given to the said John Henderson, whereupon the said Andrew Keir took possession at the hands of the said notary.

The situation of the glebe thus designed, which it will be observed was out of the lands of Little Carriden, has been probably identified with fair accuracy by the complainer and respondents, but again I do not detain your Lordships upon this matter, it being immaterial in view of what follows. The glebe remained the glebe of the parish, but on p. 73 of the joint print we have another excerpt from the Presbytery Minutes, which shews that twenty years after, in the year 1650, proceedings were taken for designing

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grass for the minister, an Act of Parliament in the meantime having been passed which allowed the minister a provision of grass over and above his glebe. From what followed thereafter I think it highly probable that the grass was designed at some place contiguous to the glebe. So matters remained for nearly 200 years. Turning to p. 104 of the joint print, we find that on 16th October 1817, the Presbytery of Linlithgow again met to deal with yet another excambion of the glebe of Carriden. The excamber this time was Sir George Hope of Carriden; although, as afterwards turned out, he was, curiously enough, not the proprietor of the lands which he proposed to give. The Presbytery duly appointed arbiters in order to judge of the relative value of the lands proposed to be given in exchange for the old glebe, and we have the report of the arbiters on p. 105. From this it appears that the glebe, as it then existed, consisted of 9·916 acres. Seeing that the original glebe was only a little over four acres, it warrants, I think, the supposition I have made, that the minister's grass had been designed at a place contiguous to the glebe, and that the whole glebe came to be known as the glebe, without distinction between the originally excambed glebe and the minister's grass which was added to it. In exchange for this Sir George Hope proposed to give part of the lands of Cuffabouts. Cuffabouts, we know from the titles, was by this time the name by which that part of what had originally been the lands of Little Carriden was called. The portion to be given extended to 11·367 acres. The final finding of the Presbytery is on p. 105, and is in the following terms:—"The Presbytery . . . Decree as they hereby do and have decreed that the old glebe of Carriden shall belong to Sir George Hope, his successors and assignees, and that the glebe of Carriden shall consist of the parks immediately to the north and east of the church and churchyard of Carriden, the parts lying to the south of the same usually called Cuffabouts, the park lying between the same and Pease Hill on the south, the triangular piece of ground lying between them and the road to Linlithgow on the west, amounting in all to 11 acres 367 decimal parts, which shall be enjoyed by the present minister of Carriden and his successors in all time coming. It is at the same time expressly and particularly to be understood, though there is a dyke now erected between the northernmost park and the road along the shore, that the sea is to be considered the boundary of the new glebe on the north, and the minister of Carriden for the time being to be entitled to all rights and privileges connected with the same."

No more conveyancing followed on this so far as the minister was concerned, but it is admitted that the minister was thereafter admitted to possession of his new glebe, and that he has possessed the same ever since. The respondents say that this pronouncement of the Presbytery was a decree by a competent Court designing the glebe to the minister, which glebe is described as having a sea boundary on the north; that a sea boundary is in law a conveyance *per expressum* of the foreshore; and that such a designation operates as a conveyance, from all and sundry, of the lands included in the designation. They plead, therefore, that the designation of the lands took the lands not only from Hope, if he was truly the owner thereof, but also, for the matter of that, from Cadell of the Grange, who had been convened

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to the process, and who as a matter of fact was personally present in the earlier steps of it; and that accordingly, so long as that decree stands unreduced, there is nothing more to be said. They say further that the decree, having been pronounced in the year 1817, is long ago unassailable under the law of the negative prescription. This view has been taken by the Lord Ordinary. All through his note he speaks of this transaction as a designation of the glebe. He holds that as long as that designation remains unreduced it must receive effect, and that no one can contend that the minerals underneath the lands falling within the designation were not carried, because the designation itself *proprio vigore* took them from the owner in whose hands they were. This view dispenses with the necessity of any further inquiry into the titles either of the complainer, as forming a competing title, or the title of the excamber, to see whether he had any right to give what, upon a just construction of the boundary given in the designation, he was proposing to give.

I am not satisfied that the case can be disposed of on what would be a very simple and easy ground. I think this view gives to the actings of the Presbytery a power and effect to which they are not entitled. But in order to consider this question it is, I think, necessary to examine with some care the series of statutes, by which Presbyteries in Scotland have power to design a glebe, and the light which is thrown by decisions upon those powers. The matter is dealt with by no fewer than seven statutes of the Scottish Parliament. They are conveniently collected, and the material provisions thereof set forth, in the well-known work of Mr Duncan on Parochial Ecclesiastical Laws. They may be said to be divided into two chapters—one from the Reformation down to 1644 and the other from 1644 down to 1663. In Pre-Reformation times the Church was amply provided with temporality of benefice. After the Reformation the claim of the Protestant clergy to succeed to the benefices of the Church was never admitted. And, accordingly, in the earlier of these statutes we find that the mischief, which was sought to be remedied, was the feuing out or letting on long leases of the manses and glebes, without making any provision for the incumbent who at the time was actually doing the work of the cure. The word "designation," which is first used in the Act of 1572, refers, not to the setting out of a glebe for the first time, but to the marking out by the Archbishop, Bishop, Superintendent, or Commissioner of four acres of land of the existing glebe lying contiguous to the manse to the said manse "if there be sa meikle."

It is quite certain that, up to 1644, the only source from which a glebe could be designed was church lands, although, if these church lands had in the meantime passed into other hands, the particular possessors for the time being were to be warned out. But in 1644 a new advance was made by legislation, and Presbyteries,—for this Act was passed during the second period of the temporary suppression of Episcopacy,—were given the power, where no glebe had been designed, or if designed had not been of the full quantity, to design a glebe of 4 acres of arable land, not only out of church lands but, if there were no church lands, out of whatever lands happened to be most commodious and nearest to the Parish Church and manse. It is perhaps well to note, as regards this Act, that in Mr Duncan's book

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there is an unfortunate misprint, the word "Kirk" in the excerpt from the Statute of 1644 being printed after the word "whatsoever" instead of the word "other," which is the proper word in the Statute. The other heritors of the parish, whose lands are not taken, are made liable proportionally to make recompense to those heritors out of whose lands the glebe has been designed. Up to this point there is no provision whatever for changing the glebe. Designation only takes place either if there is no glebe, or the glebe which is in existence is not of the sufficient extent of 4 acres. In 1649, it is true, another Act was passed which provided that, where glebes were far distant from the manses so that they could not be conveniently laboured in respect of their distance, those glebes should be changed and new glebes designed more commodious and nearer to the manse, as good in quality as the former, and not further than a quarter of a mile from the manse. But the power is given not to Presbyteries to effectuate these changes, but to the Parliamentary Commissioners for the Plantation of Kirks—the predecessors of the present Court of Teinds. Further, the Act fell under the rescissory Act, and it is exceedingly doubtful, to say the least of it, whether it was revived by the Act of 1663—(*Nairn* v. *Tweedie*,[1] and following cases).

Stair, who treats of the subject of glebes, ii. 3, 40, makes no mention of any such power; there is not a single case on the subject mentioned in Brown's Synopsis, and Erskine, as of date 1773,[2] mentions exchange only in connection with the case of the transportation of a church.

Notwithstanding, however, that there does not seem any statutory sanction for excambion, it is certain that from early times there grew up a practice of excambion. It is worthy of notice that the excambion in this case seems to be of earlier date than any case reported in the books. The first case I have been able to discover is the case of *Robertson* in 1791, not reported but mentioned in the notes of the older editions of Erskine, and commented on in Mr Duncan's book. The transaction in that case was dated 1752. The position of excambion has accordingly since that date been often recognised by the Court, and I entertain no doubt that it is a completely legal operation.

It is, however, a different question what is its precise legal effect. I am of opinion that Mr Duncan takes a just view of it (530, 2d ed.), "The transaction itself resolves into or presupposes an extrajudicial contract, and necessarily implies voluntary consent to the proposed arrangement on the part of the heritor whose ground is to be acquired as glebe as well as of the Presbytery."

I do not see how any other view can be fairly taken, and the matter may be tested by seeing to what lengths the opposite contention would lead. If this had been an original designation two things are certain, first, that the designation could not have been of greater extent than 4 acres; and, second, that foreshore could never have been designed as arable land; but here the arable lands are over 11 acres in extent, and included (upon the construction of the boundary which I for the moment assume) the foreshore. It is a startling proposition that this can be done by a third designation which

[1] M. 5143.

[2] Inst. ii. 10, 61, *ad fin.*

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could not be done by a first. But on the other theory all this is simple enough. In proper excambion the title flows from the excamber, and he can give whatever extent he thinks it worth his while to give in exchange for the glebe lands. A good illustration of such a subject will be found in the case of *Stewart* v. *Glenlyon*,[1] where the Dukes of Atholl had given a very large glebe in exchange for the old glebe which lay close to the Castle of Blair, and which they were therefore probably very glad to obtain as their own property.

The true view accordingly seems to be that the title to the land in a case of excambion flows from the excamber. The finding of the Presbytery does not give the land, it gives over the old glebe to the excamber, and it also impresses the new land with the character and status of glebe. Some important results flow from this, it pays no tithe, it need not be held by formal title; and it is emancipated from the claims of any superior, and holds blench from the Crown. Further than that, I do not think the finding of the Presbytery can go, and consequently it must, in my view, be quite ineffectual to transfer land, which is not the property of the excamber, behind the back of a person who is not a party to the deed of excambion. In other words, the difference between the position at an original designation and at a proceeding of excambion is this: At an original designation each heritor knows, or ought to know, that his land *may* be taken. And, if he allows his land to be designed, taken, and possessed for the years of prescription, he cannot be heard to say that it ought not to have been taken—*Dalhousie's Trustees* v. *Minister of Lochlee*.[2] At an excambion transaction, on the other hand, the heritor who is no party to the excambion deed is entitled to suppose that nothing will be transferred except what belongs to the excamber; and, if a question afterwards arises as to what has passed under the deed, he is entitled to treat it as he would any other competition of title.

For these reasons I am of opinion that the excambion of this glebe, sanctioned by the Presbytery in 1817, has not the effect contended for by the respondents and allowed by the Lord Ordinary. This, however, far from ends the matter. The excambion remains quite good as a conveyance, and we must construe the finding of the Presbytery just as we should construe a formal title. It is true that, in so far as it proceeded from Sir George Hope, it was at the time a conveyance *a non domino*. As there has been ample possession for the prescriptive period that would not in any event matter, so far as the landward portion is concerned, but at anyrate it was saved by a disposition from the Duke of Hamilton, who was by this time the real proprietor of the lands, and which accresced to the conveyance of the excamber. The first point therefore that arises is, did the lands conveyed include the foreshore? The matter cannot be said to be quite clear. It depends on the correct interpretation of the finding of the Presbytery, which I have already read to your Lordships, as the description in a title. On the whole, however, I think the respondent is right when he says that this does give the glebe a sea boundary, and it is now, I think, conclusively settled that a sea boundary is equivalent to an express conveyance of the foreshore. But, further, if there was doubt on the

[1] 13 S. 787. [2] 17 R. 1060, aff. 18 R. (H. L.) 72.

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matter, it is permissible to look to possession to clear it up. Now, I do not propose to go through the evidence which has been led. I shall only say that the evidence is in my view ample to shew that the minister here did possess the foreshore in such a way as to shew it belonged to him, and that the acts of possession are quite as strong as those that are said to be necessary by Lord Watson in the leading case of *Young* v. *The North British Railway Company*.[1] Now, if there were a competition for the foreshore itself this would end the matter. But the complainer points out that there is not a competition for the foreshore, but for the minerals under it; which minerals, he says, were long ago erected into a *separatum tenementum* from the foreshore, and to which he holds an express title. That being the state of the title, he says that the glebe title does not include a special title to these minerals, and that possession of the surface can never be effectual to prescribe a right in competition with an express title to the separate tenement of the minerals. Assuming the complainer's title to be as he says (and for the purpose of this argument I am bound to make this assumption), I think the complainer is right. I think that this is the result of the second case of *Forbes* v. *Livingstone*,[2] which I consider a binding authority. The whole law on the subject will be found in the two cases of *Forbes* v. *Livingstone*,[3] and the cases of *Lady Mary Crawfurd* v. *Bethune*[3] and *Lady Mary Crawfurd* v. *Durham*.[4] I do not say that these cases are without difficulty—at least in the case of *Crawfurd* v. *Bethune*.[3] But if *Crawfurd* v. *Bethune*[3] does not square with *Forbes* v. *Livingstone*,[2] the latter must prevail. It was a very carefully considered case—reconsidered by the whole Court on a remit from the House of Lords, and it was the unanimous judgment of a Court of Judges who knew more of such matters of conveyancing than it is possible for us to aspire to. The gist of the judgment may be found in one sentence which I take from the joint opinion of Lord President Hope and Lords Gillies, Mackenzie, Eldin, and Medwyn:—"Here we must not regard the possession of the surface of the land; for when coal is claimed in virtue of an infeftment not specially conveying the coal, but the lands generally without any reservation of the coal, in competition with an express reservation of coal in prior, and in themselves preferable, infeftments in favour of another party, the possession founded on for prescription must be that of the coal itself." This authority, so far as I know, has never been controverted or shaken; and with its authority I think the proprietor of the minerals could have been entitled to look on unconcernedly at any possession of the surface by others. The minerals themselves were never interfered with till the proceedings which at once gave rise to the present action.

This brings the state of the matter to this, that the complainer is entitled to prevail if he can shew that he is the proprietor of the separate tenement of minerals upon a title flowing from the Crown; but that the respondents, as in right of a title which, embracing the surface and with possession of the surface, would be good against anyone not holding that special title, are entitled to criticise the complainer's progress of title at any period they please.

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[1] 14 R. (H. L.) 53.
[2] 3 Ross' Leading Cases, 409.
[3] 1 S. 115.
[4] 4 S. 665.

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I therefore find myself obliged to apply myself to that minute consideration of the complainer's title from which the Lord Ordinary in his view of the case held himself excused.

The complainer begins with an express grant of the coal *ex adverso* of the lands of Grange, Murehouse, Little Carriden, and Stacks contained in a Crown charter which he alleges existed in 1615. He has not got the charter, but he has got the signature signed by the King at Newmarket, the precept under the signet, and an extract from the Treasury books shewing payment of the composition. The charter is to be in favour of John Hamilton, eldest son of Sir John Hamilton of Grange. It is not I think matter of dispute that *ex adverso* of Little Carriden and Murehouse covers the point in dispute. The charter was primarily a charter of the lands of Grange. I do not profess to discuss the steps, but I think all your Lordships are satisfied that the progress from this title, if it existed, is correctly made out to the complainer.

It is, however, quite enough for the respondents if they can at any stage put a blot in the progress so far as it affects the special conveyance of the coal. I think they have done so in a charter of confirmation and novodamus in 1673, for the proper understanding of which it is necessary to make some further explanation.

In 1613, two years before the alleged Crown charter of 1615 was granted, Sir John Hamilton of Grange feued out to Sir George Bruce of Carnock 24 acres of arable land of his lands of Murehouse and Little Carniden lying along the seashore, and described as bounded by the sea on the north. It is out of these 24 acres that the present glebe is taken, and there is no dispute as to that between the parties. Now, that was a sea boundary, and therefore carried the foreshore, and would have carried the minerals under it (if they belonged to the granter or came to belong to the granter by a subsequent title), were it not for a certain clause which your Lordships will find printed at p. 58 B-C, and which is in these terms:—"And notwtstanding of the setting in fewferme of the saids tuentie four aikeris of land in maner abonementioned wt. liberteis of making of herbereis & poirtis in maner foirsaid, it is speciallie provydit heirby that it salbe lesum to the said Sr. Jon. his airis & assignayis to win coillis & coilhewis stane querrellis & to mak schell lyme vpoun the boundis of the said twentie four aikeris of land in all tyme cuing. except in theis pairtis & placeis of the samy. qr. the saids salt pannis girnell house herbereis bulwarkis & vyis. warkis abonespeit. salhappin to be biggit & planttit the said Jon. his foirsaids alwayis refoundand & payand to the said Sr. George his airis and assignayis all damnage intest. and skaith that he or they salhappin to incur be casting of mynis wying of coillis coilhewis and wyning of stanes vpone the aikeris foresaids."

The respondents argue that this is not a good reservation of the coals for want of proper specification. I do not take that view. I think, looking to the law as laid down in *Dunlop* v. *Duke of Hamilton*,[1] that there is here a proper reservation of the coals in the subjects conveyed. These 24 acres passed into the hands of Sir Walter Seaton, and in 1673, on p. 74 of the print, we have a charter of confirmation and novodamus in favour of Seaton

[1] 12 R. (H. L.) 65.

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granted by the then Hamilton of Grange. Nothing need be said of the charter so far as it is a charter of confirmation, but I ask your Lordships' special attention to it, in so far as it is a charter of novodamus. The novodamus begins on p. 76 (B), and contains the recital of an onerous consideration, as follows:—"Moreover, I, for certain sums of money paid and delivered to me by the said Sir Walter Seatoune, and for divers other good causes and considerations moving me," and then proceeds to of new grant the lands, without inserting any reservation as to the coals, and it ends with a precept of sasine; and on this charter infeftment was duly taken, as is shewn by the instrument of sasine recorded on 2d October 1673, and printed on p. 80.

Now, the granter of this charter was *ex hypothesi* the owner of the reserved coal; and I am of opinion that when he granted a charter of novodamus of the lands without reservation of the coal, the coal necessarily passed under the general description of the lands. This all depends upon the true import of a charter of novodamus. No doubt a very ordinary use of the addition of a novodamus to a confirmation may be to replace a lost title or to cure a defective title. But it is also well settled that it is, in the words of Mr Bell (Conveyancing, 739), "the appropriate medium by which to express and complete a change in the prior contract between the superior and vassal in any respect."

In this respect it operates and must be construed as an original grant. Stair, ii. 3, 15, says as follows:—"In the charter by the King or subjects there may and useth to be inserted a clause *de novo damus*, which doth dispone the fee, as by an original right, in case the disponer's right should be found defective, . . . and therefore a novodamus in a bishop's charter from the King, disponing a patronage *pro omni jure*, was found to give the bishop's successor right to that patronage, though it was a laic patronage, without necessity to instruct that the bishop had any pretence of a title thereto before, but that the novodamus was as effectual as an original right." And Erskine, ii. 3, 23, is to the same effect:—"For a charter of novodamus is, in the judgment of law, an original right; and an original grant implies a release to the vassal from all burdens affecting the property previously to the date of it. One might imagine from the words of this clause that it ought to contain a grant of no subject which had not been made over to the vassal in a former charter, for the expression *de novo damus* seems to import that the right of that very subject had been formerly made over to the vassal, and that the superior then granted it to him of new; and indeed they are for the most part no more than renewed rights, yet it has been adjudged by repeated decisions that a charter of novodamus may be itself a first grant as well as the renovation of a former; and that every subject or right expressed in the clause of novodamus is deemed to be effectually conveyed to the vassal though there had been no antecedent title to it in his person."

There is a *dictum* by Lord Rutherfurd Clark in the *Duke of Argyle* v. *Campbell*,[1] which, if not sufficiently considered, might seem to be adverse to the view I have been expressing. His Lordship says that a charter of

[1] 18 R. at p. 1103.

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novodamus wherever doubt exists will be construed as commensurate with the previous titles. I think, however, that the doubt to which his Lordship here refers must be a doubt which is raised by the words of the charter itself, and I think this is clear by considering the cases which are cited in the *Duke of Argyle's* case,[1] and to which his Lordship was probably referring. They were the cases of the *Magistrates of Inverkeithing* v. *Ross*,[2] and *Earl of Perth* v. *Lady Willoughby de Eresby's Trustees*.[3] In the first of those cases the question was whether taxation of the entry of an assignee had been altered by a charter of novodamus, but the judgment of the Lord President is very distinctly put at the bottom of p. 52, and shews that he rested his construction of the novodamus upon the ground that the cause of granting the novodamus had been clearly expressed in the deed, and had to do with something quite other than the alteration of the holding. In the same way in the *Earl of Perth's* case[3] the question was not as to what was conveyed, but was a question whether the entail under a novodamus must be considered as contained in the procuratory flowing from a subject originally made, and accordingly, to be valid and effectual, it had to be registered in the Register of Tailzies; and whether the charter of novodamus flowing from the Crown could be held as constituting the entail. I think these cases go no further than this, that it is perfectly legitimate to look at other parts of the charter of novodamus to explain any ambiguity in the subjects conveyed. But here there is no ambiguity of the subjects conveyed, because the lands are conveyed and include the minerals, and accordingly I do not think that because the infeftment confirmed by the charter of confirmation contained the reservation, there is any right to construe the charter of novodamus, which is expressed in general terms, by importing a reservation which is not in it. It is, as I have said, legitimate to look at any other portion of the charter of novodamus, and accordingly the complainer here points to the expression used between A and B upon page 77, which is in the following terms:—"Upon the express provisions introduced in favour of the late Sir John Hamilton of Grange, Knight, and his heirs and successors, especially mentioned in the contract and disposition of the said acres of lands by the said late Sir John Hamilton to the late Sir George Bruce of Carnock, Knight."

I am satisfied that upon a just construction the provisions here meant are referable to the provision to make open waters and so on, and are not words of general application which would import reservation. Two other considerations go very strongly for holding the novodamus to be a full grant. The first I have already mentioned, viz., that there is a recital of a money payment for the charter, an altogether inappropriate proceeding unless something new was granted which had not been granted before. But further, there is the fact that the charter winds up with a precept of seisin. I need not remind your Lordships that this precept of seisin was entirely inappropriate to the charter in so far as it was a charter of confirmation. The existing deeds being thereby confirmed, the vassal was without anything more in a full position to grant either procuratory or precept. But with the novodamus, in so far as it operated a new grant, it was otherwise, and

[1] 18 R. 1094. [2] 2 R. 48. [3] 2 R. 538, aff. 5 R. (H. L.) 26.

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a precept of seisin was absolutely necessary if the grantee was ever to be infeft in the subjects for the first time granted. And accordingly I find without surprise that the title was after that completed by taking seisin upon the precept therein expressed. If nothing new had been granted, I look upon this proceeding as an entirely unnecessary performance. It is true there is a phrase in the precept of seisin "reserving as is above reserved." But besides the general well-known doctrine that the dispositive clause is the measure, and is not to be cut down by phrases in executory clauses, I should refer this to the only reservation in terms, *i.e.*, the reservation of the King's Highway. It is strictly inappropriate altogether, as there is no reservation of any sort in the novodamus grant, and, as I have explained, the precept of sasine is only referable to that grant. My opinion therefore on the whole matter is that Hamilton of Grange, being proprietor of the coal and superior of the lands when he gave a charter, not only of confirmation of the lands but also of novodamus, and granted of new the lands without reservation of the coal, cannot now be heard to say that the coal is not part of the grant. This of course disposes of the case, for it kills the title of the complainer. As a matter of fact I think the respondents have shewn that the title thus given under this charter of novodamus did pass to the Duke of Hamilton, and by accretion became good to Sir George Hope, who was the excamber of the glebe of 1817. But, as I have already pointed out, I do not think this matters, because the minister has a perfectly good title upon possession if he is not confronted by somebody having a separate title to the minerals.

This disposes of the case, but there are one or two other matters on which I think it right to give an opinion, as it is possible this case may go elsewhere and the view I have expressed might not be considered sound. I do so all the more readily as on these other points I am in favour of the complainer. It was said by the respondent that the complainer has not produced the original charter of 1615; and that he cannot assume that he would be able to substantiate that charter in the only formal way, viz., by an action of proving the tenor, in which action he would have to call the Crown and the Duke of Hamilton, both of whom would perhaps have a good deal to say in the matter. If that were so, I think this is a formidable objection. But I do not think it matters, for this simple reason. Leaving out of view the charter of 1615, the respondent is able to connect himself with a Crown charter of 1643. Now, the only difference between the date of 1615 and 1643 as regards the complainer's title is that there has been produced a Crown charter in favour of the third Marquess of Hamilton of date 1629, which also has a special title to the coals *ex adverso* of the whole barony of Carriden, of which it seems there is little doubt that the lands of Grange, Murehouse, and Little Carriden originally formed a part. But I think this is immaterial, because the respondents are totally unable in any way to connect themselves with that title. Now, although if the title of 1643 flowed from a subject it might be sufficient to shew an antecedent grant by which that subject had parted with it to somebody else, this is not the case with the Crown. There is always enough left in the Crown to give a good title, and accordingly in 1643 the Crown charter is a perfectly good title, unless something else better—that is to say prior—

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can be shewn flowing from the Crown by the person objecting. Accordingly, the complainer cannot have the Hamilton title pled against him, except by somebody who can connect himself therewith. The other matter depends upon the effect of a disposition of 1736 by Hamilton of Grange in favour of Robert Mirrie, but without going at any great length into that deed I am of opinion that upon the principles laid down in *Fleeming* v. *Howden*,[1] and *Orr* v. *Mitchell*,[2] the said disposition is a conveyance of the superiority and nothing more.

On the whole matter, while, as I have explained, not agreeing with the grounds of the Lord Ordinary's judgment, I have come to be of opinion that the result arrived at is right, and I think we should adhere to the Lord Ordinary's interlocutor.

LORD ADAM concurred.

LORD KINNEAR.—I entirely concur in your Lordship's opinion, which I have had the advantage of reading. Anything that I can say will, I fear, be mere repetition of what has already been said, but since the question is important and presents some points of difficulty, I think it may be right that I should express, in my own words, the view I take of what I conceive to be the main points for consideration, without attempting to repeat anything like an examination in detail, either of the titles or the principles of law that are applicable to the case.

In the first place, I agree with your Lordship's view as to the first point which seems to me to arise, that the respondent is in exactly the same position in a competition between him and the complainer as if he had obtained a conveyance from Hope of Carriden in 1817, and possessed upon that conveyance to the same extent as he has possessed upon the designation of the glebe. He derives no advantage from the so-called designation except in so far as it gives him a title of possession without direct conveyance and without infeftment. Mr Campbell argued that the designation, being the act of a competent Court, was final and conclusive as to the right of the benefice to everything which the minute of Presbytery purported to design, irrespective of any defect or limitation which might be shewn to attach to the right and title of the landowner from whom the lands of the glebe were derived. The argument was that a designation following upon a voluntary contract of excambion has exactly the same effect, as concluding the whole question of right between the benefice on the one hand and a landowner on the other, as if it had been a designation in the proper sense, in the exercise of the statutory powers which were conferred upon the bishops, and which have been held to be transferred to the Presbytery. But I know of no authority to support that proposition, and I think it is inconsistent with legal principle. I take the result of the examination which your Lordship has made of the statutes and decisions to be clearly this, that when a full and sufficient glebe has once been designed by a Presbytery, there remains no right whatever in the Presbytery to design anew to the effect of taking land from anybody but a willing granter, so as to substitute the new for the old. I do not think it necessary to consider

[1] 6 Macph. 782. [2] 19 R. 700, affirmed 20 R. (H. L.) 27.

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the rescinded Act of 1649, because it is not alleged that the Presbytery proceeded under that statute, or that its conditions were satisfied. But the general rule, as I have stated it, was applied in *Linning* v. *Baillie*,[1] and *Nairn* v. *Tweedie*,[2] and I do not find in any of the decisions to which your Lordship has referred, and which I have examined, any indication of any law to the contrary. But the statutory powers of the Presbytery were exhausted in 1629 and 1630, and after that they had no more power to take land from a heritor for the purpose of turning it into a glebe than the minister himself would have had. It is quite true that a practice has grown up by which glebes have been excambed for other land in the same parish, with the sanction of the Presbytery, and the excambed land has been thereafter designed by the Presbytery as glebe in place of that given up by the other excamber. But that kind of transaction rests upon voluntary contract and nothing else. The Presbytery had no kind of power or authority to add anything to the right of the landowner from whom they had excambed. They have no statutory power in the matter at all, and the sole source of the right of the benefice to the new land must be found in the right of the granter of the new land, which he gives in exchange for what the Presbytery and the incumbent of the benefice chose to give. The right of the grantee must of necessity be limited by the right of the granter unless it can be shewn that there is some overruling power or authority given by Parliament which will enable the Presbytery to convey from an unwilling heritor land he does not choose to give, or to carry land from an ignorant heritor by a conveyance to which he is no party. That appears to me to be the view taken in all the cases, down to the most recent case of *Bain* v. *Seafield*,[3] of the meaning and real effect of a voluntary contract of excambion between the incumbent of a benefice with the sanction of the Presbytery and the private landowner. The case of *Stewart* v. *Lord Glenlyon*[4] is a good example, because the benefice was found to have right to a large tract of land which the Presbytery could not lawfully have designed as glebe land, just because the landowner had given it in excambion for the glebe. The intervention of the Presbytery seems to me to serve two purposes, and two only. In the first place, it fills up what the authority of the incumbent himself falls short of, in disponing the glebe land. An incumbent of a parish has no power to alienate that or any other Church property, but the Presbytery, as the guardian of the benefice, may sanction a transaction of that kind which they, in their discretion, are satisfied is for the benefit of the benefice; and therefore their intervention, in the first place, supplies the authority which the incumbent of the benefice does not in himself possess; and in the second place, I think it is settled, by a series of decisions, that the consequent designation by the Presbytery of the new land of the glebe in the place of the old is, like the original designation, equivalent for the purpose of title, to infeftment. It impresses, as your Lordship said, on the new land, the character of glebe land, and therefore the benefice has acquired, by the transaction, a good title of possession upon which a right may be prescribed; but the prescrip-

[1] 1709, M. 5145.
[2] 1605, M. 5143.
[3] 14 R. 939.
[4] 13 S. 787.

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tive possession which follows must be exactly the same as the prescriptive possession which would follow upon a direct conveyance from a private landowner to a purchaser. This disposes of Mr Campbell's argument on the negative prescription and the case of *Paul* v. *Reid*,[1] because the designation is no judicial determination which must be set aside by reduction, but a mere link in the progress of titles which must stand or fall by its own merits in a question with the competing progress. The action, therefore, really resolves into a competition of titles, except in so far as the respondent may be able to say that he has had prescriptive possession upon the title constituted by the contract of excambion, and consequent designation which will fortify his right so as to exclude the competition of any earlier title. That raises the next most important question in the case, as to what kind and extent of possession upon the excambion is necessary to establish a valid title to the minerals in dispute. Now, I think that for the purpose of determining that question, it is necessary in this case to look, in the first place, at the competing titles, because the question of the extent of possession really depends upon whether the complainer has been successful in shewing that at the time when the possession of the incumbent of the benefice began, the estate of minerals under the foreshore was a separate tenement, separate, I mean from the surface of the land, or not. If the minerals were separate from the land at the time the ministers' possession of the land began, then I think with your Lordship that the case of *Forbes* v. *Livingstone*[2] is conclusive against any case that the respondent might make of the acquisition by prescriptive possession of a right to the minerals, by the mere possession of the surface of the foreshore. If, on the other hand, the minerals and the surface were not separate estates, but if the surface were conveyed with the minerals under it in the ordinary form, so that the whole subject passed by one conveyance under a sufficient title, then the distinction taken in *Lady Mary Crawfurd* v. *Bethune*[3] would apply, and the possession of the land must then be treated as possession of the whole undivided estate, including the minerals below it. I think that view is entirely consistent with the opinion of the Lord President and Lord Gillies in the case of *Forbes* v. *Livingstone*,[2] because the whole point of their reasoning depends upon this—that you cannot prove your right to one estate by possessing another. They start from the proposition that the estates are separate, and they say that in order to acquire your title to each you must prove separately your possession of each. That seems to be entirely consistent with the general principle of law. But the moment you get rid of any difficulty created by the separation, the question assumes a different aspect altogether, and is whether you do not possess the whole estate by possessing part of it, even although you have not exercised every right and power which your right of ownership in that entire estate would have given you. In that view, when you have a conveyance of land from which the minerals have not been separated, then the working of the minerals is *res merae facultatis* which the landowner can exercise or not as he pleases, but his failure to exercise it can throw no doubt upon his right under his title to the land. Therefore, it seems to me, as your Lordship has explained, that

[1] F. C., Feb. 18, 1814. [2] 6 S. 167. [3] 1 S. 115.

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at this part of the case, the true question is whether the minerals under the piece of foreshore in question were or were not a separate estate. Now, I think that the one and conclusive answer to that question is afforded by the charter of novodamus. My own view, which so far coincides with that of your Lordship, is that the complainer has succeeded in shewing that he had a good title to the minerals in question as a separate estate under the charter of 1643. I should by no means be disposed to attach much weight to the signature for a charter in 1615, because the signature, so far as we know, was not followed by the granting of a charter, or, at all events, it is not shewn that any charter was granted, and I am not disposed to hold that we can infer, as matter of fact, that because a signature had been obtained a charter in terms of the signature had also been granted by the Crown. But then, for the reasons your Lordship has given, I think that of no importance, because there is certainly a perfectly good title beginning in 1643. But then, the question is whether the separation effected by that charter between surface and minerals was put an end to, and the entire estate, including the surface and minerals, conveyed by the charter of novodamus of 1673, and I think that it was. I do not think it necessary to detain your Lordships by going over again the terms of the charter. I entirely agree with the construction your Lordship has put upon it, and I only say that I cannot entertain any doubt as to the legal effect of a charter of novodamus, if it be clear upon the construction of the language used in it that it conveys something which had not been conveyed by an original grant. I take it to be quite settled law that if a superior who has once granted out lands desires to add anything to the right he had originally created, or to make any alteration in favour of his vassal, or for that matter in favour of himself upon the grant as originally constituted, the right way to do it is to grant a charter of novodamus; and it is a matter of ordinary style and perfectly familiar in conveyancing that the confirmation of previous infeftments is combined with a novodamus when the superior intends to make any such new grant as I have supposed.

I should have had very great hesitation in saying so much, or at all events in saying it with any confidence, if I thought that it was inconsistent with the *dictum* of Lord Rutherfurd Clark, because the authority of that learned Judge, upon any question of conveyancing, has so much weight, and certainly so much weight with me, that if I thought that he really intended to convey something inconsistent with my own opinion, I should be much more disposed to believe that my opinion was wrong than that his *dictum* was erroneous. But then, I do not think that the observation which fell from him will bear the construction which the complainer's counsel have endeavoured to put upon it. The rule of construction to which he refers he mentions merely for the purpose of dismissing it as of no consequence to his argument, and therefore it is not impossible that it may have been expressed with something less than his usual precision in laying down a doctrine of law upon which he means to proceed; but apart altogether from that consideration, I think the true meaning of it is exactly what your Lordship has explained. Lord Rutherfurd Clark says that when a doubt arises as to the true meaning of a charter of novodamus, then

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you must construe the charter with reference to the previous grants, and that may be perfectly consistent with sound principles of construction, for the reason which is explained by Lord Stair in the passage which your Lordship also read. But then, the question is what is the meaning of a doubt arising, and I agree that must mean a doubt arising upon the face of the charter of novodamus itself. Now, a material point to my mind to exclude any doubt of that kind—any doubt which ought to send us back to the previous writs—is that the novodamus starts, in terms, by the announcement of the granter's intention to make a new departure. He begins by confirming his former infeftments, and then he goes on to say that in respect of certain sums of money paid and delivered to him, and for diverse other good causes and considerations moving him, he makes a new grant. That seems to me to bring in as clearly as possible the one consideration for granting a novodamus, which makes it clear that the granter intended something more than the mere renewal of former rights, because he has stated the payment of money as his reason for giving something which professedly he had not given before. On that point therefore, as on the others, I agree with your Lordship. Then, I agree also that the legal effect of that consideration is that we now have lands and minerals well united in one estate, and that the complainer's point upon the separation of the two has completely gone. If the respondent's title can be connected with the charter of novodamus, through the grant of Hope of Carriden, fortified by that of the Duke of Hamilton, he has a perfectly good and effectual title to the foreshore. I think with your Lordship that the connection is made out. But if it is not, the designation is still a good title to found a prescriptive right; and since the land and the minerals are shewn by the novodamus to have been reunited into one estate before the designation or the excambion upon which it proceeded, it follows that if the minister and his predecessors have possessed the land of the foreshore in virtue of their title for forty years, they have possessed land which includes minerals, and have acquired a good prescriptive right to the whole estate; and I think that is the true legal effect of the whole series of titles and of the evidence of possession.

THE COURT adhered.

CADELL & WILSON, W.S.—PURVES & BARBOUR, S.S.C.—Agents.

No. 111.
May 12, 1905.
Ellis v. National Free Labour Association.

WILLIAM ELLIS, Pursuer (Respondent).—*Watt, K.C.—Trotter.*
THE NATIONAL FREE LABOUR ASSOCIATION, AND OTHERS, Defenders (Reclaimers).—*Clyde, K.C.—W. Thomson.*

*Reparation—Slander—Slander by Servant—Liability of Master—Association.*—A master is liable for a slander uttered by his servant while acting within the scope of his employment, although without special instructions. So *held* where the master was a voluntary association.

*Issue—Slander—Slander by Servant.*—Where the pursuer in an action of slander alleged that a letter containing defamatory expressions had been written by the defenders' secretary in the course of their business, the Court *approved* of an issue "whether the defenders by their general secretary and manager wrote and dispatched" the letter complained of.

*Reparation—Slander—Written Slander—Production of writing com-*

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*plained of—Process.*—It is not necessary as a condition of an issue being allowed in an action for written slander that the writing complained of should be produced by the pursuer.

*Reparation—Slander—Innuendo.*—In an action for slander the pursuer complained of the circulation of a pamphlet by the defenders (a free labour association), in which it was stated that the pursuer had been dismissed by the defenders for, *inter alia*, "withholding moneys belonging to the" defenders "contrary to the byelaws" of the association. The pursuer proposed an issue in which he innuendoed this expression as representing "that pursuer had been guilty of dishonestly appropriating money."

*Held* that the expression complained of could not reasonably bear the innuendo proposed, and issue *disallowed.*

1st Division. Ld Stormonth-Darling.

WILLIAM ELLIS, at present General Secretary of the Provincial Free Labour Association, at 163 Great Hamilton Street, Glasgow, brought an action of damages for slander against the National Free Labour Association, carrying on business at 4 Garscube Lane, Cowcaddens, Glasgow, and John Chandler and others, the only known directors and managers and members of the association, and as representing it.

The pursuer averred, *inter alia*, that prior to March 1904 he had been District Secretary of the Glasgow branch of the defenders' association, and that he resigned on 8th March 1904; (Cond. 4) that on 15th March 1904 the defenders through their General Secretary and manager, W. Collison, wrote and sent to C. Houldsworth, a servant of the defenders, who then resided in Glasgow, a letter in these terms,—"I find I cannot finish my business here to-day . . . Keep your eye on the office and Ellis all day and report to me all that takes place. I shall see a good firm of solicitors on my arrival, and apply for a warrant for the arrest of Ellis for withholding the money Thursday morning." "The said letter was written by their secretary on the instructions of the defenders in the course of their business, and in the supposed furtherance of their interests. The statements in said letter are of and concerning the pursuer, and are false and calumnious, and were maliciously made by the defenders to gratify their feelings of ill-will towards the pursuer. Said statements represent, and were intended to represent, that the pursuer had been guilty of such criminal conduct as warranted his arrest and imprisonment, and that he had dishonestly appropriated money belonging to the association"; (Cond. 5) that on 12th April 1904 the defenders circulated throughout Glasgow a pamphlet containing, *inter alia*, the following statements:—"At a meeting of the Executive Council of the National Free Labour Association held at the Chief Office on Friday, March 11th, 1904, Mr W. Ellis, District Secretary of the Glasgow Branch, was summarily dismissed. The reasons for so doing are best summarised in the terms of the resolution proposing his instant dismissal, which was unanimously carried and promptly acted upon. The resolution was as follows:—'That Mr Ellis be summarily dismissed from the employment of the association for general and continuous disobedience of orders, erratic and insolent behaviour, withholding moneys belonging to the association contrary to the bye-laws, together with a contemptuous disregard of the instructions of the Executive Council through their representative the General Secretary'." "The statements in said pamphlet are of and concerning the pursuer, and are false and calumnious, and were maliciously made by the defenders in the knowledge that they were false. Said statements mean and imply, and were intended by the defenders to mean and imply, that

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pursuer was unfit for the post he held, was flagrantly disobedient as a servant, and was moreover utterly untrustworthy and guilty of dishonest appropriation of money belonging to the defenders."

The defenders lodged defences in which they stated, with regard to the letter referred to in cond. 4, that it was not in their possession, and that it was a private letter written by Collison to Houldsworth, of which the defenders had no knowledge. They called on the pursuer to produce it.

The defenders pleaded, *inter alia*;—(2) The pursuer's averments are irrelevant, and insufficient to support his pleas.

By interlocutor, dated 8th March 1905, the Lord Ordinary (Stormonth-Darling) approved of the following issues, and appointed the same to be the issues for the trial of the cause:—

(1) and (2) (Two issues which were ultimately not objected to, and which referred to another alleged slander to which it is not necessary to refer in this report).

"(3) Whether, on or about 15th March 1904, the defenders' general secretary and manager, with the authority of the defenders, express or implied, wrote and despatched to Mr C. Houldsworth, now residing at 17 Burr Street, Lower East Smithfield, London, the letter printed No. 2 in the appendix hereto [being the letter referred to in cond. 4, and quoted *supra*]? Whether the statements in said letter are of and concerning the pursuer, and are false and calumnious and were made maliciously, and represent that pursuer had been guilty of such criminal conduct as to warrant his apprehension, to the loss, injury, and damage of the pursuer? (4) It being admitted that on 12th April 1904 the defenders caused to be sent to subscribers and members of defenders' association the pamphlet printed No. 3 in the appendix hereto [being the pamphlet referred to in cond. 5, and so far as material quoted *supra*], which pamphlet was duly received by them—Whether the statements in said pamphlet are of and concerning the pursuer, and are false and calumnious, and were made maliciously, and represent that pursuer had been guilty of dishonestly appropriating money, to the loss, injury, and damage of the pursuer?" No. 5 related to the sending of the same pamphlet to certain other persons named.

The defenders reclaimed, and also gave notice of a motion to vary the third issue by deleting the words "with the authority of the defenders, express or implied," and to substitute therefor the words "on the instructions of the defenders."

Argued for the defenders and reclaimers;—(1) The third issue should be disallowed. The letter founded on was not produced, and no attempt had been made to recover it by diligence. No explanation was offered of its not being produced. No issue should be allowed till the letter was produced.[1] This was the rule of practice. If the issue were not disallowed it should be varied as proposed by the defenders. The pursuer averred, and it was his case, that the letter was written on the defenders' instructions. (2) The words founded on in the fourth issue could not reasonably bear the innuendo proposed. All that was said was that the pursuer withheld moneys contrary to the bye-laws.

Argued for the pursuer and respondent;—(1) It was not necessary as a condition of an issue being allowed that the letter containing

[1] Rose v. M'Leod, May 27, 1824, 3 S. 79.

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the expressions complained of should be produced, or that the pursuer should have taken steps to recover it. All that was necessary at this stage was that the purport of the letter should be set forth.[1] The issue should be allowed as approved by the Lord Ordinary. It was not necessary that the letter should have been written "on the instructions of the defenders." If these words had been omitted the averment would have been quite relevant. A corporation or association was liable for a slander uttered by their servant in the course of his employment, although without special instructions.[2] (2) The words founded on in the fourth issue could reasonably bear the innuendo proposed, and the issue should be allowed.

LORD PRESIDENT.—In this case the defenders make no objection to the first and second issues which have been allowed by the Lord Ordinary. As to the third issue, there is not only the objection on the reclaiming note to the allowance of this issue, but there is also the question raised by the motion to vary it, by the deletion of the words "with the authority of the defenders, express or implied," and the substitution therefor of the words "on the instructions of the defenders." I do not think that either of the forms of words proposed is the appropriate issue for bringing this question before a jury. It is impossible to predicate what may be the result of the inquiry into the relationship between the defenders and the writer of this letter, but so far as relevancy is concerned, in the case in the Privy Council to which we were referred, *Citizens' Life Assurance Company* v. *Brown*,[2] it was held quite clearly that a servant acting within the scope of his employment may issue a slander or a libel involving liability on his master, just as he may commit any other act on which an action for reparation against his master could be founded. But the question in such a case is always, was the servant in doing what is complained of acting within the scope of his employment or not; and so I think we should adopt the suggestion that was made by Lord M'Laren, and alter the issue so that it will run: "Whether, on or about 15th March 1904, the defenders, by their general secretary and manager, wrote and despatched" the letter, &c. That will leave it quite open to either side to prove their respective contentions, either that the writing of the letter fell within the scope of the secretary's employment, or that it was merely a private letter, and one for which the employers are in no way responsible.

As to issues four and five, which refer to the pamphlet, I am bound to say that I do not see how, under any fair interpretation, the words of the pamphlet can be held to bear the innuendo that is sought to be put upon them. All that is said is that the pursuer withheld moneys contrary to the bye-law, the bye-law being that all money should be paid into the chief office the same day as received. It is absurd to suggest that this statement contains an accusation of theft against the pursuer, and it seems to me it would be difficult to devise clearer language than this for expressing the breach of a bye-law. I am therefore of opinion that issues four and five should be disallowed.

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[1] Stephen v. Paterson, March 1, 1865, 3 Macph. 571, 37 Scot. Jur. 284.
[2] Citizens' Life Assurance Company v. Brown, [1904], A. C. 423.

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LORD ADAM.—I am of the same opinion. I think the proper form for the third issue is as your Lordship has suggested. If the letter complained of was written by the secretary within the scope of his employment, the defenders will be liable for it; but if it was not within the scope of his employment, then they will not be liable.

The only other remark I desire to add is as to the contention that the issue should not be allowed till the letter is produced. I know of no authority for that contention. There is no difference in our law as to the proving of a written or spoken slander. The pursuer must prove, whether by writ or parole, that the words relied on were used. That is a matter of proof. The only question now before us is whether the principal letter must be produced before an issue is allowed.

On the issues four and five I also agree. All that is averred is that the defenders issued a pamphlet in which they stated that the pursuer had been dismissed for, amongst other reasons, "withholding moneys belonging to the Association contrary to the bye-laws." The pursuer says that that meant that he had been guilty of appropriating the moneys. I think it is quite the contrary, and that the words mean that there had been a difference of opinion on the interpretation of the bye-laws. I think the innuendo is not reasonable, and that the issues should therefore be disallowed.

LORD M'LAREN.—I agree with your Lordship and also with the additional observations of Lord Adam. If there were a different rule as to spoken and written slander—if, as we know is the case in the sister country, no action would lie for spoken slander unless for special damage—there might be some ground for demanding the production of the writing complained of before an issue was allowed. But there is no such distinction in our law. It suffices if the pursuer at the trial proves the writing of which he complains, just as it is sufficient in a case of spoken slander to prove that the defamatory words were uttered.

LORD KINNEAR.—I agree as to the objection that the letter referred to in the third issue has not been produced. Assuming that the words complained of are slanderous, I think all that is necessary for relevancy is that the pursuer should aver that the letter containing these words was written and uttered by the defender, and from what the Lord President is reported to have said in the case of *Stephen* v. *Paterson*[1] it does not appear that anything more was thought to be necessary in that case. Admitting the relevancy, the letter must in general be produced to prove the slander, but it is not necessary that the writing should be produced as a condition of an issue being allowed.

As to the form of the third issue, I agree with your Lordship. The point is regulated by the rule expounded by Mr Justice Willes in *Barwick* v. *English Joint Stock Bank*,[2] that an employer will be answerable for a wrong committed by his servant in the course of his service and for the master's benefit, although the particular act has not been specially authorised. The words proposed by your Lordship will raise the question at issue.

[1] March 1, 1865, 3 Macph. 571, at p. 572.

[2] (1867) L. R., 2 Ex. 259.

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As to the fourth and fifth issues, I agree with your Lordships. I will only add that when the pamphlet complained of says that the pursuer "withheld moneys contrary to the bye-laws," it charges a breach of bye-law and not an offence against the criminal law of the country, and therefore it cannot reasonably bear the proposed innuendo.

LORD PRESIDENT.—I omitted to mention the technical point that was raised as to the production of the letter. On that point I agree with your Lordships. I have looked into the Session Papers of *Rose* v. *M'Leod*,[1] and it is quite clear that in that case the Court never had the actual terms of the letter before it.

THE COURT varied issue No. 3 so as to make it read, "Whether, on or about 15th March 1904, the defenders, by their general secretary and manager, wrote and despatched," and so forth as in the issue No. 3, quoted *supra*, and disallowed issues No. 4 and No. 5.

JAMES G. BRYSON, Solicitor—BALFOUR & MANSON, S.S.C.—Agents.

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THE REV. J. G. SUTHERLAND AND OTHERS (Trustees and Committee of Management of Gateside School), Petitioners.—*Hon. H. Gordon.*

*Charitable and Educational Trust—School—Scheme for administration of endowment and proceeds of sale of school—Religious Education—Technical Instruction—Evening Classes.*—In a deed of trust, the truster, upon the narrative of his "being sensible of the benefit of extending religious education to the children of the working classes," provided for the endowment of a school at G., and directed that the Bible should be read daily in the school. Owing to modern educational requirements it was ultimately found impossible to carry on the school, and it was sold under authority of the Court. The committee of management then presented a scheme for the application of the endowment.

The Court *approved* of the scheme in so far as it proposed to devote the funds to providing technical instruction in manufactures, agriculture, and dairy work and ambulance work; but *refused* to sanction their application to promoting instruction in Scripture knowledge in G., and maintaining a Sunday school library and providing prizes for the Sunday school at G., and to establishing evening classes in the Board School there.

1ST DIVISION. (SEE *ante*, Feb. 3, 1903, vol. v., p. 424.)

By trust-disposition and endowment dated in 1855 the late William Patrick, of Roughwood, on the narrative of his "being sensible of the benefit of extending religious education to the children of the working classes," gave and conveyed to the minister of the parish and his successors in office in trust certain ground at Gateside upon which a schoolhouse and playground, and a schoolmaster's house, offices, and garden were situated, and also granted an annual rent of £25 over part of his lands of Roughwood. The truster directed that the school and playground should be for ever appropriated and used for the education of children and adults of the labouring manufacturing and other poorer classes of Gateside or in the parish of Beith, and for a Sunday school, and as a dwelling-house for the schoolmaster, and for no other purpose. The management of the school and ground-

[1] 3 S. 79.

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annual was entrusted to a committee, which, after the death of the truster was to consist of the parish minister and three proprietors and their successors in their estates, the parish minister being chairman. With regard to the instruction to be given in the school the truster directed that it should comprise at least English grammar, reading, and spelling; writing, arithmetic, geography, and Scripture history; and that the teacher should occasionally explain the physiological state of the body, and give directions and instructions as to the habits best calculated for the preservation of health. "And it shall be a fundamental regulation and practice of the said school that the Bible be daily read therein by the children, but no child shall be required to learn any catechism or other religious formulary, or attend any Sunday school or place of worship to which respectively his or her parent or guardian shall, on religious grounds, object, and the selection of the Sunday school and place of worship shall, in all cases, be left to the free choice of such parent or guardian without the child's thereby incurring any loss of the benefits and privileges of the foresaid school."

Owing to modern educational requirements it was found impossible to carry on the school, and the present petition was presented to the Court for power to dispose of the school buildings and schoolmaster's house and ground in connection therewith. After the decision of the Court (reported *ante*, 5 F. 424) refusing authority to convey the subjects gratuitously to the School Board, and allowing the petitioners to lodge a scheme, the managers received authority from the Court on 3d June 1903 to sell the subjects to the School Board, and they were sold and disponed to them accordingly in July 1903.

The petitioners in March 1905 presented a scheme for the administration of the trust funds, being the sum of £550 realised by the sale of the heritable subjects and the ground-annual of £25. The parts of the scheme which are material to this report are quoted in note, *infra*,* those words which were ultimately deleted by the Court being enclosed in square brackets.

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* "II. . . . The balance of said funds, together with the income of any other funds in their hands, shall be applied, after meeting the annual expenses of the trust in [any one or more of the following purposes as may seem in the discretion of the trustees to be most desirable for the time being, viz.:—(1) In promoting instruction in the Bible and in Scripture knowledge to be given in or near the village of Gateside; (2) In establishing and maintaining a Sunday school library in connection with the Sunday school at Gateside; (3) In providing prizes to the children attending the said Sunday school; (4) In] providing such technical instruction in any of the following subjects as the funds will permit, viz.:—1. Technical instruction in manufactures. 2. Instruction in agriculture and dairy work. 3. Instruction in ambulance work and first aid to the injured. And such instruction may be provided either by contributing to the salaries of lecturers or instructors visiting the district, or in providing classes for longer or shorter periods at Gateside or Beith, or by giving bursaries in the said subjects to or by paying the expenses and fees of children resident in Gateside to enable them to attend classes or lectures in said subjects at institutions or colleges elsewhere, or in some such other method as shall seem to them most in accordance with the design of the truster. . . . VIII. [The committee shall have power, subject to the approval of the School Board, to establish evening classes in the Board School at Gateside, for boys, girls, or adult persons under such regulations as may be made from time to time by them]."

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In support of the proposed purposes (1), (2), and (3), counsel for the petitioners referred to the truster's directions as to religious instruction, and cited *Kirk-Session of Prestonpans* v. *School Board of Prestonpans*.[1]

LORD PRESIDENT.—This scheme relates to a somewhat small endowment consisting of an annuity of £25 and the interest of the proceeds of the sale of the school—being £550—the school having been sold, under power granted by this Court, because it had been found impossible to carry it on in view of modern educational requirements. The scheme has been submitted to us so that we may consider whether it is feasible and as far as possible in accordance with the testator's views.

Though it was natural, from a wish to follow the testator's wishes with regard to religious education, that the three subsections dealing with that matter should have been inserted, I do not think we should approve of them. The testator's provision as to religious instruction was part of his scheme of having a school. But the school being gone, and the trustees having no control over the religious education given in Gateside, I think it is better that these subsections should come out.

The eighth section of the scheme is unnecessary, unless it is meant to provide for the institution of ordinary continuation classes. That is the business of the School Board, and I do not think it would be right to devote the funds to that purpose. This section therefore should be deleted.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

An amended scheme giving effect to the deletions directed by the Court having been lodged, the Court pronounced this interlocutor:—". . . Settle the scheme for the administration of the trust funds connected with Gateside School, Ayrshire, as set forth in the amended scheme No. 24 of process; approve thereof," &c.

CARMENT, WEDDERBURN, & WATSON, W.S. Agents.

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JOHN HENDERSON & SON, LIMITED, Complainers (Reclaimers).—*M'Lennan—Macmillan.*
ALEXANDER MUNRO & COMPANY AND ANOTHER, Respondents.—*Campbell, K.C.—Horne.*

*Interdict—Interim Interdict—Publication of Trade Circular.*—M., who had formerly been one of the managing directors of H. & Co., artesian well engineers and mineral boring prospectors, having commenced business in the same line on his own account, issued an advertising trade circular, headed "Artesian Tube Wells," under his firm name of M. & Co., in which it was stated that "our Mr M. has had extensive experience as managing director for many years with the largest artesian well engineers in Scotland, and is an expert in this class of work," and lists were given (1) of persons for whom artesian wells had been successfully put down, "a special visit having been made by him (M.) in each case," (2) of boring work which he had "under his personal supervision," and (3) of contracts com-

[1] Nov. 28, 1891, 19 R. 193.

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pleted "under his directorship." The circular did not state (as was the fact) that the work referred to had been done by H. and Co. while M. was one of their managing directors.

*Held* that the circular was likely to mislead an ordinary reader into the belief that the work specified had been done by M. & Co. and not by H. & Co., and (*rev.* judgment of the Lord Ordinary on the Bills (Dundas),) that H. & Co. were entitled to interim interdict against M. & Co. publishing, issuing, or circulating it.

1ST DIVISION. Bill-Chamber.

JOHN HENDERSON & SON, LIMITED, were incorporated as a company in 1896, and carried on business in Glasgow as artesian well engineers and mineral boring prospectors. They had taken over the business of John Henderson & Son, which at that time had the largest artesian well engineering business in Scotland. From the incorporation of the Company down to 1904 Alexander Munro acted as one of the managing directors of the company. He had not had any connection with the management of John Henderson & Son prior to the formation of the Company. In December 1904 his engagement with the Company came to an end, and in January 1905 he began business on his own account as an artesian well engineer and mineral boring prospector in Glasgow under the firm name of Alexander Munro & Company.

Shortly after beginning business Alexander Munro & Company issued an advertising trade circular entitled, "To Consumers of Town's Water and Others on the Economic Value of Artesian Well Water Supply. Alexander Munro & Company, Artesian Well Engineers and Mineral Boring Prospectors, Atlantic Chambers, 45 Hope Street, Glasgow," and containing a statement headed "Artesian Tube Wells," in which, after observations as to the method of obtaining water by artesian wells, the excellence of the water so obtained, and its low cost as compared with other methods, they stated as follows:—

"Our Mr Munro has had extensive experience as managing director for many years with the largest artesian well engineers in Scotland, and is an expert in this class of work.

"The following is a list of some of those for whom artesian tube wells have been put down, a special visit having been made by him in each case to the different localities and positions fixed for the wells, all of which have been successful, the yield being from 5000 to 400,000 gallons of splendid water per day." (Then followed a list of thirty-two names.) "Expressions of satisfaction have been received in many instances upon the results obtained.

"He has also had the following boring work under his personal supervision." (Then followed a list of twenty-one names and pieces of work.)

"The following are some of the contracts completed under his directorship." (Then followed a list of thirty-six names.)

This circular did not state (as was the fact) that the work referred to had been done by John Henderson & Son, Limited, during the time when Alexander Munro was a managing director.

In February 1905 John Henderson & Son, Limited, brought a note of suspension and interdict against Alexander Munro & Company, and Alexander Munro as the only known partner of that firm and as an individual, in which they craved interdict, *inter alia*, against the respondents publishing, issuing, or circulating the circular above mentioned, and also interim interdict.

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The complainers also craved interdict against the respondents making certain representations in any future circulars.

The question raised by the crave for interdict against future circulars and by the whole of the averments and pleas of the complainers was whether the respondent was justified in representing that he was the expert who had charge of the practical and prospecting work in putting down artesian wells and conducting other boring operations while he was managing director of the complainers' Company. Upon this question the parties were at issue.

The respondents lodged answers, and pleaded, *inter alia*;—(3) All the statements and representations in the circular complained of being in fact true, interdict ought to be refused.

By interlocutor, dated 24th February 1905, the Lord Ordinary on the Bills (Dundas) passed the note, and refused interim interdict.

The complainers reclaimed, and argued;—The complainers were entitled to interim interdict against the publication of the circular libelled on record. The injury to the complainers by the publication would be great, whereas the injury to the respondent from delay in publication would be small. The intention of the circular was to mislead the public, but it was sufficient that there was a risk of the public being misled by it. Even if it was capable of a construction which was true, it was enough for the complainers' contention if the language used was calculated to mislead even the casual, heedless, and unwary reader.[1]

Argued for the respondents;—To justify interim interdict it was necessary that there should be (1) a strong *prima facie* case, and (2) a balance of convenience in favour of granting it. Neither condition was fulfilled here. On a fair interpretation what the circular said was that while managing director of a large business in the line referred to certain work was done, part of it by himself personally. That was true. There was no statement or implication that the work referred to was done by the respondent's firm. What the complainers objected to was the respondent representing that he was the expert who carried out the operations. Upon that question there was no *prima facie* case. The balance of convenience was against interim interdict. It would be impossible for the respondent if he was ultimately held in the right to shew what he had lost by the interim interdict being granted, whereas it would be easy for the complainers to shew what they had lost by the publication of the circular.

Lord President.—In this case John Henderson & Son, Limited, artesian well engineers and mineral boring prospectors, have brought a note of suspension and interdict against Alexander Munro & Company, who are also artesian well engineers and mineral boring prospectors, and they seek to have interdict against the publishing, issuing, and circulating of a certain circular sent out by the respondents. The complainers ask for interdict of this circular in particular, and then, as is usual, the prayer of the note goes on to ask for interdict against various things which the complainers say the respondents ought not to be allowed to do in future circulars. The case is in the Bill-Chamber, and it is only before your Lordships on the question of interim interdict. No one disputes that this is a

[1] Glenny v. Smith (1865), 13 Law Times, 11; Boswell v. Mathie, July 10, 1884, 11 R. 1072.

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proper case for trial, and that the note has been properly passed. But the complainers maintain that they are entitled to interim interdict. I confess that the only real difficulty which I have had has arisen from the pleadings of the complainers. It is perfectly clear that the true case for interim interdict is not properly raised. But technically it is before your Lordships, because it is raised by the crave for interdict of the particular circular which has been published by the respondents.

Now, it is plain that the object of this circular was to attract customers to Munro & Company. It is headed "Artesian Tube Wells." It contains a statement of how to obtain water by artesian wells. It commends the quality of the water so obtained, and alleges that the cost is moderate as compared with a pipe supply. On the second page the circular goes on to say, "Our Mr Munro has had extensive experience as managing director for many years with the largest artesian well engineers in Scotland." That refers to a fact which nobody denies. Munro was admittedly managing director with the complainers. The circular then says that Munro "is an expert in this class of work." That in one sense is a matter of fact, in another it is a matter of opinion. Some "experts" are only experts in their own opinion. No legal objection can be taken to this statement. But then the circular goes on to say:—"The following is a list of some of those for whom artesian tube wells have been put down, a special visit having been made by him, *i.e.*, 'our Mr Munro,' in each case to the different localities and positions fixed for the wells." Then follows a long list of names. It is explained that none of this work was done by Munro & Company, but that it was all done by the complainers during the time Munro was their managing director. It would have been easy to make a statement which would have made this quite clear. As it is, I do not think I am pressing anything unduly when I say that many people would think on reading the circular that Munro & Company had executed this work. If they took that meaning out of it, it would be misleading and untrue, and the natural result would be that they might go to Munro & Company upon seeing their large experience in the past. If they did so, injury would result to the complainers because of the attribution of the experience of Henderson & Son to Munro & Company.

This circular must be taken not on a minute examination of its terms by a trained tribunal, but on its effect upon the general reader. So viewed it is likely to prove misleading, and if so the respondents ought not to be allowed to publish it. I am therefore in favour of granting interim interdict against the publication of this particular circular.

I am not inclined to say anything more. A record has not been made up. We grant interim interdict against the circular as it stands. I say nothing as to any other circular which Munro & Company may see fit to issue pending the decision of the case.

LORD ADAM concurred.

LORD M'LAREN.—In questions of interim interdict, where the action is founded on representations, I think the Court would not, unless under very exceptional circumstances, grant interim interdict, except against the

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particular representation complained of. That would of course prevent the issue of any other representation which was a mere paraphrase or colourable variation of the circular complained of. I therefore agree that if interim interdict is to be granted here, it should be limited to an interdict against the issuing of the particular circular which is complained of.

In that view of the case the question we have to consider is whether this circular amounts to a misleading statement, or, at all events, to such an ambiguous statement that it may mislead the public, and so cause injury to the complainers' business. It may be true that on a critical examination of the phraseology of this document it will be seen that it never really says that these works were executed by the respondents' firm; and, indeed, an astute reader might, from that very circumstance, draw the inference that they were not so executed, for if they had been, the fact would have been more clearly stated in the circular. But then there are members of the public, to which this circular is addressed, who might read it in an uncritical spirit, and would be impressed only by the general effect conveyed, and if so read I think the circular is calculated to lead such a reader to the conclusion that the respondents' firm had executed the specified works. I think, therefore, that the complainers are entitled to an interdict against a circular which may be read as representing that the respondents had executed all these important works which were in reality carried out by the complainers. In issuing such a circular the respondents owed a duty to the complainers to see that it was made clear that Mr Munro only acted as assistant and not as principal. Now, the respondents' circular does not clearly shew that Mr Munro was only acting as an assistant, and I therefore agree that interim interdict should be granted in the terms your Lordship has proposed.

LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"The Lords having considered the reclaiming note for the complainers against the interlocutor of Lord Dundas, dated 24th February 1905, and heard counsel thereon, recall said interlocutor, and remit to the Lord Ordinary to pass the note and grant interim interdict against the respondents publishing, issuing, or circulating the circular, No. 6 of process."

R. H. MILLER & Co., S.S.C.—FLETCHER & MORTON, W.S.—Agents.

No. 114.

May 16, 1905. Vallery v. M'Alpine & Sons.

JOSEPH VALLERY, Pursuer (Reclaimer).—*Young*—*W. Thomson.*
ROBERT M'ALPINE & SONS, Defenders (Respondents).—*Christie.*

*Process—Proof—Proof or Jury Trial—Discretion of Lord Ordinary—Action of damages for personal injuries—Special Cause—Action transmitted under the Employers Liability Act*, 1880 (43 *and* 44 *Vict. cap.* 42), *sec.* 6 (3)—*Evidence* (*Scotland*) *Act*, 1866 (29 *and* 30 *Vict. cap.* 112), *sec.* 4.—The Lord Ordinary in an action under the Employers Liability Act, 1880, which had been transmitted to the Court of Session under section 6 (3) of that Act, sent the case to proof instead of to a jury, upon the ground that the averments were of doubtful relevancy, and that there might be difficulty in distinguishing the averments which were relevant from those which were not.

*Held* that the Lord Ordinary had a discretion as to what was special

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cause for not sending a case of this kind to a jury, that the Court ought not readily to interfere with what he had done in the exercise of it, and that there was no ground for doing so in this case.

The Lord Ordinary has the same discretion as regards the mode of proof in an action transmitted under section 6 (3) of the Employers Liability Act, 1880, as in an action originated in the Court of Session.

2D DIVISION. Lord Pearson.

JOSEPH VALLERY, labourer, Glasgow, brought an action in the Sheriff Court at Glasgow against Robert M'Alpine & Sons, contractors, Glasgow, in which he craved decree for £160, 11s., or such sum as might be found due by the defenders to the pursuer under the Employers Liability Act, 1880, in respect of injuries sustained by him while in their employment.

On 10th January 1905, before the record in the action was closed, the pursuer lodged a note for the transmission of the process to the Court of Session under section 6 (3) of the Employers Liability Act, 1880.

On 21st February the Lord Ordinary (Pearson) closed the record, and appointed a diet for the adjustment of issues.

On 14th March the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having heard counsel on the adjustment of issues allows the parties a proof of their averments, and to the pursuer a conjunct probation," &c.*

The pursuer reclaimed, and argued;—This was an action of damages for personal injuries, and therefore one of the causes specially enumerated as appropriate for jury trial in section 28 of the Judicature Act,[1] and also one of the causes excepted in section 49 of the Court of Session Act, 1850,[2] and it could only be sent to proof of consent or on special cause shewn.[3] The Court were entitled and bound to consider whether there was special cause, and to reverse the Lord Ordinary if there was not.[4] This was not a case of interfering with the Lord Ordinary's discretion. The question was whether special cause had been shewn in the sense of the statute. The special cause stated by the Lord Ordinary was not sufficient.[5]

Argued for the defenders and respondents;—There was no distinction, as regards the present question, between a case which had been transmitted under section 6 of the Employers Liability Act, 1880, and a case which had originated in the Court of Session. The Court would not interfere with the discretion exercised by the Lord Ordinary as to the mode of inquiry except upon very special grounds.[6] That rule applied to cases like the present. There was no ground for

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* "OPINION.—My opinion is that this case ought to go to proof. I rest that opinion on the ground that in some respects the averments are of doubtful relevancy, and further, that there may be difficulty in distinguishing between the averments which are relevant and those which are not. In this I find sufficient special cause for not sending the case to trial."

[1] 6 Geo. IV. cap. 120.

[2] 13 and 14 Vict. cap. 36.

[3] Evidence Act, 1866 (29 and 30 Vict. cap. 112), sec. 4.

[4] M'Avoy v. Young's Paraffin Co., Limited, Nov. 5, 1881, 9 R. 100.

[5] Morrison v. Baird & Co., Dec. 2, 1882, 10 R. 271, pp. 280 and 285; M'Intosh v. Commissioners of Lochgelly, Nov. 3, 1897, 25 R. 32; M'Mullen v. Newhouse Coal Co., May 27, 1896, 23 R. 759.

[6] Weir v. Grace, March 10, 1898, 25 R. 739; Edinburgh Railway Access and Property Co. v. John Ritchie & Co., Jan. 7, 1903, 5 F. 299.

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interfering with what the Lord Ordinary had done here. The special cause assigned by the Lord Ordinary was quite sufficient.[1]

LORD JUSTICE-CLERK.—There is no doubt that an action such as the present need not necessarily be sent to trial before a jury. After the action has been removed to the Court of Session under section 6 of the Employers Liability Act, it is for the Lord Ordinary to determine the mode of trial, as in the case of an action originally raised in the Court of Session. In the present instance the Lord Ordinary has exercised his discretion by sending the case to proof, and I should be very slow to interfere with what he has decided in the exercise of his discretion. I do not say that there might not be cases in which the Court would interfere, but it would require to be on very strong grounds. Here no cause has been shewn for altering the decision of the Lord Ordinary.

LORD KYLLACHY and LORD KINCAIRNEY concurred.

THE COURT refused the reclaiming note, and remitted to the Lord Ordinary to take the proof allowed by the interlocutor reclaimed against.

W. I. HAIG SCOTT, S.S.C.—R. & R. DENHOLM & KERR, S.S.C.—Agents.

No. 115. May 16, 1905. Milne's Executors v. Aberdeen University Court.

ARTHUR ODLING AND ANOTHER (Alexander Milne's Executors), First Parties.—*Campbell, K.C.—Kemp.*
THE UNIVERSITY COURT OF THE UNIVERSITY OF ABERDEEN, Second Parties.—*C. N. Johnston, K.C.—A. R. Brown.*
MRS ELIZA GORDON MILNE OR ANDERSON AND OTHERS, Third Parties.—*Younger—MacRobert.*

*Charitable and Educational Bequests and Trusts—Constitution—Uncertainty—Bursary Fund of University—Scheme—Bursary—University—University Court.*—By his will a testator left the residue of his estate "to the Bursary Fund of the University of Aberdeen to help in the education of poor and struggling youths of merit," and "in order to carry out and give effect to my wishes" he appointed two persons as executors. The various bursary endowments of the University were not merged in one general bursary fund, but each endowment was kept separate and devoted to the special purpose for which it was founded. By the Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), sec. 6 (1), the University Court were given power to administer funds mortified for bursaries.

*Held* (1) that the bequest was valid and not void from uncertainty, and (2) that the University Court were entitled to receive and discharge the residue, on condition of submitting to the Court and obtaining approval of a scheme for the administration thereof as a bursary fund.

*Opinion per* Lord Kincairney that this was a "charitable" bequest.

2D DIVISION.

ALEXANDER MILNE, sometime of Assam, India, afterwards residing in Aberdeen, died, domiciled in Scotland, on 8th March 1903, leaving a last will and testament, dated 19th April 1898, by which, after providing for payment of debts and expenses, and of various specific and pecuniary legacies, he provided as follows:—"And should any balance remain over from my estate after satisfying all the above

[1] Jack v. Rivet, Bolt, and Nut Co., Limited, March 10, 1894, 6 F. 572; M'Nab v. Fyfe, July 5, 1904, 6 F. 925.

claims, then I devote such balance or residue to the Bursary Fund of the Aberdeen University, to help in the education of poor and struggling youths of merit, and in order to carry out and give effect to my wishes as above set forth, I nominate and appoint as executors of this my last will and testament" two persons named, "or either of them accepting."

The executors accepted office. After satisfying debts and legacies a balance of residue remained in their hands, amounting to £9000.

In the University of Aberdeen the various bursary endowments are not merged in one general bursary fund, but each individual endowment is kept separate, the revenue being devoted to the special purpose for which the bursary was founded. These bursaries differ from one another in regard to their objects, value, conditions of tenure, &c.*

Questions having arisen between the parties interested as to the application of the balance of residue, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were (1) the executors, (2) the University Court of the University of Aberdeen, (3) the whole heirs *in mobilibus* of the testator.

The first parties maintained (1) that as the testator's intention to help poor and struggling youths of merit in their education by means of bursaries was clearly expressed, the bequest was valid; (2) that the second parties were not entitled to receive and discharge it, but that the first parties were bound to "devote" or administer the residue under a scheme to be approved by the Court.

The second parties contended (1) that the words "the Bursary Fund of the Aberdeen University" in the will of the deceased were not intended to refer to some fund with this special title, but simply to indicate the testator's desire that the money should be held along with the other bursary funds of the University for the special purpose specified by him; (2) that they were entitled to receive and discharge the said balance of residue, and that the fund should be handed over to them in order that they might administer the same in such manner as best to give effect to the wishes of the testator.

The third parties contended that the bequest of balance of residue was void in respect it referred to a bursary fund which did not exist; and further, that as the testator gave no specific directions how the money was to be applied in carrying out his wishes, and particularly did not indicate whether the revenue only was to be applied, or the whole capital and revenue expended till exhausted, and conferred no discretionary powers upon any person or persons in reference to the administration of the money, the bequest was invalid from vagueness and want of specification. They therefore claimed that this balance of residue was intestate succession, and fell to the heirs *in mobilibus* of the truster.

The questions of law were:—"1. Is the bequest of said balance

* The Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), enacts:—Sec. 6. "The University Court . . . shall . . . have power (1) to administer and manage the whole revenue and property of the University and the college or colleges thereof existing at the passing of this Act, . . . including funds mortified for bursaries and other purposes, and to appoint factors or collectors, to grant leases, to draw rents, and generally to have all the powers necessary for the management and administration of the said revenue and property."

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of residue to the bursary fund of the Aberdeen University valid? 2. (1) Are the second parties entitled to receive and discharge the same? or (2) does it fall to be administered by the first parties under a scheme to be approved by the Court? or, 3. Is said bequest invalid through vagueness and uncertainty, and does the balance fall to be paid to the testator's heirs *ab intestato?*"

Argued for the second parties;—(1) The bequest was valid. The case fell within the rule that a bequest for an object and a class of persons specified was good, although the selection of the individuals to be benefited was left to someone else.[1] The purpose of the bequest was clear. It was that the fund should be held by the University as a bursary fund, and that duly qualified bursars should be selected by the usual methods. There was no such vagueness here as was found fatal in *Blair* v. *Duncan*[2] and in *Grimond (or Macintyre)* v. *Grimond*.[3] This was a charitable bequest. It was consequently entitled to a liberal and benignant construction, and if the general intention was indicated the Court would find means of carrying the details into operation.[4] (2) The University Court were the proper persons to administer the fund. They had the power and means of doing so. There was no provision in the will for a continuing trust.

Argued for the third parties;—The bequest was void for uncertainty. The class to whom the bequest was made was not sufficiently defined,[5] and no power was given to anyone to select the individuals to be benefited. This was not a charitable bequest.[6] The case of *Baird's Trustees*,[6] though overruled as a decision on the Income-Tax Act by *Commissioners for Special Purposes of Income-Tax* v. *Pemsell*,[7] was still an authority for the purposes of the present question.[8] A bequest of a fund to a University for a bursary would be good, but a bequest for bursaries even if the University was specified was too vague. A bequest for "charities in Aberdeen" had been held void for uncertainty.[9] Neither the University nor the executors were given any power of selection. That was a defect which the Court would not supply.[10] The will did not say whether the capital or only the income was to be used.

Argued for the first parties;—The trustees whom the testator had selected were the proper persons to administer the fund. This was in accordance with the testator's intention as disclosed in his will. There was no bequest to the University. The Court would provide for the future administration of the fund.

LORD JUSTICE-CLERK.—When one looks at this clause in this will I think

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[1] Crichton v. Grierson, July 25, 1828, 3 W. and S. 329, *per* Lord Chancellor, at p. 338.
[2] Dec. 17, 1901, 4 F. (H. L.) 1, [1902], A. C. 37.
[3] [1905], A. C. 124.
[4] Magistrates of Dundee v. Morris, (1858), 3 Macq. 134, *per* Lord Cranworth, at p. 166, and Feb. 8, 1861, 23 D. 493, 33 Scot. Jur. 243.
[5] Blair v. Duncan, 4 F. (H. L.) 1; Grimond (or Macintyre) v. Grimond, [1905], A. C. 124.
[6] Baird's Trustees v. Lord Advocate, June 1, 1888, 15 R. 682.
[7] [1891], A. C. 531.
[8] Blair v. Duncan, 4 F. (H. L.) 1, *per* Lord Chancellor at p. 2.
[9] Low's Executors, June 21, 1873, 11 Macph. 744, 45 Scot. Jur. 452.
[10] Robbie's Judicial Factor v. Macrae, Feb. 4, 1893, 20 R. 358.

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it is quite clear that it was the intention of the testator to dispose of the residue and to devote it to a certain object. That object was the bursary fund of the University of Aberdeen. That is not ambiguous in any way. It does not matter whether there was a bursary fund in existence or whether this was to be the bursary fund. The testator intends that the money is to go to provide bursaries. His purpose was to help in the education of poor and struggling youths of merit in the University. This implies selection. Merit implies selection. But surely there can be no difficulty about that in the University.

I have therefore no hesitation in holding (1) that this is a good bequest for a well-defined purpose—it does not matter whether it is a charitable purpose or not; and (2) that the money should be handed over to the University Court. The only question is as to the scheme under which the fund is to be held. The Court will give its aid in this matter.

LORD KYLLACHY.—I agree. The University of Aberdeen is a great educational corporation, and has a statutory constitution, according to which it is one of the duties of the University Court to administer such portions of the University funds as are devoted to bursaries. The University has such funds, or, if it has not now, it may have them at any time; and the testator here seems to have assumed that it would possess, for purposes of administration, a "Bursary Fund," to which such funds should belong, and by means of which they could be kept separate from other funds. Accordingly, he makes this bequest, expressing it simply as a bequest "to the Bursary Fund of the University of Aberdeen." I am, I confess, unable to see any particular difficulty either as to the construction of such a bequest or as to its efficacy. It is, as I read it, simply a bequest to the University of Aberdeen, upon trust for the purpose that, either by itself or in conjunction with other funds, it should be applied by the Governing Body of the University, to a quite definite and known object, viz., the providing of bursaries to aid in the education in the University of a certain class of students. I know no ground for impeaching such a bequest as void from uncertainty. Neither do I see any sufficient reason for requiring the executors of the deceased to undertake the administration. The executors will, I think, be safe and be doing their duty in paying over the money to the University Court, whose receipt will, so far as I see, be a quite sufficient discharge. It is another matter whether we should not appoint the University Court to submit a scheme for our approval in the first instance. On that matter I am inclined to agree that that should be done.

LORD KINCAIRNEY.—I am of the same opinion. I think this bequest is the same as a bequest to Aberdeen University for the purpose of forming a bursary fund. And I also hold that this bequest is protected from invalidity by being for charitable purposes. I think it should go to the University to be administered under a scheme to be settled by the Court.

THE COURT pronounced this interlocutor:—"Answer the first question . . . in the affirmative, and the second question by declaring that the second parties are entitled to receive and

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discharge the balance of residue on condition that a scheme for the administration of the same as a bursary fund is submitted by them to and approved by the Court: Find and declare accordingly, and decern."

HENRY & SCOTT, S.S.C.—SCOTT MONCRIEFF & TRAIL, W.S.—F. J. MARTIN, W.S.—Agents.

No. 116.

May 16, 1905. Liquidators of Scottish Drug Depot, Limited, v. Fraser.

LIQUIDATORS OF SCOTTISH DRUG DEPOT, LIMITED, Petitioners (Respondents).—*Graham Stewart—W. J. Robertson.*

ALEXANDER FRASER (Collector of Poor-Rates for City Parish of Edinburgh), Respondent (Reclaimer).—*Lees, K.C.—Addison Smith.*

*Process—Competency—No title or interest to defend—Company—Winding-up—Preference—Poor-Rates—Poor-Law (Scotland) Act*, 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 88.—In a note by the liquidators of a company for authority, *inter alia*, to take credit for their remuneration, as fixed by the Court, and to pay the law expenses, and to pay the preferable claims as set forth in a schedule, among which was included a claim for poor-rates due by the Company, answers were lodged by a collector of poor-rates, who maintained that the liquidators should be ordained to pay the claim for poor-rates preferably to the liquidators' remuneration and their law expenses. The liquidators stated that their accounts shewed a balance in their hands more than sufficient to pay in full all the preferable claims, after payment of the liquidators' remuneration and law expenses, and that the respondent had been informed of this before he lodged answers. *Held* that, in respect the liquidators had admitted the claim for poor-rates to a preferential ranking and tendered payment thereof in full, there was no proper question presented to the Court for adjudication on the answers, and note *remitted* to the Lord Ordinary to proceed.

*Company—Winding-up—Poor-Rates—Preferential Payments in Bankruptcy Act*, 1888 (51 *and* 52 *Vict. c.* 62), *sec.* 1, (1) (3).—*Opinion, per* Lord Low, Ordinary, (1) that the provisions of the Preferential Payments in Bankruptcy Act, 1888, are applicable to Scotland, in so far as they deal with the case of companies which are being wound up under the Companies Acts, and (2) that under section 1, subsections (1) and (3), of that Act, poor-rates due by a company at the commencement of the winding-up thereof do not fall to be paid preferably to the liquidators' fees and the law expenses incurred by him in the liquidation.

1ST DIVISION. ON 19th February 1904 the Court ordered the Scottish Drug Depot, Limited, to be wound up under the provisions of the Companies Acts, 1862 to 1900, and appointed James Alexander Robertson Durham, C.A., and James Craig, C.A., both of Edinburgh, to be joint official liquidators.

On 10th January 1905 the liquidators presented a note, stating that the businesses and other assets of the Company had been realised, and craving the Court to remit to an accountant to audit the liquidators' accounts; to fix the remuneration of the liquidators; to authorise them to take credit for such remuneration and to pay the law expenses incurred by them; to approve of the deliverances of the liquidators as set forth in a schedule produced, and rank the claims of the creditors accordingly; and to authorise the liquidators to pay the preferable claims and to divide the surplus funds thereafter in the hands of the liquidators among the ordinary creditors *pro rata* of their claims.

The liquidators produced an account of their intromissions, shewing a balance in hand of £925, 18s. 10d. From the schedule produced

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with the note it appeared that claims, amounting in all to £117, 9s. 4d., had been admitted to a preference—these claims including, *inter alia*, one for £20, 0s. 6½d., in respect of poor and school assessments due by the Company as occupiers of certain shops in Edinburgh.

Alexander Fraser, collector of poor and school rates for the City Parish of Edinburgh, lodged answers, in which he stated that the company were owing poor and school assessments to the amount of £20, 0s. 6½d., and that he had lodged a claim for that sum. Founding on the provisions of sec. 88 of the Poor-Law (Scotland) Act, 1845,* he objected to the liquidators' fees and the law expenses of the liquidation being preferred to his claim in the order of payment, and maintained that the Court should direct and ordain the liquidators to pay his claim "out of the first proceeds of the estate, and preferably to all debts of a private nature, and, in particular, preferably to the liquidators' fees and law expenses incurred by them, and to rank" his claim accordingly.

The liquidators lodged replies, in which they referred to the Preferential Payments in Bankruptcy Act, 1888, sec. 1 (1), (3),† and explained that "the funds in hand are ample to cover the claims admitted to a preferential ranking in full, after payment of the remuneration of the liquidators and their law expenses, and the claimant was made aware of this before he lodged the answers."

On 3d March 1905 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the poor-rates due from the said company at the commencement of the winding up thereof do not fall to be paid preferably to the liquidators' fees and law expenses incurred by them, but fall to be paid in terms of section 1 (3) of the Preferential Payments in Bankruptcy Act, 1888; and in respect that the liquidators have admitted the claim for said poor-rates to a preferable ranking, and tender payment thereof in full, finds that it is unnecessary to pronounce further upon said answers; therefore dismisses the said answers . . ."‡

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* The Poor-Law (Scotland) Act, 1845 (8 and 9 Vict. c. 83), sec. 88, enacts,—" . . . and all assessments for the relief of the poor shall in case of bankruptcy or insolvency be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed."

† The Preferential Payments in Bankruptcy Act, 1888 (51 and 52 Vict. cap. 62), enacts, section 1 (1):—" . . . in the distribution of the assets of any company being wound up under the Companies Act, 1862, and the Acts amending the same, there shall be paid in priority to all other debts—(*a*) All parochial or other local rates due from . . . the company at the date of . . . the commencement of the winding-up, and having become due and payable within twelve months next before that time . . . (*b*) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, the foregoing debts shall be discharged forthwith so far as . . . the assets of the company . . . are sufficient to meet them."

‡ "OPINION.—. . . The liquidators have ranked the claim as a preferable debt, and there is no dispute that the funds are sufficient to pay the expenses of the liquidation (including the remuneration of the liquidators) and the preferable debts. The collector, however, is not satisfied with a preferable ranking, but maintains that the rates ought to have been paid out of the first proceeds of the estate, and preferably to all debts of a private nature, including the liquidators' fees and the expenses of the winding-up.

"That view is rested upon the 88th section of the Poor-Law Act, 1845,

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The respondent reclaimed, and argued;—The provisions of the 88th section of the Poor-Law (Scotland) Act, 1845, that poor-rates, in cases of bankruptcy, should be "paid out of the first proceeds of the estate," and should be "preferable to all other debts of a private nature," were decisive in favour of the reclaimer's contention. That section was unrepealed, and was unaffected by the Preferential Payments in Bankruptcy Act, 1888. The latter statute had no application to Scotland whatever. The Lord Ordinary's view that the statute, though not applicable to Scotland *quoad* sequestrations under the Bankruptcy Acts, was nevertheless applicable to Scotland *quoad* companies being wound up, was untenable. While, in the present case, there was a sufficient balance to pay the claim for poor-rates as well as the liquidators' fees and law expenses, it was of importance in the public interest and in view of future cases, that it should be

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which provides that all assessments 'for the relief of the poor shall in case of bankruptcy or insolvency be paid out of the first proceeds of the estate, and shall be preferable to all other debts of a private nature due by the parties assessed.'

"Even if that enactment was the statutory provision now in force in the case of companies in liquidation, it would be necessary to consider how far it supported the claim of the collector that poor-rates fall to be paid before any provision is made for the expenses of the liquidation. But it is unnecessary to consider that question if, as the liquidators contend, the matter is now regulated by the Preferential Payments in Bankruptcy Act, 1888 (51 and 52 Vict. cap. 62).

"In regard to that Act, I think that there are strong reasons for holding that it is not applicable to Scotland so far as sequestrations under the Bankruptcy Acts are concerned, but I see no sufficient ground for affirming that it does not apply to Scotland in the case of companies which are being wound up under the Companies Acts.

"*Prima facie* the Act applies to Scotland, because Ireland is excluded from its operation, while Scotland is not excluded, and further, I do not think that there is any difficulty in applying its provisions, so far as companies in liquidation are concerned, to Scotland. It is also worthy of observation that the Act was amended in 1897 by an Act (60 and 61 Vict. cap. 19), which makes provision in certain cases for the payment of the debts declared to be preferable by the Act of 1888 in priority to the claims of holders of debentures under a floating charge created by the company. These provisions are not appropriate in the case of Scotch Companies, and accordingly it is provided that the Act shall not extend to Scotland. The Act, however, is made applicable to Ireland, which was excluded from the Act of 1888, and it is so made applicable by declaring that in its application to Ireland the Preferential Payments in Bankruptcy (Ireland) Act, 1889, shall be substituted for the Act of 1888. That shews that the Legislature had in 1897 considered the position of the Act of 1888 as regards both Scotland and Ireland, and had deliberately allowed the Act to remain, as it bore to be, an Act applicable to Scotland.

"It was argued, however, that if the Act had been intended to apply to Scotland the 88th section of the Poor-Law Act would have been repealed. If the Act of 1888 does not apply to sequestrations that argument is not of much weight, because the terms of the 88th section are more appropriate to cases falling under the bankruptcy laws than to insolvent companies, for the winding up of which a special code was provided by the Companies Act of 1862. If, as I think was the case, the Act of 1888 applied only to companies in Scotland that would account for the 88th section of the Poor-Law Act not being to any extent repealed.

"I am therefore of opinion that the Act of 1888 applies, and it provides

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definitely decided that a claim for poor-rates fell to be ranked preferably to liquidators' fees and law expenses. The claims of the liquidators were in no better position than the claim of a heritable creditor who had obtained decree in an action of poinding of the ground, and such a claim was postponed to a claim for poor-rates.[1]

The petitioners were not called on.

LORD PRESIDENT.—I do not think that this case presents any difficulty. It is a case where the liquidators of The Scottish Drug Depot have presented a note in ordinary form to your Lordships' Court, in which they ask that the Court should fix their remuneration and authorise them to take credit therefor and to pay the law expenses of the liquidation, and further, that it should approve of their deliverances as set forth in the schedule, and authorise the payment of the preferential claims and the distribution of the surplus; and finally grant them their discharge. In the schedule appended to the note they set forth that they have admitted to a preferential ranking £117, 9s. 4d. of preferential claims, and among them is included the claim of the collector of poor-rates for the City Parish of Edinburgh, who had put in a claim for unpaid poor-rates, payable on certain property which had been occupied by the Company. The liquidators set forth that they have sufficient funds and propose to pay all the preferential claims in full. The

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that the parochial rates and the debts specified shall, 'subject to the retention of such sums as may be necessary for the costs of administration or otherwise, be discharged forthwith so far as the assets of the company are sufficient to meet them.'

"That enactment does not support the collector's contention that the parochial rates fall to be paid preferably to the liquidators' fees, and the expenses incurred by them. These appear to me to fall within the words 'the costs of administration.' The rates, however, are, subject to retention of the amount necessary to meet the costs of administration, to be paid 'forthwith.' That I take to mean that they shall be paid out of the first funds available for division.

"In the present case the circumstances were these:—The Company had carried on business as chemists and druggists, having their principal place of business at Nicolson Street, Edinburgh, and having seven branches in various places in Edinburgh and Leith. The liquidators deemed it to be advisable, in order that the assets of the Company might be realised to the best advantage, to carry on the business for a certain time, and the Court authorised them to do so until Whitsunday 1904. The present note was presented on 10th January 1905, and the liquidators stated that they had then realised the businesses and all other assets of the Company.

"The winding-up order was not pronounced until 19th February 1904, so that I do not think, considering the nature of the assets, that there has been any delay in realisation, and I am not surprised that the liquidators did not deem it expedient to make any division of the funds until the whole estate was realised.

"It may be that the liquidators were, at a somewhat earlier date, in possession of funds out of which the rates and other debts which the Act of 1888 directs to be paid 'forthwith' might have been paid, and it may be that to have paid them at an earlier date would have been more in accordance with the directions of the statute. I have, however, no information upon that point, and I do not think it necessary to inquire, as all the preferable debts will be paid in full."

[1] North British Property Investment Co., Limited, v. Paterson, July 12, 1888, 15 R. 885.

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collector has put in answers in which he sets forth this claim, amounting to £20, 0s. 6½d., and then sets forth the clause from the Poor-Law Act of 1845, providing for the preferential payment of such claims. He then states that he has put in a claim for preferential payment, and goes on to refer to the prayer of the liquidators' note, and asks the Court to ordain the liquidators to pay his claim out of the first proceeds of the estate, and preferably to all debts of a private nature, and in particular, preferably to the liquidators' fees and law expenses incurred by them, and to rank his claim accordingly.

He therefore not only asks for payment of his debt, but asks for it with the epithetical addendum that it should be paid out of the first proceeds of the estate. I call it an epithetical addendum, because it is distinctly stated by the liquidators in their replies, and not denied by the collector's counsel, that the collector was informed that he would be paid in full before he lodged his answers to the note. I think the question of payment out of first proceeds can only arise when there is a competition as to the funds, but cannot arise here when payment in full of all these claims is tendered. I do not think a litigant can come here and ask us to answer a question which does not arise in his case, but which may arise in some other case. I consider that is a preposterous request. I further think that as the applicant has driven the liquidators into litigation, both here and in the Outer-House, he must pay the expenses of both discussions. The question having been raised in the Outer-House, the Lord Ordinary has been induced to make a pronouncement on the question of preferential payments, though it was unnecessary for the decision of the point before him. I would prefer that we should recall the Lord Ordinary's interlocutor in so far as it deals with the Bankruptcy Act of 1888, as such a finding is unnecessary for the disposal of this case, and I think it better that a finding should not be allowed to stand which deals with a point that does not arise on the facts of the case that the Court has to decide.

LORD ADAM.—I am of the same opinion, and have no doubt at all. The claimant Fraser may have an interest to have the question now raised settled, but he can have no interest to have it decided in this particular case. The question should be determined in a case where it properly arises for decision. I do not think that a collector who desires to have some legal question decided is entitled to fix upon a particular estate, where the liquidator has plenty of funds and no objection to pay the debt, and to burden it with the expenses of carrying on an unnecessary litigation for the benefit of the community.

LORD M'LAREN.—I think that every unprejudiced person would be ready to admit that in a bankruptcy or liquidation, where there are funds sufficient to pay twenty shillings in the pound, no question of preferential payment can arise. But, further, where there are degrees of ranking among those entitled to preferential payment, if there are sufficient funds to pay all the preferential debts in full, no competition can arise between the preferential creditors of different orders. That is precisely the case we have to consider, and I therefore think the collector's contention is untenable.

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I agree with your Lordship that, although the Lord Ordinary has given his opinion on the question of the order of the preferential payments, that part of his Lordship's interlocutor is not necessary for the disposal of the matter of the action, and should be recalled. If it were to stand, the judgment might be cited as an authority on the point, and I do not think that a decision should be allowed to go out as an authority when the point it purports to decide does not really arise on the facts of the case.

LORD KINNEAR concurred.

THE COURT recalled the interlocutor of the Lord Ordinary: "Find that in respect that the liquidators have admitted the claim for poor-rates to a preferential ranking and tendered payment thereof in full, there is no proper question presented to the Court for adjudication on the answers, and remit to the Lord Ordinary to proceed: Find the reclaimer liable in expenses of the reclaiming note, and also the expenses incurred by the liquidators in the Outer-House in connection with the answers . . . and the replies . . . and decern."

DAVIDSON & SYME, W.S.—R. ADDISON SMITH & Co., W.S.—Agents.

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May 16, 1905.

Somerville & Co., Limited.

1ST DIVISION.

JOHN SOMERVILLE & COMPANY AND OTHERS, Petitioners.—*C. D. Murray.*

*Bankruptcy—Sequestration—Notice of meeting to elect trustee—Nobile Officium—Expenses—Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 48 *and* 67.—On 8th May 1905, on the petition of John Somerville & Company and others, creditors of Alexander Ross Mackenzie, Resolis, Mackenzie's estates were sequestrated by the Lord Ordinary on the Bills. The deliverance appointed a meeting of the creditors for the election of a trustee to be held on 18th May. The petitioners having failed to insert the statutory notice of this meeting in the *London Gazette* of 9th May, it became necessary to have another date fixed for the meeting. The petitioners having presented an application for this purpose the Court appointed the meeting to be held on 27th May, and remitted to the Sheriff to proceed, with a declaration that the expenses of the application and procedure connected therewith were not to be allowed against the estate.

PURVES & BARBOUR, S.S.C., Agents.

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Clements v. Corporation of Edinburgh.

2D DIVISION.

JAMES CLEMENTS, Pursuer.—*M'Millan.*
LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF THE CITY OF EDINBURGH, Defenders.—*M'Clure.*

*Expenses—Taxation — Fees to Skilled Witnesses — Certificate—Action settled before trial—A. S. 15th July* 1876, *V. iii.* (2).—*Held* that the provision of the Act of Sederunt of 15th July 1876, requiring the certificate of the Judge who tries a case to warrant an additional allowance to expert witnesses, does not apply where a case is settled before trial, and that in such cases a party entitled to expenses will be entitled to charge for reasonable remuneration to experts.

JAMES CLEMENTS, Inland Revenue officer, Edinburgh, brought an action against the Lord Provost, Magistrates, and Town-Council of Edinburgh, in which he concluded for payment of £2000 as damages

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for the death of his son, which was caused by the collapse of a bridge which he alleged was the property of the defenders and under their sole charge and control, and at the time of the accident was being taken down by the defenders with a view to reconstruction.

Issues were adjusted for the trial of the cause by jury, but before the trial the action was settled, the pursuer accepting an extrajudicial tender of £500, with expenses as taxed.

The nature of the case averred by the pursuer was such as to require engineering and medical skilled evidence.

In taxing the pursuer's account of expenses, the Auditor disallowed a sum of £14, 9s. for investigations and examinations made by one civil engineer and two medical men with a view to trial.*

The pursuer lodged objections to the Auditor's report, and argued;—The charges of £14, 9s. taxed off by the Auditor, should be allowed. The Act of Sederunt 15th July 1876 could only apply where the case had gone to trial. The pursuer was entitled to just and reasonable expenses for investigations by experts.[1] No doubt Lord M'Laren's opinion in *Turnbull* v. *North British Railway Company*,[2] was to the contrary, but the weight of authority[1] and the practice[3] was in favour of the pursuer's contention. If the Auditor was right, then if a case was abandoned just before trial, the defenders could get no expenses under this head, however reasonable and necessary the outlay had been.

Argued for the defenders;—In any view, the pursuer could not take any benefit from the Act of Sederunt, which only provided for

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* To his report the Auditor appended the following note:—"The Auditor has disallowed the fees to skilled witnesses simply because the witnesses have not been certified in terms of the Act of Sederunt. It is true that the case was settled before going to trial, but the Auditor understands the rule of the Court to be that, even in that case, a certificate is necessary, and that without it he has no discretion—*Turnbull* v. *North British Railway Company*, 5 F. 944. Had he had such a discretion, he would, in the present case, have allowed the fees as charged, as they seem to him moderate, both as to the number and class of the witnesses, and the amounts charged." †

[1] M'Dougall v. Caledonian Railway Co., June 28, 1878, 5 R. 1011; Lord Elphinstone v. Monkland Iron and Coal Co., Limited, Feb. 2, 1887, 14 R. 449.

[2] June 12, 1903, 5 F. 944, at p. 946.

[3] Whiteley v. Dobson, Molle, & Co., Limited (Outer-House, Lord Stormonth-Darling), 10 S. L. T. 325; Mackay's Manual, pp. 674-675; Smith on Expenses, p. 319; *see* also A B v. C D, July 20, 1894, 21 R. 1083.

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† The Act of Sederunt, 15th July 1876, "for regulating the fees and charges of enrolled law-agents practising before the Supreme Courts of Scotland," in the table of fees thereto annexed, provides (under head V. "Jury Trials and Proofs," subhead iii., "Allowances to Witnesses," sec. 2) that "in cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants, to make investigations previous to a trial or proof in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable; provided that the Judge who tries the cause shall, on a motion made to him either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance."

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the previous expenses of witnesses examined at the trial. Apart from the Act of Sederunt he was not entitled to anything. By the Act of Sederunt 10th July 1844, which as regards this matter was in the same terms as the Act of Sederunt 15th July 1876, such charges were allowed as an exception to the general rule, and subject to a condition. The maxim *expressio unius exclusio alterius* applied. There was no trace prior to 1844 of such charges being allowed. The authorities on the point were two contrary *obiter dicta*,[1] of which the later in date was in the defenders' favour. The case of *Lord Elphinstone*[2] founded on by the pursuer, did not apply. That was a case where the proof was led before one of the Judges of the Division, which had the advantage of his opinion upon the matter. So far as could be discovered Lord Ormidale's opinion in *M'Dougall*[3] had been followed in the practice of the Auditor until the case of *Turnbull*[4] was decided. The view taken by Lord M'Laren in *Turnbull*[4] was the right one. It was impossible, where there had been no trial, to say whether charges for investigations were just and reasonable or not.

LORD JUSTICE-CLERK.—I think it is quite plain that this is not a case falling under the Act of Sederunt. The Act of Sederunt provides for a certificate being granted with regard to expert witnesses by the Judge who tried the cause. But this case never went to trial, and the question is whether in these circumstances such a certificate is required. Issues had been adjusted, and from that point onward the case was not before any Judge in particular. It might have been enrolled before the Lord Ordinary to fix a day for trial, or it might have come before the Lord President or the Lord Justice-Clerk, or before some other Judge appointed to try the case at the sittings. But till the trial there was no Judge from whom it would have been possible to obtain the certificate. And further, the certificate referred to by the Act of Sederunt is a certificate regarding witnesses who have been examined, not witnesses who might have been examined if the trial had gone on. So, I think that this case is altogether outside the Act of Sederunt, and that no certificate is required when the case has been settled before going to trial. When the case is settled on the footing that the pursuer is to get his expenses, I think any question as to what such expenses include falls to be decided according to the ordinary practice of the Court, with the assistance of the Auditor, and that the pursuer will be entitled to get his ordinary and proper charges according to the circumstances of the case. Here the Auditor has said that the fees in question are moderate, both as to the number and class of the witnesses for whom they are charged and as regards the amounts charged. The matter was really one for his decision, and, as he has reported that the charges are proper and moderate, I think they should be allowed.

LORD KYLLACHY.—I am of the same opinion. The Act of Sederunt plainly

[1] M'Dougall v. Caledonian Railway Co., 5 R. 1011, *per* Lord Ormidale at p. 1012; and Turnbull v. North British Railway Co., 5 F. 944, *per* Lord M'Laren at p. 946.

[2] 14½R. 449.

[3] 5 R. 1011, at p. 1012.

[4] 5 F. 944.

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does not apply. We are consequently thrown back upon the rule which would have applied if the Act of Sederunt had not been passed. And the only such rule of which I know is, that a successful litigant who is found entitled to expenses shall get the expenses incurred by him according to what is just and reasonable in the circumstances. I think, therefore, the Auditor in this case was quite entitled to allow such payments as he thought just and reasonable for expert witnesses.

LORD KINCAIRNEY.—I entirely concur, and I adopt your Lordship's opinion.

LORD STORMONTH-DARLING.—I concur.

THE COURT sustained the objections to the Auditor's report, and granted decree for the amount of the account as taxed, with £14, 9s. in addition thereto.

DAVIDSON & SYME, W.S.—THOMAS HUNTER, W.S.—Agents.

No. 119.
May 20, 1905.
Singer Manufacturing Co, Limited, v. Clelland.

THE SINGER MANUFACTURING COMPANY, Appellants.—*Constable.*
JOSEPH CLELLAND, Respondent.

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. c.* 37)—*Stated Case—Transmission of Process—A. S., 3d June* 1898, *sec.* 9 (*f*).—In a stated case under the Workmen's Compensation Act, 1897, one of the parties moved for an order on the Sheriff-clerk to transmit the process, on the ground that there was a note appended by the Sheriff-substitute to his interlocutor which it was advisable that the Court should have before them when the stated case came up for decision. The Court *refused* the motion.

1ST DIVISION. Sheriff of Stirling, Dumbarton, and Clackmannan.

IN an arbitration under the Workmen's Compensation Act, 1897, before the Sheriff-substitute (Blair) at Dumbarton, between the Singer Manufacturing Company, Kilbowie, Clydebank, and Joseph Clelland, sawyer, 1 Elgin Street, Clydebank, the Sheriff-substitute, at the request of the Singer Manufacturing Company, stated a case.

In the Single Bills counsel for the appellants moved the Court for an order on the Sheriff-clerk to transmit the process. He referred to A. S., June 3, 1898,* and stated as a reason for the motion being granted that there was a note appended by the Sheriff-substitute to his interlocutor which, in the opinion of the appellants, it was advisable that the Court should have before them when the stated case came up for decision.

No appearance was made for the respondent.

THE COURT (the LORD PRESIDENT, LORD ADAM, LORD M'LAREN, and LORD KINNEAR) refused the motion.

J. W. & J. MACKENZIE, W.S.—MACKAY & YOUNG, W.S.—Agents.

* A. S., June 3, 1898, which regulates procedure under the Workmen's Compensation Act, 1897, enacts, sec. 9 (*f*),—"The regulations as to the printing of appeals from the Sheriff Courts contained in the Act of Sederunt of 10th March 1870, . . . shall apply to cases stated under the Act, provided always that it shall not be necessary to print any document, except the case, without a special order from the Court, and provided also that either party may move for an order on the Sheriff-clerk to transmit the process."

No. 120.

May 23, 1905.
Ridley v. Kimball & Morton, Limited.

WILLIAM RIDLEY, Pursuer (Appellant).—*Orr, K.C.*—*A. M. Anderson.*
KIMBALL & MORTON, LIMITED, Defenders (Respondents).—*Younger, K.C.*—*Melville.*

*Expenses—Awarding—Modification—Jury Trial—Appeal from Sheriff Court for Jury Trial—Small amount awarded.*—In an action for £500 of damages at common law, or £249 under the Employers Liability Act, for personal injuries, proof was allowed in the Sheriff Court. On appeal by the pursuer the Court of Session sent the case to trial by jury. The defenders did not move to have the case remitted to the Sheriff Court. The jury awarded £35 of damages. The defenders, who had made no tender, moved that expenses to the pursuer should be subject to modification in respect that the case, as tested by the amount of damages awarded, should properly have been tried in the Sheriff Court. *Held* that the pursuer was entitled to expenses without modification.

1ST DIVISION. Sheriff of Lanarkshire.

THIS action was brought in the Sheriff Court at Glasgow at the instance of William Ridley, metal polisher, Glasgow, against Kimball & Morton, Limited, machine makers, Glasgow, for £500 of damages at common law, or £249 under the Employers Liability Act, 1880, for personal injuries sustained by the leather on a revolving buff—a wooden wheel covered on the circumference with leather—coming loose and hitting him on the head.

The pursuer averred that the force of the blow caused concussion of the brain, which rendered him unconscious; that he did not recover consciousness until the afternoon of the day following the accident; that his head was severely cut and bruised, and that he was permanently disfigured and his health permanently impaired; and that he had not since the accident been able to follow any employment.

The Sheriff-substitute (Boyd) allowed a proof. On appeal by the pursuer for jury trial the Court sent the case to trial by jury. The defenders did not move to have it remitted to the Sheriff Court.

The case was tried before Lord Kyllachy and a jury.

The jury returned a verdict for the pursuer, and assessed the damages at £35. No tender had been made by the defenders.

The pursuer moved the Court to apply the verdict and find him entitled to expenses.

The defenders moved that expenses to the pursuer should be subject to modification.

Argued for the defenders;—The sum awarded as damages was a mere fraction of the sum claimed, and the smallness of the award was a sufficient reason for modifying the expenses. The case was one which should properly have been disposed of in the Sheriff Court in Glasgow (where all the witnesses were resident), and was not one in which the defenders should have been subjected to the expense of a jury trial. The circumstances favouring modification of expenses were stronger in the present case than in many cases in which the expenses had been modified.[1]

Argued for the pursuer;—In appealing for jury trial the pursuer

[1] Jamieson v. Hartil, Feb. 5, 1898, 25 R. 551, *per* Lord Trayner and Lord Moncreiff; Shearer v. Malcolm, Feb. 16, 1899, 1 F. 574; Brennan v. Dundee and Arbroath Joint Railway, May 26, 1903, 5 F. 811, *per* Lord Trayner, at p. 812; Lafferty v. Watson, Gow, & Co., Limited, June 3, 1903, 5 F. 885.

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had merely exercised his statutory right. The circumstances of the case were such as to make the case appropriate for trial by jury. In determining the amount of his claim a pursuer must have regard to what he thought was reasonable reparation, and could not be expected to anticipate the sum which a jury might award him. There had been no tender by the defenders, and they had not moved to have the case remitted to the Sheriff.[1]

At advising,—

LORD PRESIDENT.—The motion before the Court is to modify the expenses, upon the ground that the sum which was recovered was £35, and, that being so, the pursuer ought not to have the full expenses of the jury trial. Such cases as this appear to have been dealt with in various ways. I do not think it expedient to lay down any rule that can be rigidly applied to them all, and I should not be disposed to do anything which might cast doubt on the power of the Court to deal with expenses according to its discretion in each particular case. But on the general question of procedure it seems to me that the Court ought to be guided by Act of Parliament; and where Parliament has dealt with the matter, it is not for us to do something which is tantamount to altering the law. It would not be impossible to reconcile the decisions in the various cases which have been cited to us, although it might not be possible to reconcile some of the opinions which have been expressed in these cases. But judging, as I propose to do, each case by itself, it seems that here we are dealing with a case which in its nature was quite appropriate for jury trial. The pursuer having, according to his statutory right, asked for a jury trial, I think we should give expenses in the ordinary way.

LORD ADAM concurred.

LORD M'LAREN.—In this particular case I do not think that the circumstances are strong for the modification of expenses. I understand your Lordships wish to consider the question on general grounds, and with regard to the difference in practice between this and the Second Division of the Court. I feel bound to say that in my opinion the Second Division are entirely within their powers in laying down the rule with respect to the numerous cases under the Employers Liability Act, which are of small value and really not suitable for jury trial, that they should be kept within bounds by the application of the power of the Court to modify expenses. The Court has at common law complete control over expenses, and has established two scales of taxation in the Sheriff Court by Act of Sederunt. Without the formality of an Act of Sederunt I see no difficulty in treating questions of taxation in our own Court according to a definite rule, provided we apply the rule consistently. We do not claim to exercise an arbitrary discretion in the matter of expenses more than in any other matter. I am the more inclined to think that the practice of the Second Division should be followed, because in the Employers Liability Act we have a

[1] Casey v. Magistrates of Govan, May 24, 1902, 4 F. 811; Fraser v. Caledonian Railway Co., Feb. 20, 1903, 5 F. 476; M'Daid v. Coltness Iron Co., Limited, Nov. 4, 1904, *ante*, p. 32; M'Gilp v. Caledonian Railway Co., Oct. 26, 1904, *ante*, p. 4.

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clear indication how appeals of small value are to be dealt with. That Act, by the sixth section, provides that any action brought under its provisions may be removed to the Court of Session at the instance of either party in the manner provided by, and subject to the conditions prescribed by, section 9 of the Sheriff Courts (Scotland) Act, 1877 (40 and 41 Vict. cap. 50). It was held in the case of *Paton* v. *Niddrie and Benhar Coal Company*,[1] that this enactment did not, by implication, exclude the right of appeal under the 40th section of the Judicature Act, 1825, as re-enacted by the Court of Session Act, 1868, sec. 73. I do not understand how that result was arrived at, and indeed I should have thought that where a statute gives a power of appeal subject to a condition, the power could only be exercised subject to that condition. I of course accept the case of *Paton*.[1] But if it is provided by statute that in a certain class of statutory appeals there is this discretion as to expenses, it would be consistent with sound principle that we should have a similar discretion to deal with expenses in cases which do not fall under the statutory power. I make these observations because it is consistent with my experience and that of your Lordships that many accident cases are brought up here from the Sheriff Court which ought never to have left that Court. That is the opinion I believe of the legal profession in Glasgow, and also to some extent here. I cannot think it right that the provisions of the Employers Liability Act, as to the conditions of the right of appeal, should be reduced to a dead letter by bringing all appeals under the 73d section of the Court of Session Act, 1868, instead of under that Act. I think, therefore, that something ought to be done by way of modification of expenses towards suppressing this grave abuse.

LORD KINNEAR.—I agree with all that the Lord President has said, and therefore, in expressing my own opinion, I need only say, that, in the circumstances of this case, I see no sufficient ground for interfering with the ordinary rule.

THE COURT refused the defenders' motion for modification, and applied the verdict, with expenses.

CLARK & MACDONALD, S.S.C.—MITCHELL & BAXTER, W.S.—Agents.

No. 121.

May 23, 1905.
Sharples v. Yuill & Co.

CECILIA SHARPLES, Pursuer (Appellant).—*Orr, K.C.—A. A. Fraser.*
WALTER YUILL & COMPANY, Defenders (Respondents).—*Watt, K.C.—A. M. Hamilton.*

*Process—Proof—Proof or Jury Trial—Appeal for Jury Trial—Remit to Sheriff Court—Judicature Act* (6 *Geo. IV. cap.* 120), *sec.* 40—*Court of Session Act*, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 73.—*Per curiam* (after consulting Judges of the Second Division)—The principles to be deduced from the authorities are clear, and may be summarised thus: (1) When a case is appealed for jury trial the Court is not bound to grant a jury trial, but may either (*a*) decide the case on any legal ground which will allow the case to be disposed of without inquiry, or (*b*) order inquiry by some other method than jury trial, if it considers jury trial unsuitable. Such inquiry may be either by proof before a Judge in the Court of Session, or

[1] 12 R. 538.

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by proof before the Sheriff; and in deciding between the two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the House of Lords on the facts. (2) In deciding whether a case is or is not suitable for jury trial it will apply the same criterion as it does in cases raised before itself. That is to say, it will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it. And further, as to amount, it will be guided by the standard fixed by the Legislature, viz., £40, so that unless the action on the face of it discloses a claim which, in the opinion of the Court, could not reasonably be entitled to a verdict amounting to more than £40, it will not refuse a jury trial to an otherwise appropriate case.

1st Division. Sheriff of Lanarkshire.

In December 1904, Cecilia Sharples, laundry worker, Govan, with the concurrence of her father as her curator and administrator-in-law, brought an action against Walter Yuill & Company, proprietors of the Victoria Laundry and Dye Works, Govan, in which she craved decree for £100 as damages at common law for personal injuries sustained by her while in the defenders' employment, or alternatively, for £39 or such other sum as should be found due to her under the Employers Liability Act, 1880.

The pursuer averred that on 15th November 1904, while in the employment of the defenders, she was proceeding to her work at 6 A.M., and "as was her custom and also the custom of the other workers," had just entered by the gate leading to the defenders' works when she fell into a hole which had been excavated on 14th November, and which had been left open, unfenced, and unlighted, and sustained serious injuries. (Cond 4.) "In addition to a severe shock to her system the pursuer received serious injuries to her arms and body, and particularly to her foot, the sinews of which had been strained in the fall. In consequence of said injuries the pursuer, after being taken home in a cab, was compelled to have constant medical attention, and was ordered complete rest for a period of two months from the date of her receiving the injuries. The injuries to the foot have caused pursuer so much suffering that her general health has become impaired, and it is questionable if the pursuer will ever fully recover from the result of the injuries and shock."

By interlocutor dated 9th February 1905 the Sheriff-substitute (Boyd) allowed a proof before answer.

The pursuer appealed to the Court of Session, and proposed an issue for the trial of the cause by jury.*

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* The Court of Session Act, 1868 (31 and 32 Vict. c. 100), sec. 73, enacts:—"It shall be lawful, by note of appeal under this Act, to remove to the Court of Session all causes originating in the inferior Courts in which the claim is in amount above £40, at the time and for the purpose and subject to the conditions specified in the 40th section of the Act 6 Geo. IV. c. 120, and such causes may be remitted to the Outer-House."

6 Geo. IV. c. 120 (The Judicature Act, 1825), section 40, contains this proviso—"But it is hereby expressly provided and declared that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session by bill of advocation, which shall be passed at once without dis-

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On the case being called in the Single Bills the defenders intimated objections to the relevancy, and also asked that, if relevant, the cause should be remitted to the Sheriff Court for proof in respect of its trifling character. The case was sent to the Summar Roll, and it was intimated by the Court that they desired a full discussion upon the question of remitting such cases to the Sheriff, with a view to general rules upon the matter being laid down.

Argued for the defenders and respondents;—(1) They maintained that the action was irrelevant at common law, that consequently the action was only for £39, and therefore that it could not competently be appealed under section 40 of the Judicature Act[1] and section 73 of the Court of Session Act, 1868.[2] (2) Even if the action was relevant at common law it ought to be sent back to the Sheriff Court for proof. That was competent.[3] The trifling character of the cause was a sufficient reason for doing so.[4] If it appeared on the face of the record that no jury could reasonably return a verdict for as much as £40 then the case should be remitted to the Sheriff.[5] The present case was ruled by *M'Nab* v. *Fyfe*.[6] That was an action of damages for personal injuries like the present. The damage averred here was less than in that case. The case of *Cochrane* v. *Ewing*[7] merely decided that it was competent to send cases appealed under the 40th section of the Judicature Act to proof in the Court of Session, as well as to send them back to the Sheriff.

Argued for the pursuer and appellant;—This was an ordinary action of damages for personal injuries, and therefore one of the causes enumerated as appropriate for jury trial. It had been competently brought to the Court of Session under section 40 of the Judicature Act.[8] No doubt the Court might remit such cases to the Sheriff Court for proof upon sufficient cause shewn, but the smallness of the amount at stake, if over £40, was not by itself sufficient cause for doing so.[9]

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cussion and without caution; and in case no such bill of advocation shall be presented, and the parties shall proceed to proof under the interlocutor of the inferior Court, they shall be held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session, in so far as by such judgment the several facts established by the proof shall be found and declared."

[1] 6 Geo. IV. cap. 120.

[2] 31 and 32 Vict. cap. 100.

[3] Dennistoun v. Rainey, Knox, & Co., May 16, 1871, 9 Macph. 739, 43 Scot. Jur. 408; Pollock v. Mair, Jan. 10, 1901, 3 F. 332; Tosh v. Ferguson, Oct. 27, 1896, 24 R. 54; Nicol v. Picken, Jan. 24, 1893, 20 R. 288; Bethune v. Denham, March 20, 1886, 13 R. 882; Dunn v. Cuninghame, July 9, 1902, 4 F. 977; M'Nab v. Fyfe, July 5, 1904, 6 F. 925; Kane v. Singer Manufacturing Co., May 21, 1904, 6 F. 658, at pp. 661-2.

[4] M'Nab, *cit.* 6 F. 925; Kane, *cit.* 6 F. at p. 661; Nicol, *cit.* 20 R. 288; Bethune, *cit.* 13 R. 882.

[5] Jack v. Smith, June 10, 1904, 6 F. 811, *per* Lord Adam at p. 812; Dickie v. Scottish Co-operative Wholesale Society, Limited, Nov. 17, 1903, 6 F. 112, *per* Lord Adam at p. 115, and Lord Kinnear at p. 115.

[6] 6 F. 925.

[7] July 20, 1883, 10 R. 1279.

[8] Paton v. Niddrie and Benhar Coal Co., Limited, Jan. 14, 1885, 12 R. 538.

[9] Dickie v. Scottish Co-operative Wholesale Society, Limited, 6 F. 112.

No. 121. At advising,—

May 23, 1905.
Sharples v. Yuill & Co.

LORD PRESIDENT.—This is an action raised in the Sheriff Court of Lanarkshire by Cecilia Sharples, some time a laundry worker, against the proprietors of the Victoria Laundry, Govan. It concludes for damages for injuries received by her through falling into a hole in the defenders' premises as she was going to work. The damages claimed are put at £100, or alternatively at £39, according as the liability may be found to exist at common law or under the Employers Liability Act.

A proof was ordered in the Sheriff Court, whereupon the pursuer appealed to the Court of Session under the provisions of section 73 of the Court of Session Act, and section 40 of the Judicature Act.

The respondents' counsel, on the case being called in Single Bills, asked that it should be dismissed as irrelevant, or otherwise in respect of the trifling nature of the case that it should be remitted to the Sheriff Court. The pursuer asked for an issue with a view to the case being tried by jury.

As regards the relevancy, I have no doubt. The averment is that an open and unguarded hole was left in the passage through which the girl usually obtained access to her work. That this is a good averment of fault is beyond question, though there may be a good defence on the facts stated by the defenders, who say that that passage was at the time shut up and the girls warned to go another way. But the motion to remit the case to the Sheriff on the ground that it is a case of a trifling character is a motion which recently has been frequently made, and it seemed to me that the matter should be thoroughly discussed with a view to laying down the general rules which will guide this Division of the Court in dealing with such applications. The matter has been dealt with in many decisions, which are in some cases not at first sight very consonant, and which should be referred to some general rule.

An application to this Court for jury trial from the Sheriff Court at the stage at which proof has been ordered in that Court has its origin in the 40th section of the Judicature Act of 1825. That section provided primarily for the finality of findings in fact pronounced by a Division of this Court in cases originating in inferior Courts, and permitted further appeal to the House of Lords only on questions of law, the facts as found by this Court being given the effect of a special verdict of the jury.

The section was in its primary aspect discussed and elucidated by the House of Lords in two cases, viz., *Mackay* v. *Dick & Stevenson*,[1] and *Shepherd* v. *Henderson*.[2] It, however, concludes with the following proviso: "But it is hereby expressly provided and declared, that in all cases originating in the inferior Courts in which the claim is in amount above £40, as soon as an order or interlocutor allowing a proof has been pronounced in the inferior Courts (unless it be an interlocutor allowing a proof to lie *in retentis*, or granting diligence for the recovery and production of papers), it shall be competent to either of the parties, or who may conceive that the cause ought to be tried by jury, to remove the process into the Court of Session, by bill of advocation, which shall be passed at once without dis-

[1] 8 R. (H. L.) 37. [2] 9 R. (H. L.) 1.

cussion and without caution; and in case no such bill of advocation shall be presented, and the parties shall proceed to proof under the interlocutor of the inferior Court, they shall be held to have waived their right of appeal to the House of Lords against any judgment which may thereafter be pronounced by the Court of Session, in so far as by such judgment the several facts established by the proof shall be found and declared." This shews that it is not competent to refuse the appeal on the ground that the case is not suited for trial in the Court of Session. It is imperative that the case is to be removed into the Court of Session, and then the question arises, what is to be done with it?

Now, the first question that would naturally arise on this proviso would be whether a remit to the Jury Court (for at this date the Jury Court was a separate Court) was a matter of statutory right as soon as the case had been advocated, or whether the Court of Session were entitled to consider whether the cause was truly suitable for jury trial. Accordingly we find that this question was raised in two cases very soon after the passing of the Act, in both of which it was held that a remit to the Jury Court was not imperative—*Sands* v. *Meffan*,[1] *Baird* v. *Officer*.[2]

The case of *Sands*[1] was a case which was obviously unsuited for a jury, but where there were previous interlocutors which the Court held to be wrong, and they accordingly remitted to the Lord Ordinary (advocations at that time being dealt with by the Lord Ordinary) to dispose of these interlocutors. The question of inquiry therefore did not arise. But in *Baird's*[2] case the point did arise for discussion, how inquiry should be directed—upon the assumption that the case was unsuited for jury trial—and the Lord President and Lord Gillies gave the opinion that if proof was necessary it must be taken in the Court of Session, and could not be remitted to the Sheriff as Sheriff—and accordingly the Division recalled the interlocutor of the Lord Ordinary, who had remitted the case *simpliciter*, and ordered him to proceed in the advocation.

That this view remained the view of the Court for some time may be gathered from the fact that this opinion in *Baird* v. *Officer*[2] is stated as the law in Mr Macfarlane's work on Jury Trial (published 1837), p. 38, and is repeated in Shand's Practice (published 1848), p. 458.

Neither of these works cite any case trenching on the authority of *Baird*.[2] At the same time it can hardly be held to have been authoritatively settled, and accordingly we find it treated as a moot point in the next case which I have been able to discover on the subject, viz., *Harrington* v. *Richardson*.[3] This case contains an instructive judgment by Lord Ivory on the points arising out of the 40th section. On p. 371 he further says, "whether—the competency being sustained—other questions connected with the future course of procedure may not, as in *Sands'*[1] case, arise, will be for after consideration."

Lord Rutherfurd took occasion to reaffirm the principle that the removal under the 40th section gave the Court the right to refuse a jury trial and to give effect to prejudicial pleas—but he did not touch on the method of proof if proof were necessary but the case unsuited for jury trial.

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[1] 7 S. 290. [2] 8 S. 893. [3] 16 D. 368.

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The books are silent on the point till we come to the case of *Dennistoun* v. *Rainey & Knox*,[1] which was the first case cited at the bar. It may be noted that the case of *Campbell* v. *Campbell*,[2] which in this and several of the subsequent cases is cited as an authority, has really nothing to do with the point, being an advocation under 50 George III. cap. 112, section 36. By this time (1871) the Court of Session Act of 1868 had been passed, which abolished advocations and instituted appeals, and specially dealt with advocation under the 40th section of the Judicature Act by section 73, which is in these terms—(His Lordship read the section). *Dennistoun's*[1] case was therefore the first considered judgment under the new Act. It was an action of interdict at the instance of a riparian owner against certain operations in the bed of a stream. The petitioner appealed for jury trial, but on the appeal being called asked that the case should be tried by a Judge without a jury. The Court (First Division) refused the motion as being against the spirit of the 40th section, in respect that to allow a proof before a Judge would get rid of the finality of facts provisions. As a matter of fact they ordered an issue, but indicated notwithstanding in their opinion that failing an issue (that is to say, if the case had been unsuitable for a jury) the proper course would be to remit to the Sheriff to proceed with the proof already ordered.

And accordingly they did take that course in the case of *Chisholm* v. *Marshall*.[3] The opinion of Lord President Inglis is short and explicit:—"This is a matter on which I have no doubt. The defender is the person who has brought the case here, and he has been quite consistent all through in asking for an issue, but there can be no question that, if we find that the case is not one which can be properly sent to a jury, there is no obligation on us to send it there. Failing that, there are only two courses open to us, either to order the proof to be taken here or to send the case back to the Sheriff. The case of *Dennistoun* v. *Rainey*[1] shews that it would be a plain violation of the spirit of section 40 of the Judicature Act to have the proof taken here, and so we must send it back to the Sheriff, before whom the proof will be taken."

In the case of *Watson* v. *Earl of Seafield*, only reported in 7 S. L. R. 327, in 1870, the Second Division had sent a case unsuitable for jury trial to proof before one of themselves, and notwithstanding the decision in *Chisholm's*[3] case the same Division in the next year, finding a case which they considered unsuitable for jury trial, ordered a proof before one of themselves—*Laidlaw* v. *Wilson*.[4] Lord Neaves' remarks on the change of circumstances since 1825 are instructive. Lord Ormidale dissented, holding that such a course was contrary to what had been settled in *Dennistoun's*[1] case. *Chisholm's*[3] case does not seem to have been cited.

Following on this case a diversity of practice arose between the two Divisions—the First Division following *Chisholm's*[3] case, and remitting, in all cases where they thought jury trial unsuitable, to the Sheriff, the Second Division appointing proof before one of their own number or a Lord Ordinary. The competency of this latter course being doubted by the

[1] May 16, 1871, 9 Macph. 739.
[2] 9 D. 135.
[3] 1 R. 388.
[4] 2 R. 148.

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First Division they took advantage of the case of *Cochrane* v. *Ewing*[1] to send the question to the whole Court. The unanimous opinion of the consulted Judges was as follows :—"We are of opinion that the proof can competently be taken in the Court of Session. We think that by the appeal the case is removed from the Sheriff Court, and that it may be dealt with in the same manner as if it had originated in the Court of Session."

This case then only dealt with and confirmed the competency of proof before a Judge; it did not deal with or touch the competency as an alternative method of remitting to the Sheriff as had been done in *Chisholm's*[2] case. The first attempt to have a case remitted to the Sheriff and a jury refused on the sole ground of the trifling nature of the action seems to have been made in the subsequent year in the case of *Mitchell* v. *Urquhart.*[3] This case also seems to have escaped notice. It was not cited in the discussion, and is not referred to in subsequent decisions, but it is very important, because the report bears that it was advised by the First Division after consultation with the Judges of the Second Division. The judgment of the Lord President is as follows :—"We are of opinion, after consulting with the other Judges, that this case being in its nature one appropriate for jury trial, and the sum at issue being above the limit fixed by the statute, there is no reason why the party appealing should not have the case so tried."

The next case in which a remit was made was the case of *Bethune* v. *Denham,*[4] and the case of *Mitchell* v. *Sutherland*[5] mentioned in the note. In the argument in *Denham's*[4] case the expression "trifling" is used, but the ground of judgment was the unsuitability of the case in itself for trial by jury.

This was followed by the case of *Nicol* v. *Picken.*[6] The rubric in this case is obviously wrong, and is probably answerable for some of the false ideas that followed. But the same view as had prevailed in *Mitchell* v. *Urquhart*[3] was again affirmed by the First Division the next year in *Willison* v. *Petherbridge,*[7] and reaffirmed the succeeding year in *Johnstone* v. *Hughan.*[8]

We do not propose to go through in detail the causes in which since that date remits have been made to the Sheriff. They are perhaps not altogether consistent. But nearly all can be properly referred to the opinion that the cases were in themselves unsuitable for jury trial. Many of them were in fact trifling, and that circumstance, helped by the erroneous rubric in *Nicol* v. *Picken,*[6] has probably given rise to the idea which is embodied in the motion now made before us, that because a case is small in its amount it ought to be remitted to the Sheriff. And at least in some of them the idea is actively contested, as for example in the judgment of Lord Adam in the case of *Dickie* v. *The Scottish Co-operative Wholesale Society, Limited.*[9] "In this case the sum claimed is £50, so that *ex facie* this is a perfectly competent appeal under the Judicature Act. But a motion has been made

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[1] 10 R. 1279. [2] 1 R. 388. [3] 11 R. 553.
[4] 13 R. 882. [5] 13 R. 882, note. [6] 20 R. 288.
[7] 20 R. 976. [8] 21 R. 777. [9] 6 F. 112.

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by the defenders that the case should be remitted back to the Sheriff-substitute in Glasgow, to be tried in the Sheriff Court there, on the ground that it is of such a trifling nature that it would be more appropriately dealt with in that manner. Now, as to the competency of such a course of action there can be no doubt. It is perfectly competent for us to send the case to a jury, to try it ourselves, or to remit it back to the Sheriff-substitute. But when the Judicature Act has definitely fixed the sum to entitle the pursuer to a jury trial at £40, I do not think it right that we should fix it at any other figure. At the same time I quite admit that if it had appeared on the face of the pleadings that the case was in reality a trumpery case, and that the sum sued for had been raised to £40 merely for the purpose of bringing it within the provisions of the Act, I should not, in such a case, hesitate to send it back to the Sheriff Court, even though the sum sued for were very much larger than the statutory amount. Now, the test that must be applied is just this: Are the facts as pleaded such that no jury could be reasonably expected to award so large a sum of damages as £40? I cannot say that that appears to be the nature of the case now before us. Here we have a young man meeting with an accident, and suffering an injury to his foot, which resulted, after a few weeks treatment, in partial amputation. So this is the case of a young man who has been permanently mutilated, and I cannot say that I consider a case such as that a light one. If a jury saw fit to assess the damages at £40, I would not be prepared to say that that must of necessity be an unreasonable verdict. Such, then, being the circumstances of the case now before us, I cannot see my way to hold that it ought to be sent back to the Sheriff."

The principles to be deduced from the authorities are clear, and may be summarised thus: (1) When a case is appealed for jury trial the Court is not bound to grant a jury trial, but may either (*a*) decide the case on any legal ground which will allow the case to be disposed of without inquiry, or (*b*) order inquiry by some other method than jury trial, if it considers jury trial unsuitable. Such inquiry may be either by proof before a Judge in the Court of Session, or by proof before the Sheriff; and in deciding between the two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the House of Lords on the facts. (2) In deciding whether a case is or is not suitable for jury trial it will apply the same criterion as it does in cases raised before itself. That is to say, it will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it. And further, as to amount it will be guided by the standard fixed by the Legislature, viz., £40, so that unless the action on the face of it discloses a claim which, in the opinion of the Court, could not reasonably be entitled to a verdict amounting to more than £40, it will not refuse a jury trial to an otherwise appropriate case.

The application of these views to the present case is that we shall allow an issue with the view of the case being tried by jury.

That is the judgment of the Court, and the Judges of the other Division have been consulted and agree with this opinion.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR were present at the advising. No. 121. May 23, 1905. Sharples v. Yuill & Co.

THE COURT approved of the proposed issue, and appointed it to be the issue for the trial of the cause.

STRUTHERS SOUTAR & SCOTT, Solicitors—R. S. SHARP, Solicitor—Agents.

GEORGE WINDRAM AND OTHERS (Owners of the "Buccleuch"), Pursuers (Reclaimers).—*Clyde, K.C.—R. S. Horne.*
WILLIAM ROBERTSON (Owner of the "Kyanite"), Defender (Respondent).—*Aitken, K.C.—Spens.*
*Et e contra.*

No. 122. May 23, 1905. Windram v. Robertson.

*Shipping Law—Collision—Departure from Collision Regulations—Onus—Regulations for Preventing Collisions at Sea, Articles* 20, 21, 22, 23, *and* 27—*Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. c.* 60), *secs.* 418 *and* 419 (4).—The s.s. "Kyanite," finding herself in dangerous proximity to the "Buccleuch," a ship under sail, whose lights were inadequate, and being unable to tell what the course of the sailing ship was, starboarded her helm in order to turn away from the sailing ship, and continued to go full speed ahead. This brought the "Kyanite" across the course of the "Buccleuch," and, two or three minutes after the "Buccleuch" was first sighted by the "Kyanite," a collision took place, the stem of the "Buccleuch" striking the "Kyanite" on the starboard side, nearly amidships.

In cross actions of damages, *held* (1) that although the "Kyanite" did in fact depart from the Regulations for Preventing Collisions at Sea, by crossing the course of the "Buccleuch," she, being wholly unaware of the course of the latter owing to her inadequate lights, was not chargeable with fault in respect of this departure from the regulations; but (2) that the "Kyanite" was to be held at fault in respect that she had infringed article 23 of the regulations by failing to stop and reverse in the short space of time after she sighted the sailing ship, and had failed to discharge the *onus* which lay on her of shewing that her failure to comply with this article of the regulations was excusable, by proving either that her departure from the regulations was the only chance of escaping a collision, or that the risk of collision would have been increased by obeying the regulations.

IN November and December 1903 George Windram and others, owners of the iron sailing ship "Buccleuch" of Liverpool, and William Robertson, owner of the s.s. "Kyanite," of Glasgow, raised cross actions of damages, concluding respectively for £3000 and £10,000, on account of a collision between these two vessels, which occurred on 17th October 1903 in the English Channel between Folkestone and Dover. The actions were conjoined. 1ST DIVISION. Lord Low.

In the action at their instance the owners of the "Buccleuch" averred that on the evening of 17th October 1903 the "Buccleuch" was proceeding eastwards on a voyage from Falmouth to Amsterdam under all plain sail, and, about 7.45 P.M., in clear weather, those on board sighted the "Kyanite" approaching her some miles off on the port bow. (Cond. 3) "The lights of the 'Buccleuch' were burning brightly, and her port light was visible to any person keeping a proper lookout on the 'Kyanite.'" (Cond. 4) "The vessels were then approaching each other in a direction which seemed to involve a risk of collision if each kept on its course, and it was the duty of the steamer to keep out of the way of the sailing vessel. Nevertheless the 'Kyanite' continued upon her course, by which she was being brought nearer to the 'Buccleuch.' Thereupon, in order to still further warn those on board the 'Kyanite' of the proximity of his

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vessel, the master of the 'Buccleuch' burned a blue flare light on the port side of his ship . . ." (Cond. 5) "When within about 150 yards of the 'Buccleuch' the helm of the 'Kyanite' was suddenly put to starboard, which had the effect of taking her directly across the bows of the 'Buccleuch,' and of making a collision between the vessels inevitable. The master of the 'Buccleuch' tried to avert a collision by putting his helm hard-a-starboard; but before this operation could take effect upon his vessel's course the vessels collided," the stem of the "Buccleuch" striking the "Kyanite" on the starboard side nearly amidships.

The owner of the "Kyanite" answered;—(Ans. 3) "Denied that the 'Buccleuch's' lights were burning so as to be visible to any vessel approaching her. . . ." (Ans. 4) "Admitted that the 'Kyanite' kept on her course, as, owing to the absence of lights on board the 'Buccleuch,' those on board the 'Kyanite' had no reason to anticipate any danger until the 'Buccleuch' suddenly loomed up close on her starboard bow. *Quoad ultra* denied." (Ans. 5) "Admitted that immediately after seeing the loom of the 'Buccleuch' the 'Kyanite' starboarded her helm in order to try and run clear of the 'Buccleuch,' which was then the only possible chance of safety for both vessels. Owing, however, to the proximity of the 'Buccleuch,' and to the fact that the latter improperly starboarded her helm and came to port, the collision could not be avoided."

The owners of the "Buccleuch" further averred;—(Cond. 6) "The said collision was caused by the fault of those in charge of the 'Kyanite.' Instead of directing their course so as to keep out of the way of the 'Buccleuch,' as it was their duty to do, they navigated their steamer so as to bring her directly across the course of the sailing vessel, and thereafter, in breach of Rule 22 of the Regulations for Preventing Collisions at Sea, they attempted to cross ahead of her. Had they, instead of attempting to cross ahead, ported the 'Kyanite's' helm instead of starboarding it, the pursuers believe and aver that the collision would have been avoided. Further, upon approaching the 'Buccleuch,' it was the duty of the 'Kyanite' to stop and reverse, which she failed to do. The pursuers also believe and aver that no proper lookout was kept on board the 'Kyanite' prior to the said collision. The defender's servants were thus guilty of breach of the rules of good seamanship, and of the Articles for the Prevention of Collisions at Sea, particularly Articles 20, 22, 23, and 29." *

* The Regulations for Preventing Collisions at Sea, made by Order in Council of 27th November 1896, under the Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 418, are, *inter alia*, as follows:—

Art. 20. "When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel."

Art. 21. "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

Art. 22. "Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other."

Art. 23. "Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

Art. 27. "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

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The answer was in these terms;—(Ans. 6) "The collision was caused solely by the fault of those in charge of the 'Buccleuch.' Her lights were defective, either being out altogether or having become invisible. In consequence, those in charge of the 'Kyanite' were not aware of the proximity of the 'Buccleuch' until it was too late to avoid a collision. Those in charge of the 'Kyanite' did everything possible to avoid the collision by directing her course to port as aforesaid. The collision might have been avoided had it not been that the 'Buccleuch' starboarded her helm immediately before the collision, and so ran into the 'Kyanite.' Those in charge of the 'Buccleuch' were thus guilty of breach of the rules of good seamanship and of the Regulations for the Prevention of Collisions at Sea, and particularly of Articles 1, 2, 5, 21, and 29 thereof."

The owners of the "Buccleuch" pleaded;—(1) The said collision having occurred through the fault of the servants of the defender on board the "Kyanite," and the pursuers having suffered damage thereby, the defender is liable in reparation.

The owner of the "Kyanite" pleaded;—(1) The collision in question having been caused solely by the fault of those in charge of the pursuers' vessel, the defender is entitled to be assoilzied. (3) *Separatim*, the collision in question having, in any event, been contributed to by the fault of the pursuers, the loss falls to be apportioned according to Admiralty practice.

The record in the action at the instance of the owner of the "Kyanite" was to a similar effect.

A proof was allowed in the conjoined actions. The proof disclosed that the "Kyanite" before the time of the collision was proceeding on a course S.W. by W. half W., in charge of the mate, Fife. The course of the "Buccleuch" was E. by N., the wind being northerly. The steamship "Ness" was at the time holding the same course as the "Buccleuch," astern of her, on the south side, the other side from the "Kyanite." The other facts disclosed by the proof which are material to this report sufficiently appear from the opinions of the Lord Ordinary and the Lord President.

On 12th July 1904 the Lord Ordinary (Low) pronounced this interlocutor:—"Finds that the collision between the sailing ship 'Buccleuch' and the steamer 'Kyanite' was caused by fault on the part of those in charge of both vessels," &c. *

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* "OPINION.—(After analysing the evidence as to the sufficiency of the lights of the 'Buccleuch,' and coming to the conclusion in fact that they were not sufficient)— . . . I am therefore of opinion that the 'Buccleuch' was in fault, and the next question is whether the 'Kyanite' was not also in fault.

"It is said that there was no proper watch being kept on board the 'Kyanite.' There is one very strong ground for supposing that that was the case, and that is that the mate and lookout never noticed the lights of the 'Ness.' They frankly admitted that that was the case, and said they could not account for it. The mate was extremely honest in his evidence upon the point, because when it was suggested that the lights of the 'Ness' might have been hidden by the 'Buccleuch,' as they were both sailing the same course, he replied,—'If he had seen us, we were bound to see him.'

"Notwithstanding that answer, however, I think that at times, and especially when the vessels were nearing each other, the 'Ness' may have been shut out of view of the 'Kyanite,' and that the fact that neither Fife nor M'Alister saw the lights of the 'Ness' does not necessarily lead to the

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The owners of the "Buccleuch" reclaimed.

Argued for the owners of the "Buccleuch," on the question whether the "Kyanite" was at fault;—Those in charge of the "Kyanite" were in fault in (*a*) starboarding her helm immediately before the collision, and (*b*) failing to stop and reverse her engines. The starboarding of the helm of the "Kyanite" so as to attempt to cross ahead of the "Buccleuch," was a breach of Rule 22 of the Regulations for Preventing Collisions at Sea. Further, by failing to stop and reverse as they approached the "Buccleuch," those in charge of the "Kyanite" were in breach of Rule 23 of these Regulations. Under Rules 20 and 21, the whole duty of keeping out of the way lay on the "Kyanite," which was a steam vessel, and the "Buccleuch," being a sailing ship, was entitled and bound to keep her course and speed. These rules were absolute, and were disregarded at the peril of those dis-

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conclusion that they were not looking out at all. I think, however, that the inference is that they were not keeping so constant or keen a watch as they ought to have done, especially in the busy waters of the channel. Further, my impression is that if the 'Ness' had been seen by the 'Kyanite,' the collision would have been avoided. I take it that it would have been the duty of the 'Kyanite' to keep clear of the 'Ness,' and if she had done so she would probably have also kept clear of the 'Buccleuch.' That, however, is by no means clear upon the evidence, and I need not consider the point further, because, in my opinion, the 'Kyanite' was otherwise plainly in fault. I refer to the manœuvre which she adopted when she sighted the 'Buccleuch.'

"Fife then put his helm to starboard, and continued to go at full speed ahead. That, as it happened, was the very worst thing which he could have done, because it took him right across the bows of the 'Buccleuch.' Captain Cowie, a gentleman of great experience, said that it would have been a proper thing for Fife to port his helm. That opinion, I think, was given in view of the fact that the 'Kyanite' and the 'Buccleuch' were crossing ships, and that it was the duty of the former to give way. But at the time Fife did not know that the 'Buccleuch' was a crossing ship. He had no idea in what direction she was sailing. All that he knew was that a ship under sail was in dangerously close proximity. In such circumstances I think that his duty was to stop and reverse. That was the one course which, I think, he could not have been wrong in following. What he did do was fatal if, as it turned out, the 'Buccleuch' was a crossing ship.

"Fife said that to have stopped and reversed would not have avoided the collision, because there was not time for the change in the motion of the engines to take effect. Whether that opinion is well founded or not depends upon how far the 'Buccleuch' was distant when Fife sighted her. He says that only half a minute elapsed before the collision. I think that that is an underestimate. After Fife sighted the 'Buccleuch' her master burned a blue light. The master says that the light had burned out some time before the collision, and other members of the crew say the same thing. The master of the 'Ness,' however, says that it was still burning when the collision occurred. I think that the inference from the whole evidence is that the light had very nearly, but not quite, burned out at the time of the collision. Now, it appears that a blue light of the kind burns for several minutes, and accordingly I do not think that less than two or three minutes could have elapsed between the time when Fife sighted the 'Buccleuch' and the collision. Now, Captain Cowie says that a steamer can be stopped from full speed ahead in less than one minute, and therefore if the order to stop and reverse had been given immediately the 'Buccleuch' was sighted, not only might the way of the 'Kyanite' have been stopped before the time when the collision took place, but the reverse action of the engines

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regarding them.*[1] The owner of the "Kyanite" had failed to shew —and the *onus* was entirely on him—that the circumstances of the case made departure from the Regulations necessary. Even if the reason put forward by those on board the "Kyanite" for starboarding her helm—viz., that they did not know that the "Buccleuch" was a crossing ship—was valid, it furnished no excuse for their failure to stop and reverse. The "Buccleuch" was seen, or ought to have been seen, before the ships were in the agony of a collision; and there was ample time for the "Kyanite"—a much longer time than was considered sufficient in the case of the "*Khedive*"[1]—to realise the situation and obey the rule as to stopping and reversing. If the "Kyanite," in obedience to the rules, had ported her helm and stopped and reversed, a collision would have been avoided.

Argued for the owner of the "Kyanite";—The sole cause of the collision was the misconduct of those on board the "Buccleuch" in having defective lights. Owing to this misconduct the ships were brought into a position of extreme peril, and, in that situation, even if it was an error on the part of the "Kyanite" to starboard her helm and not stop and reverse, it was an error due not to her fault, but to the fault of the "Buccleuch." The owner of the "Kyanite" was not liable for a breach of the rules which had been committed by those in charge of her endeavouring to do their best in the position of peril in which the "Buccleuch" had placed her.[2] When the "Buccleuch" suddenly loomed up on the starboard bow of the "Kyanite," those on board the "Kyanite" did not know that the "Buccleuch" was a crossing ship, and, that being so, it was an act of ordinary skill and care on the part of those in charge of the "Kyanite" to starboard her helm, and so try to clear the "Buccleuch."[3] A collision would thereby have been averted if the "Buccleuch" had not suddenly starboarded her helm. If the rule as to stopping and reversing had been followed, the effect would have been, with a right-handed screw, to turn the prow of the "Kyanite" to starboard, and so increase the risk of a collision. That fact in itself was sufficient to excuse the "Kyanite" for not following Rule 23.[4] Under Rule 23 the "Kyanite" was bound to stop and reverse only "if necessary," and if it was shewn by a ship that to stop and reverse in compliance with

might have come into operation. Further, the master of the 'Buccleuch' had very properly thrown his ship's head up into the wind, which stopped her way, and if Fife had stopped and reversed, the probabilities are, so far as I can judge, that the collision would not have taken place.

"I am therefore of opinion that the 'Kyanite,' as well as the 'Buccleuch,' was in fault."

* The Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 419 (4), enacts:—"Where, in a case of collision, it is proved to the Court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulations have been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

[1] The "Khedive," 1880, L. R., 5 App. Cas., 876, *per* Lord Blackburn.

[2] The "Bywell Castle," 1879, L. R., 4 P. D. 219; Hine Brothers v. Clyde Trustees, March 7, 1888, 15 R. 498; Hoek van Holland Maatschappij v. Clyde Shipping Co., Limited, Dec. 11, 1902, 5 F. 227.

[3] Baker v. Owners of the "Theodore H. Rand," 1887, L. R., 12 App. Cas., 1247.

[4] The "Benares," 1883, L. R., 9 P. D. 16.

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Rule 23 would have increased the risk, then Rule 27 was applicable, and non-compliance with Rule 18 would not cause the ship to be held in fault.[1]

At advising,—

LORD PRESIDENT.—This is an important case, and it has been very well argued before your Lordships. I do not think I need to recapitulate the circumstances of the case, because being fresh in your Lordships' memory, as far as you are concerned, they are for others exceedingly well explained in the very careful judgment of the Lord Ordinary which is the subject of this reclaiming note. That reclaiming note, presented by the owners of the "Buccleuch," has been taken advantage of by the owners of the "Kyanite," so that your Lordships have to consider the question of whether either or both of these vessels was in fault.

Now, so far as the manœuvre is concerned, I do not think there has been any doubt (it is not contested even in the speeches of counsel) that so far as the "Buccleuch" was concerned, she is not to blame. The "Buccleuch" was a sailing ship, and as such she was entitled under the regulations to have steamers keep out of her way, and upon the approach of any steamer her proper proceeding was to hold her course. She did hold her course, and although at the very last moment she did execute the manœuvre of turning her head into the wind, she being at that time sailing very close to the wind, with the view of stopping, nobody says that she was not perfectly right in doing so; indeed, it did not alter her holding her course. But, then, there is the question of whether she on that night was sufficiently provided with lights so as to allow a steamer which was meeting her to see her in time to get out of her way. (His Lordship reviewed the evidence on the question of lights.)

I have therefore come to the conclusion that the lights on the "Buccleuch" on that occasion were not lights that were in accordance with the requirements of the collision regulations, and that in that matter the "Buccleuch" was in fault. Now, of course, if that is so, that prevents the "Buccleuch" recovering against the "Kyanite."

We have now to consider the question of the "Kyanite." On this branch of the case I am bound to say I have not personally felt any difficulty. I think the Lord Ordinary is clearly right, although I am not inclined to put much stress on what he alludes to in part of his judgment, I mean the supposed error in crossing the other ship's course. If we start with the assumption of the facts which I hold to be proved, namely, that the other ship had not adequate lights, although she had lights, the "Kyanite" found itself in dangerous proximity to something ahead, without being able to tell what the course of that something was. Of course we know the fact now, which is, that the "Kyanite" did cross the course of the "Buccleuch," which in itself would be an improper manœuvre, but I do not think that she can be charged with any breach of the regulations, because,

[1] *Per* Brett, M. R., in the "Benares," 1883, L. R., 9 P. D. 16, at p. 17; The "Memnon," 1889, 6 Asp. Mar. Cases, 488, *per* Lord Chancellor (Halsbury), at p. 489; Marsden's Collisions at Sea (5th ed.), pp. 45 to 49; Merchant Shipping Act, 1894, sec. 419 (4).

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as has been often said in such cases, and, indeed, is quite obvious, you cannot in the proper sense of the word, break a regulation unless you know to what the regulation applies. I do not think those on the "Kyanite" knew what the other vessel's course was, or could know. The regulation which I think was contravened was article 23d for not stopping and reversing.

There was cited a good deal of authority upon this matter, and I am bound to say that I think the authority as determined by the judgment of the House of Lords is perfectly clear. The leading case is undoubtedly the case of the "*Khedive*,"[1] and the subsequent cases of the "*Benares*"[2] and "*Memnon*"[3] are not at variance with that authority. The "*Benares*"[2] was not in a Court which could overrule the House of Lords. The "*Memnon*"[3] was in the House of Lords, which does not overrule its own judgments. I think the two cases are perfectly in accordance with the case of the "*Khedive.*"[1] The judgment in that case was a very important one. Lord Blackburn in delivering the leading opinion in the House of Lords says as plainly as he can say that so far from the manœuvre in the case of the "*Khedive*"[1] being a bad manœuvre, it probably was the best thing that could be done, and as matter of fact probably saved great loss of life, because he came to the conclusion that the manœuvre which was performed had the effect of bringing about a collision between the two ships side to side, whereas if that manœuvre had not been performed one ship would have sent the other to the bottom, and he held that, as a seaman, the unfortunate captain could not have done anything better than he did. Lord Blackburn felt it necessary to lay down as the law that the real meaning of these rules of collision at sea was not that they were hints to people as to what they had best do in a certain condition of circumstances, but that they were absolute rules to be disregarded at the peril of those disregarding them, and the breach of which was only to be excused if a case of absolute necessity was made out. Now, there were cited some authorities both in the English Courts and in this Court before the "*Khedive.*"[1] I cannot help thinking that the mistake, which is a very common mistake, is that a generality is taken, and that the generality is too widely expressed, because there is nothing, I think, in the actual decisions of those earlier cases which seems to me inconsistent with the "*Khedive.*"[1] I think I cannot do better to illustrate what I mean than by taking the case of *Hine Brothers* in this Court in 15 R., p. 498, where the *dictum* of Lord Justice James in the "*Bywell Castle*"[4] is quoted with approval. Let me remind your Lordships of the circumstances in the case of *Hine*[5] which were these: a large steamer called the "Horatio" was proceeding in the River Clyde on the wrong side of the river. It met a barge going in the opposite direction, which barge was upon the same side of the river, and therefore, of course, its right side. The barge, seeing that this large steamer was coming right down upon it, and reflecting that in the impending collision the damage to it would be very much worse if it were to go straight on, crossed to the other or wrong side. Almost at

[1] L. R., 5 App. Ca. 876. [2] L. R., 9 P. D. 16. [3] 6 Asp. M. C. 488.
[4] L. R., 4 P. D. 219. [5] 15 R. 498.

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the same moment the "Horatio" changed its course, and went over to its own right side of the river, with the result that a collision happened. It was maintained by the "Horatio" that the barge could not recover against the "Horatio" because the barge was at the time of the collision admittedly transgressing the rule by going to the wrong side. It was held, and I think perfectly rightly, that it was not in the mouth of the "Horatio" to say that, because it was the "Horatio's" own mistake that had caused the barge to go there. The general proposition which Lord Justice James in somewhat similar circumstances laid down in the case of the "*Bywell Castle*"[1] was quoted with approval by the Lord Justice-Clerk in this case. His Lordship said,—"I desire to add my opinion that a ship has no right by its own misconduct to put another ship into circumstances of extreme peril, and then charge that other ship with misconduct." That seems to me to be too absolute a proposition. Where your own misconduct leads directly to the breaking of a rule, it is true. But otherwise the true position is well laid down in the case of the "*Khedive.*"[2] These rules are things which cannot be broken except at your own peril.

With regard to the "*Benares,*"[3] the facts of that case may be taken from the rubric,—"A steamer, the G., saw a green light at some distance and starboarded her helm. Soon after the port side of the B., without a red light, came into view so close that the only chance of avoiding a collision was for the G. to continue at full speed ahead and starboard her helm, which she did. The B. struck the G. on her starboard side. *Held* that the B. was alone to blame for the collision, and that article 18 of the regulations did not apply under the circumstances to the G., and that article 23 was applicable." Now, the Master of the Rolls (Brett) in deciding that case dealt with the question, whether there had not been a breach of the regulations. He said,—"By article 18, if there was nothing else in the circumstances, he ought to have stopped and reversed. But the rules of navigation are contained not in one article, but in all the articles, and article 23 is as much to be observed as article 18." One must construe that sentence by getting hold of the rules that were then in operation, which were not the rules we are dealing with now, so that numbers are misleading if taken without considering the rules to which they apply. Article 18 of those days is article 23 nowadays. Article 23 which the Master of the Rolls (Brett) mentions is not article 23 now.* Article 18 of the Rules of 1879 was in these terms,—"Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary." In the case of the "*Benares*"[3] it was held to be made out on the facts that continuing full speed ahead and starboarding the helm was a necessary manœuvre to take, the only chance of escape. That is not inconsistent with the judgment in the "*Khedive*"[2] case. That judgment summarised is this: In impending danger of any sort you are entitled to a moment's hesitation in order that you may bring to your mind whether the

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[1] L. R., 4 P. D. 219.
[2] L. R., 5 App. Ca. 876.
[3] L. R., 9 P. D. 16.

* Article 23 of the Rules of 1879 corresponded to Article 27 of the Rules of 1896, quoted *supra*.

rules apply or whether they do not, but once having that moment of hesitation you are then bound to follow the rule. If you do not follow the rule, you neglect it at your own peril. You may be able, as a matter of proof, the *onus* being upon you, to shew that, following the rule, you would have increased the risk of collision, and that I think is the sentence that is quoted from the Lord Chancellor's judgment to us in the case of the "*Memnon*."[1] The *onus* is upon you, and if you do not discharge it, then you cannot be excused if you have not followed the rule. That is surely not only common sense, but is very much accentuated when you have the state of the facts such as we find them in that case. I can understand that when a man is in a position where he sees that there is a chance of safety, it may be right that in what has been called the agony of the collision you are not to hold him too hard because he did his best. Although even there, in the light of the authorities that I have quoted, I think he would need to shew not only that he did what he thought was best, but what other seamen would think was best for the purpose of avoiding a collision. But if a person, through no fault of his own, is in a state, from the circumstances of the case, in which he cannot tell what is the right and proper manœuvre, then more than ever, it seems to me, he is absolutely bound to stick to the rules and to leave them at his own peril.

Now, applying these rules to this case, I do not think there is much doubt. Of course it is impossible to be very precise as to what distance off the "Kyanite" saw or ought to have seen the "Buccleuch," on the view that I have submitted to your Lordships that the "Buccleuch" had a light, although a bad one. Then, there is also the question of the time that was taken to burn the blue flare. I do not think it is necessary to go through evidence particularly upon that, but undoubtedly a blue flare did begin to burn before the collision. There was a small space of time given to the captain or the mate of the "Kyanite" in which to act. I may remind your Lordships of how extraordinarily small the time was that was given in the case of the "*Khedive*";[1] it was only from a minute to a minute and a half, and yet there the captain was found to have been wrong in leaving the rules. In this case I cannot doubt that there was a small space of time in which to act, and that the person in charge had no certainty that any manœuvre would lead him to safety. The manœuvre that he took had this in its favour, that he saw something on the starboard bow, and that consequently he starboarded his helm, sending his ship to port, which of course would turn him away from the object he saw, but which had the effect of making him cross the bows of the other vessel. But it is not on the question of his helm that I think he is liable or wrong; it is entirely on the question of not stopping and reversing his engines. The learned counsel tried very hard to shew that he was right in not doing so, because the effect of a right-handed screw on reversing the engines is to incline the vessel's head to starboard, and that that was the quarter in which danger appeared. But I have two observations to make on that point. Upon the expert evidence, I do not think that that proposition is at all made out for the "Kyanite"; and secondly, and that is enough for me, it

[1] 6 Asp. M. C. 488. [2] L. R., 5 App. Ca. 876.

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falls enormously short of proving that proposition, the *onus* of which is upon the "Kyanite"—I mean the proposition that is put by the Lord Chancellor in the case of the "*Memnon*,"[1] and which I think was held affirmatively in the case of the "*Benares*."[2] The evidence on that matter stands thus: The expert for the "Buccleuch" states that the proper thing was to have reversed, and in cross-examination this point is put against him by the other side: "Assuming that the light on the sailing vessel is so bad that she is very close on the starboard bow of the steamer before she is visible, and that it is impossible in the dark to tell what course the pursuers' sailing vessel is on, is it not a seamanlike course to keep full speed ahead on a hard-a-starboard helm? (A.) No, his duty was to put his engines full speed astern, and indicate by signal what he was doing." That is the evidence of the pursuers' expert. With regard to this the defender's own expert, Mr Dick, when examined in chief, says, "supposing the ship's sails loomed up at a distance of about 700 feet suddenly on the starboard bow of a steamship, in my opinion a reasonable course for the man in charge of the steamship to pursue would be to turn away from it by starboarding," and in cross-examination at p. 84 B and C, he is asked,—"(Q.) Would it not be the proper thing for a prudent seaman to do, just because he did not know what was the course of the other boat, to stop and reverse? (A.) That would be the one course, but I think the other was a perfectly good course." So that it seems absolutely impossible on that evidence to hold that the *onus*, which on this matter I hold in accordance with the authorities was on the "Kyanite," has been in the slightest degree discharged. For these reasons I have come to the conclusion that on the second branch of the case the Lord Ordinary is right, and I think your Lordships should adhere to his interlocutor.

Lord Adam.—(After dealing with the question of fact as to the condition of the "Buccleuch's" lights, as to which he came to the same conclusion as the Lord President)—On the question as to whether the "Kyanite" was in fault, I agree with your Lordship in thinking that the captain acted without any sufficient justification, and in contravention of Article 23, in not stopping and reversing his engines.

On these grounds I agree with your Lordship in thinking that the Lord Ordinary's interlocutor should be adhered to.

Lord M'Laren.—(After dealing with the question of fact as to the condition of the "Buccleuch's" lights)—On the question of the liability of the "Kyanite" I agree with your Lordships that the fault of the "Kyanite" consisted in not stopping and reversing. I do not think the owners have been successful in establishing that they come within the very narrow margin of exceptions that is permissible in applying that rule as interpreted by the judgment of the House of Lords in the case of the "*Khedive*."[3] The only reason suggested for treating the case as exceptional is that the "Kyanite" was a single screw vessel, and that with a single screw, when the engines are reversed, there is a tendency—I do not think it is put

[1] 6 Asp. M. C. 488. [2] L. R., 9 P. D. 16.
[3] L. R., 5 App. Ca. 876.

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more strongly than that—there is a tendency for the ship's head to turn in one direction or the other according as the pitch of the screw is what is termed right hand or left hand. Now, these regulations are framed by experts, and issued by the Board of Trade. They are authorised by Parliament, and have the force of an Act of Parliament, and the experts who framed those rules were perfectly aware that there are such things as single screws as well as double screws, depending upon the size of the vessel, and if they had thought that the rule did not apply to single screw vessels, they would have said so. I agree with an observation made by your Lordship in the chair, that this tendency, as long as the ship was making forward way, could always be counteracted by the helm. After she ceases to be under way, the object of the manœuvre has been attained, because the vessel is then at a standstill, and a collision is either averted or, at all events, it is diminished as much as possible. I therefore agree that the neglect to stop and reverse the engines was an error of judgment on the part of the mate, which (although possibly in the case of his being tried for mismanagement it would be a good defence) is not a defence which will exempt the owners from liability for negligence.

LORD KINNEAR concurred.

THE COURT adhered.

WEBSTER, WILL, & Co., S.S.C.—J. & J. ROSS, W.S.—Agents.

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Patterson v. Landsberg & Son.

MISS AGNES G. PATTERSON, Pursuer (Respondent).—*Sol.-Gen. Salvesen—Guthrie, K.C.—Munro.*
H. LANDSBERG & SON, Defenders (Reclaimers).—*Mackenzie, K.C.—Wilson, K.C.—M. P. Fraser.*

*Sale—Misrepresentation—Sham Antiques—Res ipsa loquitur*—A wholesale dealer sold certain articles of jewellery, which he had got made to resemble antiques, to a retail dealer. In an action of rescission of the sale on the ground of misrepresentation the buyer gave evidence to the effect that the seller had stated that the articles were the antiques they appeared to be. The evidence of the seller was that he said nothing about them. The Court, preferring the evidence of the buyer, *held* (*aff.* judgment of Lord Low) that the pursuer was entitled to rescind the sale.

Opinion *per* Lord Kyllachy, that the offer of articles appearing to be antiques was in itself a misrepresentation, on the principle of *res ipsa loquitur*, and that the seller was not entitled to leave the articles to speak for themselves, but was bound to displace the inferences which to his knowledge their appearance was calculated to suggest.

2D DIVISION.. Lord Low.

IN 1902-3, H. Landsberg, of the firm of H. Landsberg & Son, diamond merchants, 52 Hatton Garden, London, sold to Miss Agnes G. Patterson, dealer in curios, George Street, Edinburgh, certain articles of vertu, described as a portrait of Flora Macdonald, a medallion of Queen Victoria in her coronation robes, and a miniature of General Monk. These articles had all been painted and set to the order of Landsberg & Company, but they were so got up as to look like antiques.

Miss Patterson brought the present action against Landsberg & Son,

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concluding for declarator that she was entitled to rescind the contracts of sale by which she had acquired the articles in question, and that the defenders were bound to accept the return of the articles and to repay the price.

In her condescendence the pursuer averred that Landsberg had represented to her that these articles were antiques of historical interest.

The defenders averred;—(Ans. 4) "Denied that any representations were made by the defenders to the pursuer in the terms condescended upon, or in similar terms. Explained that no guarantee or warranty of any description was, at the date of the contract of sale, or at any time, given by the defenders to the pursuer."

The pursuer pleaded, *inter alia*;—(1) The pursuer having been induced to purchase the articles referred to in the condescendence through the defenders' false and fraudulent representations as condescended upon, she is entitled to have the contracts rescinded, and to obtain repayment of the sums paid by her for the said articles. (2) The said articles having been sold to the pursuer as antiques, and not being of that description, the pursuer is entitled to reject the same, and to obtain payment of the sums alternatively concluded for. (4) The said transactions being unconscionable, the pursuer is entitled to restitution *in integrum*.

The defenders pleaded;—(1) The pursuer and the defenders having entered into valid contracts of sale of the articles condescended upon, and the defenders having duly implemented their part of said contracts, the latter are entitled to absolvitor.

Proof was allowed, and led. The import of the evidence is sufficiently given in the opinion of Lord Kincairney.

On 17th January 1905 the Lord Ordinary pronounced the following interlocutor:—"Finds, decerns, and declares, in terms of the first and second branches of the first declaratory conclusion of the summons, and also in terms of the third branch of said conclusion in so far, but in so far only, as an alleged 'Duke of Albemarle' brooch, sold at the price of £85, is concerned: Finds, decerns, and declares, in terms of the second declaratory conclusion of the summons, that the defenders are bound to accept return tendered to them of the articles referred to in said first and second branches of said first declaratory conclusion, and in said third branch thereof as far as said alleged 'Duke of Albemarle' brooch is concerned, as aforesaid, and to make repayment of the sums paid by the pursuer to them in respect thereof, viz.—(1) the sum of £150 in respect of the alleged Flora Macdonald necklace and pendant; (2) the sum of £185 in respect of the alleged medallion of Her Majesty the late Queen Victoria; (3) the sum of £85 in respect of the alleged 'Duke of Albemarle' brooch, with interest on said sums as after mentioned, and accordingly decerns against the defenders for payment to the pursuer of the said sums of £150, £185, and £85, amounting together to the sum of £420 sterling, with interest thereon at the rate of 5 per centum per annum from the date of citation in this action till payment; and *quoad ultra* assoilzies the defenders from the conclusions of the summons, and decerns."

The defenders reclaimed, and argued;—On the evidence it was not proved that Landsberg made any representation regarding the articles. On that assumption the pursuer had no case. In a contract of sale where there was no representation or warranty the rule was *caveat*

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*emptor*. Silence was not equivalent to misrepresentation, even if the seller knew that the buyer was under a misapprehension.[1]

Argued for the pursuer and respondent;—On the evidence it was proved that Landsberg represented to the pursuer that the articles were antique. At the lowest it was proved that he said he knew nothing about their history, and that, in the case of articles which had been made up to his own order, was a misrepresentation. Even if it were held that he said nothing, the articles involved a misrepresentation. The seller of sham antiques was bound to state that they were sham. The maxim *res ipsa loquitur* applied. If a man sold a sham coin at the price of a real one, he surely represented that the coin was genuine. Mere silence might be representation.[2]

At advising,—

LORD KINCAIRNEY.—I have found this action confused, intricate, and difficult; but, after consideration, I have come to concur in the judgment of the Lord Ordinary.

The pursuer carries on business in George Street, Edinburgh, as a bookseller and printseller, and dealer in curios, and engravings; and the defenders design themselves as diamond merchants in London. The action relates to purchases from the defenders by the pursuer, made of course with the view of re-sale at a profit in the course of her business. The articles purchased purported to be (1) a necklace with a miniature of Flora Macdonald, (2) a medallion of Queen Victoria in coronation robes, (3) a brooch with a miniature of the Duke of Albemarle (General Monk), bearing the date 1650, and (4) an emerald brooch, the question about which has been decided by the Lord Ordinary for the defenders, and is not brought up by this reclaiming note. The questions debated have related therefore to the three articles first named,—The Flora Macdonald necklace and miniature, the medallion of the Queen, and the Albemarle brooch. These were purchased on 15th December 1902, 3d March 1903, and 3d July 1903, at the prices of £150, £250, and £150. This last sum of £150 includes the price of the emerald brooch which is not within the reclaiming note, and the parties seem to be agreed that £85 of that sum shall be held as paid for the Albemarle brooch. These prices have been paid by the pursuer except £50, being part of the price of the medallion of the Queen.

By this action the pursuer seeks repayment of the sums so paid by her. The action is in a somewhat unusual form, but is in substance a reduction of the sales.

The three articles to which the action now relates are of the same general character. They are all ornamental and artistic, set with gold enamel and various gems, chiefly diamonds and pearls, and each forms a single piece of bijouterie or object of vertu. It is averred, and I think it is proved, notwithstanding considerable differences in the evidence of the skilled witnesses,

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[1] Benjamin on Sale (4th ed.), pp. 404, 432; Peek v. Gurney, 1873, L. R., 6 H. L. 377, *per* Lord Cairns, at p. 403; Keates v. Earl of Cadogan, 1851, 10 C. B. 591, *per* Jervis, C. J., at p. 600; Smith v. Hughes, 1871, L. R., 6 Q. B. 597, *per* Cockburn, C. J., at p. 603; Ward v. Hobbs, 1878, 4 App. Cas. 13.

[2] Lee v. Jones, 1864, 17 C. B. (N. S.) 482.

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that the prices charged by the defenders and paid are exorbitant, a point to which I need not return; but it is not said that the jewels and gold with which they were ornamented are false, although it is said they are of poor quality and small value; still it is not said that they are essentially different (except in one important particular) from what they purported to be, and, apart from that particular, it is not suggested that there is any ground on which the sales can be set aside. That particular is, that whereas they were sold as antiques, apparently of value on account of their antiquity and associations, they are not really antiques or relics or rarities at all, but are modern fabrications, and have really no associations; perhaps not wholly without value as deceptive objects of art, but of no value as relics or antiques.

The first articles of the record are vague and general, and it is not until the sixth condescendence that the pursuer distinctly avers that the articles sold "are modern productions, made-up goods, and of inferior quality, that the respective prices obtained by the defenders from her therefor were unconscionable and out of all proportion to their true value. Of this the defenders were, at the time of the respective transactions aforesaid, well aware, while the pursuer was in ignorance thereof." The essence of the case seems to lie in this ill-framed averment, which I take to mean that the defenders, when they sold the articles, knew that they were "modern productions, made-up goods." The word "fraud" or "fraudulent" is not in the condescendence, although I think that falsehood with the knowledge that what was said was false is averred, and that, I take it, amounts to an averment of fraud.

The defences are equally unsatisfactory. They consist mainly of denials that the defenders made any averment about the articles or gave any warranty; and, although they were the sellers of the articles, and though Louis Landsberg brought them personally to the pursuer, the defenders assert that they said nothing to her about them but merely exhibited them, leaving her to form her own judgment; and, although there is no admission that they were represented to be antiques, the answers suggest that they might be so for anything the defenders knew to the contrary. Now, that was the nature of the record on which parties went to proof, and it is startling to find it now admitted that the defenders not only knew all about the articles sold, but made them themselves or had them made for them.

I find it impossible to avoid the conviction that the defenders intended to mislead, and did mislead the pursuer.

It may be true, however, that the case cannot, or at least need not be, decided against the defenders on the ground of their silence and non-disclosure only, nor on the ground of the apparent antiquity of the articles, nor because the pursuer believed them to be old, nor even that the defenders were aware that the pursuer was under that belief and did not undeceive her, because the defenders' contention in law that when a seller gives no warranty the buyer must protect himself must be conceded. But when a seller knows that a buyer is purchasing under a false impression, he certainly must take care not to go a step beyond what the law does not prevent. But the Lord Ordinary has not proceeded on mere misapprehension, but on active, direct, aggressive falsehood, which he finds proved against the defenders, and which forms the ground of his judgment.

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The question, therefore, seems to be this question of fact, depending on conflicting evidence, whether, in any of the three cases, or in all of them, the transactions were induced by the active and positive misrepresentation of the defenders.

The first of the sales in date is that of the Flora Macdonald necklace and miniature. Was that transaction induced by the false statements of the defenders? The Lord Ordinary has decided that question against the defenders, and I agree, although not without hesitation. On this point, as throughout the action, the defenders give no assistance. They assert that they said nothing whatever, and merely stand on the ground that they gave no warranty and made no representation.

The question, therefore, is whether the defenders passed the limits sanctioned or overlooked by the law, and made some false averment of a material character which persuaded the pursuer to purchase this article. The pursuer depones that Mr Landsberg, when he called at her shop with the necklace and pendant, stated that "the necklace had been given by one of the Stuarts to Flora Macdonald in recognition of her devotion to the cause of the Stuarts." The pursuer's case is that she believed that statement, and in that belief, and because of it, bought the necklace and miniature. There seems no doubt that that was the pursuer's understanding, but how that understanding was reached is not explained. Mr Landsberg has no suggestion to make about the portrait from which the miniature was taken, but it may be readily believed that the pursuer would recognise the portrait. It is, however, next to impossible to suppose that having got this miniature painted by Mr Soper, the defender said nothing at all about it to the pursuer, whether he intended to tell the truth or to deceive, but merely laid it before her, leaving her to name the miniature for herself.

On the whole, I am not prepared to dissent from the Lord Ordinary's conclusion that Landsberg falsely represented to the pursuer that the portrait, necklace, and pendant formed a genuine Stuart relic, and induced her to buy it on account of that false belief.

The second article is the medallion of the Queen. It represents the Queen in coronation robes, but it was not of the date of the coronation. but was made up by the defenders, and the portrait was painted by Soper on the defenders' employment. Here, again, the proof of representation is incomplete and unsatisfactory. Landsberg says he made no representation of any kind. The pursuer depones that Landsberg asserted that it had been presented by the Queen on her coronation to a lady of rank, which, if said, was of course false. It does not appear that he named the lady, but it is difficult to understand how he could possibly have avoided some statement, true or false, about the portrait. The Lord Ordinary finds his positive falsehood in the assertion that he, Landsberg, knew nothing about the medallion and could give no history of it. That was positively false, seeing that he knew everything about its history from beginning to end.

The pursuer advertised this medallion in the *Connoisseur*, and she does not state in the advertisement that it represented the Queen at her coronation, which was what Landsberg, according to her, had told her. But she advertises it to the public as the work of Chalons, a miniature painter of

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the period, which seems to have been a gratuitous invention of her own, and which leads one to receive her evidence with considerable doubt. I believe, however, that Landsberg did represent that it was a work of the time of the coronation, and deceived the pursuer by that falsehood.

Some difficulty, however, is occasioned as to this part of the case by a second transaction between Landsberg and the pursuer about this medallion, which took place at or about 2d January 1904, at which date I do not think she was fully aware of the defenders' deception. But I consider that the arrangement then made was afterwards cancelled.

The only other point remaining regards the Duke of Albemarle's miniature.

Here also there is a narrow question whether the defenders' representations went so far as to entitle the pursuer to rescind the sale. The question resembles that raised about the medallion of the Queen. The miniature was made by Soper by the directions of the defenders. General Monk seems a somewhat singular person about whom to practise such a deception, and one would hardly have expected his name to raise a very large price. The defenders were no doubt very reserved, but Mr Landsberg did assert that he knew nothing about the miniature, which was the same untruth as that about the medallion of the Queen. Perhaps the erroneous date on the miniature may be noticed, as well as the other mistakes mentioned in his evidence. These, however, are not of importance now that the manufacture of the article has been admitted.

I think it proved that in these three transactions the defenders practised a system of deception, against which possibly the pursuer might have been unable to find a remedy, had not the defenders gone the length of positive misrepresentation.

Lord Kyllachy.—In this case I have since the hearing carefully read the proof, and the result is, I have come generally to the same conclusion as that which has just been expressed.

I confess to having some doubt as to whether the defender's representations were in all respects so explicit as might be inferred from the pursuer's evidence. I think it quite possible that the defender at all events believed that he had sufficiently guarded himself against what he calls guarantees (or as he probably means representations) as to the character and history of these articles. But on full consideration I have been unable to conclude otherwise than that, in one way or another, he (the defender), knowing the contrary, conveyed to the pursuer that the Flora Macdonald and the General Monk jewels were what are commonly called "antiques," and that if the Queen Victoria miniature was not an antique, it was at least a contemporary portrait having a history. That is the Lord Ordinary's view who saw the witnesses and took the proof, and I am unable to say that he had not sufficient grounds for that conclusion. It is probably true that with respect to the Flora Macdonald jewel the Lord Ordinary's reasoning partly proceeded upon a misapprehension as to the source of the pursuer's knowledge that the portrait was one of Flora Macdonald. The parties were agreed that that was so. But it does not seem to me that that is a matter which at all affects the substance of his Lordship's judgment.

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It is not perhaps necessary to say more. But I may add that I am personally disposed to think that the case might be decided upon a ground which does not involve a solution of the conflict of testimony between the pursuer and the defender, and which would apply even if there were no adequate reason for preferring the testimony of the one to that of the other.

I must say I incline to hold upon the proof, and indeed upon the defender's own evidence, (1) that the appearance of age and other appearances presented by these articles constituted by themselves misrepresentations; in short, that the case is really one of *res ipsa loquitur;* (2) that this being so, the defender was not entitled to leave, as he says he did, the articles to speak for themselves, but was bound to displace the inferences which the appearance of the articles was to his knowledge bound to suggest; and (3) that the defender not only failed to do this, but by the use of equivocal language and assumption of airs of mystery and otherwise, indorsed and helped to encourage the inferences which the appearance of the articles suggested. I refer in particular to such things as (1) the attachment of the £350 ticket to the Victoria miniature, as to which the defender can give no explanation; (2) the statement as to the same miniature that he knew nothing about it, and could give no history; (3) the similar statement as to the Albemarle jewel; and (4) the conversation of a similar import as to the ribbon required (as shewn in old pictures) to be used in wearing the Flora Macdonald necklace.

It appears to me that it is difficult to say that the defender has discharged the *onus* which in these circumstances rests upon him, and I am disposed to think that in this view alone the pursuer is entitled to judgment.

The LORD JUSTICE-CLERK concurred.

THE COURT adhered.

W. CROFT GRAY, S.S.C.—TAIT & JOHNSTON, S.S.C.—Agents.

No. 124.
May 30, 1905.
Cooper & Greig v. Adam.

COOPER & GREIG, Appellants.—*Campbell, K.C.*—*Lord Kinross.*
JOHN ADAM, Respondent.—*Garson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7—"*Undertakers*"—"*Engineering Work.*"—The Workmen's Compensation Act, 1897, sec. 7, enacts,—"(1) This Act shall apply only to employment by the undertakers, as hereinafter defined, on or in or about a . . . factory . . . or engineering work . . . (2) In this Act . . . 'engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used. 'Undertakers' . . . in the case of a factory . . . means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. . . ."

A workman in the employment of a firm of boilermakers was injured in the course of repairing a boiler in a spinning-mill belonging to a third person. The work in which he was engaged at the time of the accident was all done by hand, and no mechanical power was being used, although there was on the premises steam power available for use.

*Held* (1) that, as the spinning-mill was not a factory occupied by the

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workman's employers, it was not a factory of which they were the undertakers in the sense of the Act; (2) that the work in which the workman was engaged was not an engineering work in the sense of the Act; and therefore (3) that the workman was not entitled to compensation under the Act.

1st Division. Sheriff of Forfarshire.

A CLAIM for compensation under the Workmen's Compensation Act, 1897, by John Adam against his employers, Cooper & Greig, engineers and boilermakers, Dundee, was submitted to the determination of the Sheriff-substitute of Forfarshire (Campbell Smith) as arbitrator.

On 12th July 1904 the Sheriff-substitute pronounced the interlocutor quoted below.*

The Sheriff-substitute having refused to state a case, Cooper & Greig presented a note to the First Division praying for an order on the claimant to shew cause why a case should not be stated. They averred that the claimant had been sent by them on the day of the accident, along with two other men, to repair a boiler at the factory of the Tayport Spinning Company at Tayport, while the work of that factory was suspended for the annual holidays. "The work to be done was the removal and renewal of the blow-off saddle of the boiler, and no steam, water, or other mechanical power was employed by the appellants in the performance thereof, or in connection therewith."

They further set forth the questions of law they desired to be submitted to the Court.

The claimant lodged answers, in which he maintained that the Sheriff was justified in refusing to state a case, as no question of law arose.

On 29th November 1904 the First Division remitted to the Sheriff-substitute to state a case setting forth the facts found by him to be admitted or proved relative to the following questions:—"(First) Whether the respondent was injured in or about a 'factory' within

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* "Finds that the pursuer is a boilermaker, and was, on 29th July 1902, while working in the employment of the defenders, so injured in the left eye as to be deprived of the sight of it: Finds that the work at which he was engaged was the removal and the renewal of the blow-off saddle of the Tayport Factory boiler, and that he was standing on the outside of it holding a cutter four inches long by a handle of twisted wire against a rivet-head on the inside in order that it might be struck off by a companion workman using a heavy hammer on the inside; that said companion struck the cutter so held so that the rivet-head flew at the blow struck from the inside of the boiler, somewhere rebounded from the inside, flew through the manhole at which the pursuer was standing with the cutter in his grasp, hit him on the eye: Finds that the said Tayport Factory is in its regular business a spinning factory, but that the spinning business was, in respect of the week's annual holidays in the end of July, suspended for the week, and the factory was occupied by the defenders for engineering repairs, and in particular, for the repair of this boiler, which, but for its weight and the difficulty of transport, could have been repaired as easily and as well, and by operations identical in every important respect, in the defenders' engineering establishment in Dundee: Finds that, in carrying out the work they were employed to do, the defenders were, for the time being, occupiers and tenants at will of this Tayport Factory as completely as if the said factory had been totally surrendered to them: Therefore repels the defences: ıds the pursuer entitled to compensation. . . ."

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the meaning of section 7 (1), (2), of the Workmen's Compensation Act, 1897?* (Second) Whether the appellants were 'undertakers' of that 'factory' within the meaning of section 7 (2) of said Act? (Third) Whether the work at which the respondent was injured was 'engineering work' within the meaning of section 7 (2) of said Act? (Fourth) Whether, if the foregoing are answered in the affirmative, the Sheriff-substitute was right in awarding compensation for the period from 12th April to 18th December 1903, and recommend to the Sheriff-substitute to include in such case any other question of law arising out of the facts found by him to be admitted or proved relative to the merits of the claim, and to give his judgment on the facts relative to these points?"

The case stated by the Sheriff-substitute set forth that all questions of fact in controversy between the parties were disposed of by his interlocutor of 12th July 1904, which was referred to and held as repeated in the stated case. The case further stated as follows:—"The Sheriff-substitute wrote his interlocutor and note in the undoubting belief that the three questions set forth in the interlocutor of the Court of appeal all fell to be answered in the affirmative in point of fact. . . . At the time of the accident there was a contiguous and substitute boiler generating steam and driving the machinery in the adjoining mechanics' shop, and that machinery and steam-propelled tools were at the service of the defenders, had they required to use them to facilitate any part of their work. . . ."

The questions of law for the opinion of the Court were, *inter alia*, "(1) Whether, in respect of the facts admitted and proved as above set forth, the Sheriff-substitute was wrong in law in holding the pursuer entitled to compensation under the Workmen's Compensation Act, 1897?"

Argued for the appellants;—It was settled by authority that, under section 7 (1), (2), in order to give a claim under the Act, the factory in which the accident occurred must be the factory of the workman's employers. The employer was not an "undertaker" of a factory which was not in his occupation and under his control.[1] The appellants, therefore, not being "undertakers" of the spinning-mill, where the accident occurred, were not liable in compensation. (2) The work in which the respondent was engaged when he sustained the injury was not work in which machinery driven by steam, water, or other mechanical power was used, but was done entirely by hand. Therefore it was not an engineering work, as defined in section 7 (2) of the Act.

Argued for the respondent;—The spinning-mill was undoubtedly a factory, and the respondent was employed in that factory by the appellants. It was immaterial that the accident occurred outside of the premises actually belonging to the appellants. The spinning-mill was for the time being for all practical purposes part of the appellants' yard, and the respondent was at the time engaged "in the course of his employment," and this was sufficient under section 1 (1) of the Act to give him a claim for compensation. The appellants were "occupiers" of the spinning-mill on a lawful and sufficient title at the time of the accident, and were, therefore, "undertakers," in

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* The section is quoted in the rubric.

[1] Francis v. Turner Brothers, L. R. [1900], 1 Q. B. 478; Wrigley v. Whittaker & Sons, L. R. [1902], A. C. 299; Malcolm v. M'Millan, Jan. 30, 1900, 2 F. 525; Purves v. Sterne & Co., Limited, May 22, 1900, 2 F. 887.

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accordance with the definition in section 7 (2). (2) The work in which the respondent was engaged at the time of the accident was part of a composite process. Though mechanical power was not then in actual use, the duty he was performing was a necessary part of a composite process of repair, in the course of which mechanical power was used. In the spinning-mill there was, as stated in the case, steam power available for the use of the appellants' workmen, if and when required. The work, accordingly, was an "engineering work" in the sense of the Act, and the appellants were the undertakers thereof.[1]

LORD PRESIDENT.—The stated case before your Lordships is not satisfactory in form, but still there are in it and the note for appellants and answers sufficient materials to enable your Lordships to dispose of the case. It is not in satisfactory form, because it would have been more convenient, in view of the interlocutor pronounced by your Lordships on 29th November 1904, if the Sheriff-substitute had kept to the questions then asked instead of substituting two new questions of his own. The reason for his doing so appears from the stated case, where he says,—"The Sheriff-substitute wrote his interlocutor and note in the undoubting belief that the three questions set forth in the interlocutor of the Court of appeal all fell to be answered in the affirmative in point of fact." When I turn to your Lordships' interlocutor I find it was a remit to state the facts relative to the following questions, viz.:—(1) Whether the respondent was injured in or about a "factory" within the meaning of section 7 (1), (2), of the Workmen's Compensation Act, 1897? (2) Whether the appellants were "undertakers" of that "factory" within the meaning of section 7 (2) of said Act? (3) Whether the work at which the respondent was injured was "engineering work" within the meaning of section 7 (2) of said Act? These are not questions of fact; they may be questions of composite fact and law, and if so, they are questions of law. The Sheriff-substitute treats them as questions of fact, and states new questions for himself. But sufficient material is given in the findings in the Sheriff-substitute's interlocutor, which is incorporated by him with the stated case—(His Lordship quoted the interlocutor).

Now, on these findings it is clear that the Sheriff-substitute's judgment proceeded on one of two grounds, either (1) that the place where the accident occurred was a "factory," and the appellants were "undertakers" thereof; or (2) that the place was an "engineering work."

(1) This point is entirely concluded by authority. It is clear from the case of *Wrigley* v. *Whittaker*[2] that the "factory" referred to in section 7 (1) means the "factory" that belongs to the undertakers. This disposes of the first point, as the Tayport factory was not the factory of the defenders. (2) This point is not directly dealt with by decision. It is that these Tayport premises—for now the word "factory" is of no importance—became for the nonce the "engineering work" of the defenders. The Sheriff-substitute says the defenders were "tenants at will of the premises." The phrase seems

[1] Middlemiss v. Middle District Committee of the County Council of Berwickshire, Jan. 17, 1900, 2 F. 392; Reid v. P. R. Fleming & Co., June 25, 1901, 3 F. 1000; Atkinson v. Lamb, 1903, 19 T. L. R. 412.

[2] L. R. [1902], A. C. 299.

to me quite inapplicable. Any tradesman coming to do work in a house is, on that principle, a "tenant at will" of the house while engaged on the work. It does not seem to me that there is any ground for such an idea. The view of the statute is that the work should be the work of the "undertakers," and "engineering work" is defined in section 7 (2),—"In this Act . . . 'engineering work' means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." Here it is clear that neither steam, water, or other mechanical power was used. It is not to the point that there was steam on the premises that might have been used, and consequently the fact falls far short of the definition of "engineering work" in the statute. The case fails therefore in the second point also, so that there is here no ground of liability at all.

In my opinion the first question should be answered in the affirmative, and if this is done the second question need not be answered.

LORD ADAM.—(After stating the facts)—The question is whether, on these facts, the claimant is entitled to compensation under the Workmen's Compensation Act, 1897?

The claim was put upon two grounds—(1) It was said that when he was injured he was engaged on or in or about a factory. No doubt he was injured in a factory. But it has been held, and I think rightly, that in order to give a claim under the Act the factory must be the factory of the employer, and the factory in which this accident occurred was not the employer's factory. (2) It was said he was employed on or in or about an "engineering work." Now, when we go to the definition of "engineering work" in subsection (2) we find that it means "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer." The work of the claimant here did not fall under any of these categories. We find also that "engineering work" includes "any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." If the workman is engaged on or about a railway or the other kinds of work mentioned in the earlier part of the definition, it is unnecessary that mechanical power should be employed. But in the case of the work mentioned in the later part of the definition, it is essential that machinery driven by mechanical power is used. In the work at which the claimant was engaged at the time of the accident no mechanical power was used. The work was all done by hand. That is the distinction between the present case and the case of *Reid* v. *P. R. Fleming & Company*.[1] In that case mechanical power was used, and that fact made the employers liable. But in this case the work was not an engineering work in the sense of the Act.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT answered the first question of law in the affirmative.

ANDERSON & CHISHOLM, Solicitors—DOUGLAS & MILLER, W.S.—Agents.

[1] 3 F. 1000.

No. 125.

May 30, 1905.* Free Church of Scotland v. M'Rae.

1st Division.

THE FREE CHURCH OF SCOTLAND, Complainers.
THE REVEREND JOHN M'RAE AND OTHERS, Respondents.

*Administration of Justice—Lord Ordinary on the Bills—Declinature—Court of Session Act*, 1821 (1 *and* 2 *Geo. IV. c.* 38), *sec.* 4.—In a note of suspension and interdict at the instance of the Free Church of Scotland against the Rev. John M'Rae, United Free Church, Aberfeldy, and others, the Lord Ordinary on the Bills (Johnston) orally reported to the First Division that the case was one connected with a series of litigations in which he had acted throughout as counsel for the Free Church of Scotland and for the local parties connected with it, and that in these circumstances he thought it proper to decline, but in respect it was a Bill-Chamber case, he could not do so without their Lordships' assistance under the statute.† The Court in respect of this report *sustained* the declinature, and *remitted* the case to another Lord Ordinary.

SIMPSON & MARWICK, W.S.—COWAN & DALMAHOY, W.S.—Agents.

No. 126.

June 1, 1905. Muirhead & Turnbull v. Dickson.

MUIRHEAD & TURNBULL, Pursuers (Respondents).—*Lees, K.C.—Chree.*
JAMES DICKSON, Defender (Appellant).—*Watt, K.C.—Mercer.*

*Contract—Consensus in idem—Sale or Hire—Hire Purchase Agreements—Construction of verbal contract.*—A, a piano merchant, who was in the practice of disposing of his pianos in one of three ways—1st, in sales for cash; 2, in hire-purchase agreements; 3, in letting them for hire—made an oral offer to B of a piano "at the value of £26, payable 15s. per month." B accepted the offer, and after the lapse of a month paid certain instalments. B having subsequently failed to continue the payments, A raised an action in the Sheriff Court for re-delivery of the piano, alleging that it had been let on hire to B. It appeared from a proof that A in making his offer had intended the transaction to be on the hire-purchase system, while B understood it to be a sale for a price payable by instalments. The Sheriff held that as there had been no *consensus in idem*, there was no valid contract between the parties, and that A was entitled to have the piano restored.

In an appeal, *held* that B understood, and was entitled to understand from the terms of A's offer, that the transaction was an immediate sale for a price payable by instalments, and that a contract of sale had been completed by B's acceptance.

1st Division. Sheriff of Lanarkshire.

MUIRHEAD & TURNBULL, piano merchants, Glasgow, raised an action in the Sheriff Court at Glasgow against James Dickson, praying for an order on the defender to deliver to the pursuers a piano "hired by

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* Decided May 26, 1905.

† The Court of Session Act, 1821 (1 and 2 Geo. IV. c. 38), sec. 4, enacts,—" . . . In case of the . . . legal declinature of the Lord Ordinary on the Bills during the period of the session, but at a time when the Court is not actually sitting, any one of the permanent Ordinaries, on a due statement by any of the Clerks of the Bills of such fact, and of some urgency in the case, shall and may pronounce, on any Bill which may in such case be laid before him, such interlocutor as circumstances may require, . . . without prejudice to the power of either Division, upon legal declinature of the Lord Ordinary on the Bills, when represented to them in any case, to remit the same to another Ordinary in his stead."

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the pursuers to the defender on or about 26th November 1902, and now in the possession of the defender."

The pursuers averred that they, on 26th November 1902, "agreed to hire" the piano to the defender "at a rent or hire of 15s. per month, a month's trial or approval being allowed; that the rent or hire of the piano for four months was paid by the defender on certain dates, the fourth month's rent being paid on 27th April 1903, since which date the defender has made no payments towards the said rent, with the exception of 3s. paid upon 18th January 1904; and that the defender had been repeatedly requested either to pay up the arrears of rent or deliver the piano to the pursuers, but declined to do either the one or the other."

The defender denied these averments, and in a statement of facts stated that he purchased the piano from the pursuers for the price of £26. "No written contract was entered into between the parties, nor was one then suggested by the pursuers, but it was arranged that payment of the price was to be made by instalments extending over a period of years, the purchaser to pay as often and by as large sums as he possibly could, 15s. per month being talked about as a sum that would be acceptable. The piano was duly delivered by the pursuers and accepted by the defender on that understanding." These statements were denied by the pursuers.

The defender further stated, and the pursuers admitted, that on 15th December 1903 representatives of the pursuers called on defender's wife and endeavoured to get her to sign a hire contract, which she refused to do, and that on 18th January 1904 representatives of the pursuers called at the house of the defender to get him to sign a hire contract, but the defender refused.

The pursuers averred that the signature of the pursuers' usual hire agreement was contemplated by both parties from the beginning. This was denied by the defender.*

The pursuers pleaded, *inter alia*;—(1) The piano in question being the property of the pursuers, and having been hired to the defender, and he having fallen into arrears with the rent, they are entitled to delivery thereof from him.

The defender pleaded, *inter alia*;—(1) The action is irrelevant. (3) The pursuers having sold, and the defender having purchased and obtained delivery of the piano in question, and the property therein having passed to the defender, the present action is incompetent.

A proof was taken.†

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* The form of agreement used by the pursuers in their business, No. 11 of process, is quoted in the Lord President's opinion.

† The material portions of the evidence were as follows:—George Grant, the pursuers' manager, examined—"I called on the defender. There were present defender, his wife, and myself. We sell pianos for cash, the full sum being paid in cash, and we sell on the hire-purchase system and also let out on hire. I offered the defender an instrument at the value of £26, payable 15s. per month." Cross-examined.—"I cannot say that I made it clear to defender that it was a trial hire."

The defender examined,—"After discussing terms, I agreed to purchase the piano in dispute at the price of £26. I told him I was unable in the meantime to pay the full value, and that he would require to take it by the instalment principle. He said that was all right. No mention was made of hire contract or hire-purchase system. Two or three days afterwards a piano was sent out. I was to pay the piano up at the rate of 15s. per

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On 15th July 1904 the Sheriff-substitute (Davidson) pronounced this interlocutor:—"Finds that the pursuers sold to the defender . . . a piano at the price of £26, payable by instalments of 15s. per month; that the defender has failed to pay the instalments as arranged . . . that the pursuers in these circumstances have no claim for delivery of the piano, their proper remedy being an action for the price; therefore assoilzies the defender."*

The pursuers appealed to the Sheriff (Guthrie), who, on 17th October 1904, pronounced this interlocutor:—"Finds that about 25th November 1902 the defender obtained possession of a pianoforte belonging to the pursuers, pianoforte dealers, upon the understanding that it was to be paid for on the instalment system; the price of the piano being fixed at £26, and the instalments at 15s. per month: Finds that the pursuers, as the defender knew, carry on an extensive trade in pianofortes upon the hire-purchase system, their customers signing a contract providing, *inter alia*, that instalments shall be paid, and that the property in the piano shall not pass to the customer until the whole fixed price is paid, and that the pursuers shall be entitled to resume possession on failure duly to pay the instalments: Finds that the defender has failed to pay a number of instalments admittedly due, having paid in all only £3, 5s.: Finds that, on being required on account of his failure to pay to deliver up the pianoforte, the defender claimed that he had bought it, said that he would pay the balance of the price, and refused to sign a hire-purchase contract: Finds that the pursuers all along regarded the piano as having been delivered to the defender on a hire-purchase contract: Finds that it was agreed that the piano should be for a month on approbation, so that a hire-purchase contract was not at first executed, and that by an oversight on the part of their manager or other official there was delay for some months in sending a formal hire-purchase contract to

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month, and if I could see my way to pay sums over and above that, I was to do so. I have had a legal training. I am aware of the hire-purchase system."

Mrs Dickson, the defender's wife, examined,—"I remember in the month of November 1902 a representative of pursuers calling at my house with the view of selling a piano. He said we would get the piano by paying 15s. every month. . . . My husband and I were present on that occasion. Nothing was said about a hire contract. The piano was delivered on these terms."

* "NOTE.—The pursuers aver what is known as a hire-purchase agreement; the defender a sale, the price payable by instalments. The first-named of these bargains differs essentially from the second. A sale with deferred payment of the price is a sale pure and simple; the bargain about the price is merely a subsidiary one. A hire-purchase transaction is a sale with special conditions; one being suspensive, to the effect that in a certain event the sale is to be held as void. It appears to me that it rests with the person who wishes to establish that special form of contract, to do so by clear evidence; there is a presumption in favour of a simple sale. Here there is the evidence of Mr Grant on the one side, and of the defender and his wife on the other. It may be argued that the pursuers could not, in the nature of things, be expected to have any other evidence. But there is a piece of very valuable evidence which they might have had, and which it is their custom in similar transactions to procure, I mean a signed contract of hire purchase, for which they have printed forms. I cannot but feel that the absence of such a contract increases the presumption against them. . . ."

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the defender for signature: Finds that in these circumstances it is not proved either that there was a sale or a hire-purchase contract, there being no mutual agreement to transfer the property, and possession having been given by the pursuers upon a supposed hire-purchase contract to the terms of which the defender did not agree: Finds therefore that the defender has no title of possession: Recalls the interlocutor of 15th July 1904, and ordains him to deliver as craved, and decerns: Finds that the pursuers are entitled to retain the sum paid as aforesaid, on account of the use the defender has had of the pianoforte, reserving any further claims: Finds the pursuers entitled to expenses, including those of the appeal." *

The defender appealed, and argued;—The contract was not one of hiring, but a sale with deferred payments. The periodical payments stipulated for were instalments of the price. The amount of these payments was out of proportion to any payments that could reasonably have been stipulated for merely as hire for a piano of this value. The contention of the pursuers that the contract was one of hire purchase was wholly inconsistent with their own averments and the conclusion of their action. The evidence of the pursuers' manager was that he offered the defender this piano at a certain sum, and that the defender accepted the offer. The hire-purchase form of agreement was not produced by the pursuers at the date of the contract, and when, long afterwards, they tendered it to the defender for signature he consistently and properly refused to sign it. If the pursuers had intended the contract to be one of hire purchase, they should have made that clear to the defender at the time, and, on their own admission, they had not made it clear to him. The defender having bought the piano and being willing, in accordance with the contract, to pay the instalments of the price as soon as he could, the action should be dismissed. The principle of no *consensus ad idem*, which was the ground of the Sheriff's judgment, was quite inapplicable in the circumstances.

Argued for the pursuers;—The contract here was the very common form of contract known as hire purchase. Such a contract was truly a hire and not a sale, and, accordingly, the action was in proper form. The pursuers' case was established by the admission of the defender that he got the piano on the "instalment principle," and that he was aware of the hire-purchase system. To take a piano on "the instalment principle" meant taking it on the hire-purchase system. The

* "NOTE.— . . . Sheriff Davidson in his judgment deals with the case as it stands upon a strict view of the pleadings. But even so, I doubt, with all respect, whether the sound view of the situation is not the reverse of what he has held, viz., that in truth both parties made the hire-purchase agreement referred to in the receipts which passed between the parties. There can be little doubt that the price was fixed by the pursuers on the footing that they were making one of their usual contracts, and that it would have been higher if the very easy terms of sale contended for by the defender had been agreed to. But there is not the usual formal agreement, and, as I have indicated, the defender *may* have honestly thought that he was buying outright. I think that the absence of a plea in law, which can always be supplied, is not a reason why it should not be held, as it seems right and reasonable to hold, that when the instrument was delivered and approved there was no *consensus in idem*. In other words, there was mutual mistake in regard to the nature of the contract, so that there was no valid contract at all, and the true owner is entitled to restitution.—(Erskine iii. 1, 10; Bell's Prin. 11 (5), 526-531 *sqq.*)"

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hire-purchase system had been recognised by the Courts both in Scotland and England, and under such a contract the property in the piano had not passed to the defender, and the pursuers were entitled to delivery of it.[1] It was quite unknown in the pursuers' business to sell instruments on the footing that the price was to be paid by instalments and the property in the instrument pass at once to the purchaser, and this was well known to the defender. The fact that the hire-purchase agreement was not signed by the defender did not make the contract any the less a hire purchase, for the form of hire-purchase agreement could have been signed by the defender at any subsequent time, and the pursuers had relied on his signing it. If the contract was not one of hire purchase, there had not been *consensus ad idem* between the parties, and, therefore, there had not been a contract at all.[2] In this view the Sheriff was right in holding that the pursuers, as the true owners of the piano, were entitled to delivery of it.

At advising,—

LORD PRESIDENT.—This is an appeal from the Sheriff of Lanarkshire in which the pursuers who are piano merchants, sue the defender, who is resident in Glasgow, and pray for an order upon the defender to deliver to the pursuers a certain piano hired by the pursuers to the defender on or about 26th November 1902, and now in his possession. The case is not, I think, either free from difficulty or satisfactory for your Lordships' determination. I find considerable difficulty in understanding the pleadings as they are, and still more in arriving at the meaning of the precise form of questions which have been put to the witnesses. The action is laid with the prayer which I have quoted, and sets forth in the condescendence a mere agreement to hire a piano at the rate of 15s. per month. Then follows the statement that whereas for a certain time the 15s. were paid further payments were not duly made, and that those payments not having been made the pursuers are entitled to redelivery of the piano. The defence proponed to this demand is that the piano is the property of the defender in virtue of a contract of sale entered into on the said 26th of November and verbally concluded between Mr Grant, one of the partners of the pursuers' firm, and the defender, by which contract the piano was sold to the defender for £26, payment being conditioned to be made by instalments. The averment as to the instalments is certainly in a peculiar form, because it is said that the piano was to be paid by instalments extending over a period of years, the purchaser to pay as often and by as large sums as he possibly could—15s. per month being talked about as a sum that would be acceptable. The learned Sheriff-substitute, before whom the case depended, assoilzied the defender from the conclusions of the action, pronouncing a finding that the pursuers sold to the defender, on the date specified in the petition, a piano at the price of £26, payable by instalments at the rate of 15s. per month, his view being that, that sale having been truly effected, the pursuers had mistaken their remedy, their true remedy being, not of course

[1] Murdoch & Co., Limited, v. Greig, Feb. 6, 1889, 16 R. 396; Helby v. Mathews, L. R. [1895], App. Ca. 471.

[2] Duke of Hamilton v. Buchanan, Jan. 25, 1877, 4 R. 328, June 8, 1877, 4 R. 854, March 8, 1878, 5 R. (H. L.) 69.

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to sue for re-delivery of the piano, which was not theirs, but to sue for the instalments remaining unpaid. The Sheriff, on appeal, recalled that interlocutor, and pronounced a set of detailed findings, all of which I need not read, but the crucial one of which I think is this:—"Finds that in these circumstances it is not proved either that there was a sale or a hire-purchase contract, there being no mutual agreement to transfer the property, and possession having been given by the pursuers upon a supposed hire-purchase contract to the terms of which the defender did not agree: Finds therefore that the defender has no title of possession." In other words, the view to which the Sheriff came was that although the defender had not proved the contract which the Sheriff-substitute held proved, the pursuers on their part had not proved that upon 26th November they had made out a hire-purchase contract, so that in law there was no *consensus in idem* —no contract at all—and that consequently the only title to the piano being in the original proprietors of the instrument, the pursuers, they were entitled to delivery.

Now, your Lordships will notice that in detailing the Sheriff's judgment I have used the words as he used them, "hire-purchase contract," and the whole endeavour of the pursuers in the proof was to make out that the true bargain upon 26th November was a hire-purchase bargain. A hire-purchase bargain is not perhaps a term actually known to the law as a term of art, but it is a form of contract which has become common enough in modern times, and it was judicially inquired into and noticed in the case of *Helby* v. *Mathews*.[1] It is a form of bargain by which the sellers of these instruments who wish to push their sales have tried to get round the doctrine of common law, uncomfortable to them, that you cannot give a person a moveable, and at the same time hold that moveable in security of the debt which that other person may owe, or in security of the contract in respect of which the moveable is transferred. I am not by any means suggesting that the proceeding is not a perfectly proper one. It was held to be quite legal in the case before the House of Lords, and although perhaps there might be something said upon whether the old view of the common law was not one which was more conducive to advantageous dealing between citizens, I do not think these considerations are for a Court of law so long as the form of contract is a perfectly legal form. The particular class of bargain which these pursuers admittedly wished to enter into on that date is shewn by the form No. 11 of process, which is the hire-purchase form in ordinary use by the pursuers' firm, and which was the form which after that date they made several efforts to induce either the defender or the defender's wife to sign, which they refused to do. I ask your Lordships' attention to this for the reason that here we have the first peculiarity of the case as regards the position of the pleadings to which I alluded in my opening remarks. The form No. 11 of process is a form of agreement by which the person signing it agrees to hire from Muirhead & Turnbull such and such a piano, of the value of so much, to pay to them the sum of so much "on signing this agreement (in consideration of the option of purchase herein given) and for which credit will only be given in

[1] [1895], A. C. 471.

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the event of the purchase being effected as herein provided; and for the use thereof the sum of per month, the first payment to be made upon ." Then there are certain stipulations for taking care of the piano and allowing persons to inspect it and so on, and a provision that the one party is to return the piano if he allows one monthly payment to run into arrears. He is also bound to pay its full value if it should be damaged or destroyed, and then it goes on,—"Declaring, that at any time during the hiring (subject to the conditions aforesaid) the said Muirhead & Turnbull shall be bound on demand to sell said pianoforte to me at the price of £26 sterling, in which case I shall receive credit for all payments previously made under this agreement. I shall be at liberty to return the said instrument after I have paid hire for a period of three months, and in that case I shall only be liable for hire up to date of return, but not for less than three months' hire in any case. Notwithstanding of anything herein contained, I shall have no right of property in said pianoforte until after a sale in terms of the foregoing obligation, and this is declared to be a suspensive condition."

I call your Lordships' attention to that because I think your Lordships will see that it truly does not square with the pursuers' condescendence at all. The pursuers' condescendence simply narrrates a naked agreement of hire, and when we called the attention of Mr Lees to that fact his answer was that the hire-purchase agreement of his clients was truly a hire and not a sale. That it is a hire I have no doubt, but it is a hire and something more. It is a bilateral contract which gives the person the option to convert the hire into a sale. The great difference which seems to me to lie between that agreement and an ordinary naked hiring arrangement, which had no term in it to shew that it was a bargain of hire for a certain time—what would in the case of other subjects have been a lease—is that the latter could at any moment have been put an end to. If, for example, you hired a piano at will, you could at any moment put an end to that contract, whereas it is perfectly clear that, under an agreement such as I have read, the person who gets the piano, although it is still truly a hiring agreement, has his creditor under an obligation that if he does certain things the transaction will be turned into a sale, and if he chooses to pay the balance he becomes proprietor. That is truly in its essence a perfectly different agreement from the agreement which we should gather from reading the condescendence. So much for the pleadings of the pursuers. The pleadings of the defender are really not much better, because though he says that there was a sale, and a sale with a superadded condition that the price should not be paid at once in cash, but should be paid in instalments, when he goes on to say what the instalments are, he sets forth in the paragraph I have read what I do not say is impossible, but what is so unlikely that it is difficult to believe a piano merchant would ever enter into such a bargain. In cases which are begun in the inferior Courts—however much your Lordships may deplore the irregular pleadings—this Court has never been in use to deprive litigants of justice because their procurators have written their pleadings badly, and accordingly I do not think your Lordships should dispose of this case upon the pleadings either of the one side or the other. To dispose of it on the strict view of plead-

ings would result in turning the case out of Court altogether, finding neither party entitled to expenses, and pronouncing no operative order. But I do not think your Lordships can do that, and therefore I propose to examine what is the position of affairs as it would have been if the pleadings had been rectified.

There is one thing which is not a matter of pleading. Your Lordships cannot change the actual form of the action. The action is one for delivery and nothing else. We cannot turn it into a petitory action for money. Now, it is certain that the piano is in the place where it is, that is to say in the custody of the defender, in consequence of an arrangement come to between the pursuers and the defender. The defender did not get hold of the piano by any trick or subterfuge. He did not borrow it or steal it, or get it by some false pretence. The pursuers are coming here to invert the present possession. I make that observation because I think something might turn upon the *onus*. We have therefore to inquire and come to the best conclusion we can as to what was the bargain made between these two people. Now, the description of the bargain is given by three witnesses. It is given by the pursuers or the person who is the manager of the pursuing firm, and it is given by the defender and by the defender's wife. The crucial part of it is contained in a very few sentences, and here I find the justification for the other observation I made as to the way in which the witnesses have been examined. The one thing that is not asked either on the one side or the other is what the people said; and yet of course it is on what the people said that the whole question depends. But your Lordships must take the evidence and see what it comes to. Mr Grant, the pursuers' manager, says that there were present at the interview the defender, his wife, and himself, and then he goes on—turning his evidence into *oratio directa*—as follows:—"We sell pianos for cash, the full sum being paid in cash, and we sell on the hire-purchase system, and also let out on hire. I offered defender an instrument at the value of £26, payable 15s. per month." Now, I agree that, if that evidence is taken fairly to Mr Grant, it means that he had in his mind to let out this instrument upon his own hire-purchase system. Your Lordships see that he details three methods in which he conducts his business:—Selling pianos for cash, the whole sum being paid down; hire purchase; and mere hire.

Now, the offer which he details is an offer of the piano for £26, payable 15s. per month. This cannot be the first of his methods of business, because it is not a sum in cash; and it cannot be the third, because it is not a mere hire, and therefore it is the middle kind according to his views.

At the same time Mr Grant—and I think it right, in fairness to Mr Grant, to say that I see no reason to suppose that he was anything but perfectly honest and upright in the evidence he has given—says in cross-examination, —"I cannot say that I made it clear to defender that it was a trial hire." Now, the defender says that Grant called and stated he would "be pleased to let me have a piano. I left it with himself, because I was no judge. After discussing terms I agreed to purchase the piano in dispute at the price of £26. I told him I was unable in the meantime to pay the full value, and that he would require to take it by the instalment principle. He said that was all right." The defender's wife's view is substantially the same.

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She says, "He, Grant, said he would get the piano by paying 15s. every month, and if it was paid in three years there would be a good discount. My husband and I were present on that occasion. Nothing was said about a hire contract." Now, of course, if the matter really was as to what in their inmost hearts people thought, I think that, taking these people as honest people on both one side and the other, what they thought would lead me to the conclusion at which the Sheriff has arrived, namely, that Grant thought he was selling on the hire-purchase system, and the other person thought he was buying upon some instalment plan. But commercial contracts cannot be arranged by what people think in their inmost minds. Commercial contracts are made according to what people say, and accordingly I come to the conclusion that what was said here was, in the words of Mr Grant himself, that he offered the defender an instrument of the value of £26, payable 15s. per month, and that the defender accepted that offer, namely, to buy a piano at £26, but payable on the instalment principle at the rate of 15s. a month. In other words, I think the finding of the Sheriff-substitute which I read is a true finding in fact, because I think that was the meaning of Grant's words which the defender was entitled to accept according to their ordinary meaning. Grant could have made it clear if he had liked that his meaning was not the ordinary meaning of these words, but that their meaning was that he really wanted a hire-purchase agreement by producing the hire-purchase agreement on the spot. But he admits himself that he did nothing of the sort, and that as matter of fact the hire-purchase agreement was never put before the defender till long after, when certain of the instalments had been paid. Mr Lees made an attempt to shew that really the defender proved the pursuers' case by saying that he used the words that he would require to get it on the instalment principle, and Mr Lees argued that the instalment principle really meant the hire-purchase system. I do not think it is possible to arrive at that result. In the first place, if a man says "I will take a thing on the instalment principle," I do not think that in ordinary language he does anything more than say "I will take it by paying up instalments." When you have a word like instalment principle you can only give it a meaning by one of two methods. It has either the ordinary meaning of the English language, or you can shew by appropriate evidence that instalment principle means a certain sort of arrangement. I think you can only do that by shewing that a certain custom is so well known that it has become part of the general law merchant—and nobody suggests that that is the case here—or you can shew that a particular custom has been so generally accepted in a particular trade that it has become an implied part of every bargain made in ordinary course of that trade. But in order to do that you must have appropriate averments and appropriate proof. Mr Lees said that everybody in Glasgow knew about it. But I should say that the knowledge of it in Glasgow is of a fluctuating character, and there is no better illustration of that than by comparing the agreement in the case quoted to us, *Murdoch & Company* v. *Greig*,[1] with the agreement in the present case. They both represent the laudable efforts of instrument makers to sell their instruments and at the

[1] 16 R. 396.

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same time get security for their debts. But, as your Lordships will remember, Lord President Inglis held in the case of *Murdoch* [1] that it was a sale out and out, but a sale under suspensive conditions, whereas I agree with Mr Lees that the agreement sought to be brought forward in this case is an agreement which will square with the agreement in *Helby's* [2] case, with the option of a sale if certain conditions were fulfilled. All that accentuates the fact that by merely using the words instalment principle you cannot bring in the very peculiar and very particular stipulations of the agreement I have read to your Lordships.

That is my view of the case, and the result is that in this case the petition falls to be dismissed. I do not mean to say that in some ways it is a very satisfactory result, but I do not think the Court ever does much good by speculating upon the particular moral results of a judgment between two parties. The plain lesson to be derived I hope from the judgment is this, that when parties wish to bind persons to a contract with unusual stipulations they must bring that contract clearly to their knowledge, and that, on the other hand, if they use words which are capable of ordinary interpretation, they must expect the persons who hear them to take them up in their ordinary significance.

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion. As regards the pursuer's right to have his piano returned, which was the object of the action in the Sheriff Court, three different views have been taken. There is the view of the Sheriff Court petition, viz., that the piano was given to the defender on a contract of hiring, because neither in the prayer nor in the condescendence is there any reference made to the hire-purchase system, or any indication given that this alleged contract of hiring might in certain circumstances or conditions be converted into a contract of sale. The second view is the view which the pursuer supports by his evidence, and the theory he puts forward—I do not say the legal effect of his evidence—but the theory he advances in his evidence, is that the piano was delivered on what he calls a hire-purchase contract, and in explanation of what is meant by that the form No. 11 of process is tabled. The general effect of that form (in cases where it is the basis of the contract) is that the piano is let on hire at so much a month with the condition that the contract is converted into one of purchase by paying up the agreed-on price less the amount of the instalments already paid. Then the third view of the pursuer's claim is that taken by the Sheriff, which is that no contract was ever entered into, because the parties were not agreed as to the terms upon which the piano was given over, and consequently, that the piano being the pursuer's property but in the custody of the defender, must be delivered. The defender again has only one contention, and perhaps it is an advantage to him that he is consistent throughout. He says that the piano was sold to him on credit, and that while he has not been able to pay the price, this does not give the vendor any right to have the instrument returned. That is an intelligible contention, and if consistent with the facts, is, I think, sound

[1] 16 R. 396. [2] L. R. [1895], App. Cas. 471.

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in law. With regard to the Sheriff's ground of decision I am unable to agree with it, and for this reason. The ordinary case, what we may call the typical case of parties being remitted to their original rights in consequence of no effective contract being entered into is the case of ambiguity. *Buchanan* v. *Duke of Hamilton*,[1] a case in the House of Lords between landlord and tenant, is an instance of that kind. There were two offers. One party honestly believed that possession was given upon the faith of the two offers taken together, while the other party contended that it was only the second offer which was meant to be effective, and that the first had been impliedly withdrawn. The ambiguity did not arise upon the words of either instrument, but upon the time and manner in which the two offers were made. The much more common case is where the words of a contract are ambiguous, and it is impossible for the Court to say that each party is not honestly entitled to put his own meaning upon it. But I see no ambiguity in this case. There is here really nothing but a question of evidence. What are we to spell out of statements not entirely consistent regarding the terms upon which the piano was delivered? Now, the pursuer's statement is different from that put forward in the record. But I agree with your Lordship that the pursuer's statement as noted in the evidence is capable, in the absence of any specification of the words used, of being read with the defender's statement, which is that this was a sale on credit, the price being payable in instalments. It is true that the pursuer states that he has three modes of doing business, but there is nothing to shew that his customers had such a knowledge of his business that they knew all the different methods in which he was prepared to deal. There is no reason to suppose that in this case the defender knew anything more about the pursuer's conduct of business than what he was told at the time. The pursuer's statement is that he offered the piano on a month's trial, the instrument being of the value of £26 payable by monthly instalments of 15s. each. It may be that the pursuer had in his mind that this was to be a hire-purchase contract, but he does not say that he told the defender that there was to be an option. On the other hand, and here I agree with the Sheriff-substitute in thinking this an important point, he never put into the defender's hands one of the printed forms applicable to the hire-purchase system. Against that you have the statement of the defender and his wife that they said they were unable to pay the piano at once, and that it would have to be on the instalment principle. I agree with your Lordship that that means a sale upon credit. The result of the evidence, which is not quite consistent, but as it seems to me not absolutely contradictory, is that there is nothing proved but a contract of sale with deferred payment, and I think the result which I should arrive at upon the parole evidence is confirmed by the proceedings which the pursuer thought it necessary to take, because evidently he was not very sure of his rights, and he ineffectually attempted to get the defender to sign a hire-purchase form.

The result is that I think we must return to the judgment of the Sheriff-substitute, and while one feels that the result is not altogether an equitable one, because the defender meantime retains the piano while he does not

[1] 5 R. (H. L.) 69.

seem to be in a position immediately to pay for it, yet that result I think is due entirely to the pursuer's loose mode of doing business in that he did not take care to confine his purchaser to the contract which he says he intended to make.

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LORD KINNEAR.—I have found this a question of very great difficulty on the facts, but once the facts are ascertained there is not much difficulty in applying the law to them. But as to the facts themselves I have had very great doubts, arising mainly from the circumstance pointed out by the Lord President in his opinion that the evidence before us is taken in such a way as to leave material points not only unexplained but unexpressed. The appropriate and perfectly simple method of proving a verbal contract by parole is to put the parties into the witness-box and make them depone to the words of agreement that passed between them when the bargain was made. Nothing can be simpler than to prove a contract of sale or contract of hiring by proving the verbal offer and acceptance in the terms which were used by the people making the bargain at the time. Unfortunately neither party has thought it necessary to prove either what was said by themselves or by the other party to the contract, and therefore we are left to gather as best we can the intention of the contracting parties from indirect expressions as to the conclusion at which each had arrived in his own mind, because we are not informed what they said to one another when they were making their bargain. But then I agree with your Lordship that after proof has been led and closed, and the Judges in the Sheriff Court have applied their minds to it, it would be out of the question to throw out the case either because of defects in the pleadings, which are unfortunately very observable in the present case, or because of defects in the conduct of the case. We must take it as it stands and make the best of it, and although my difficulty has been very considerable I have come to the same conclusion and for the same reason as the Lord President has expressed.

THE COURT pronounced this interlocutor:—"Recall the interlocutors of the Sheriff-substitute and of the Sheriff . . . Find that the pursuers sold to the defender on the date specified a piano at the price of £26: That the pursuers in these circumstances have no claim for delivery of the piano, their proper remedy being an action for the instalments of the price so far as not paid: Therefore assoilzie the defender from the conclusions of the action, and decern," &c.

ADAMSON, GULLAND, & STUART, S.S.C.—D. MACLEAN, Solicitor—Agents.

PATRICK BURNS, Pursuer (Appellant).—*Graham Stewart—Wark.*
D. & W. HENDERSON & COMPANY, LIMITED, Defenders (Respondents).
—*Sol.-Gen. Salvesen—R. S. Horne.*

No. 127.
June 2, 1905.
Burns v. Henderson & Co., Limited.

*Reparation—Master and Servant—Ship in course of repair—Open and Unlighted Hatch.*—A workman, who was accustomed to take chipping and scaling jobs, was engaged to execute chipping work on a ship which was undergoing extensive repairs in a shipbuilding yard. In going to the place on board the ship where his work was to be done he fell into an open hatchway on the middle deck and was injured.

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in law. With regard to the Sheriff's ground of decision I am unable to agree with it, and for this reason. The ordinary case, what we may call the typical case of parties being remitted to their original rights in consequence of no effective contract being entered into is the case of ambiguity. *Buchanan* v. *Duke of Hamilton*,[1] a case in the House of Lords between landlord and tenant, is an instance of that kind. There were two offers. One party honestly believed that possession was given upon the faith of the two offers taken together, while the other party contended that it was only the second offer which was meant to be effective, and that the first had been impliedly withdrawn. The ambiguity did not arise upon the words of either instrument, but upon the time and manner in which the two offers were made. The much more common case is where the words of a contract are ambiguous, and it is impossible for the Court to say that each party is not honestly entitled to put his own meaning upon it. But I see no ambiguity in this case. There is here really nothing but a question of evidence. What are we to spell out of statements not entirely consistent regarding the terms upon which the piano was delivered? Now, the pursuer's statement is different from that put forward in the record. But I agree with your Lordship that the pursuer's statement as noted in the evidence is capable, in the absence of any specification of the words used, of being read with the defender's statement, which is that this was a sale on credit, the price being payable in instalments. It is true that the pursuer states that he has three modes of doing business, but there is nothing to shew that his customers had such a knowledge of his business that they knew all the different methods in which he was prepared to deal. There is no reason to suppose that in this case the defender knew anything more about the pursuer's conduct of business than what he was told at the time. The pursuer's statement is that he offered the piano on a month's trial, the instrument being of the value of £26 payable by monthly instalments of 15s. each. It may be that the pursuer had in his mind that this was to be a hire-purchase contract, but he does not say that he told the defender that there was to be an option. On the other hand, and here I agree with the Sheriff-substitute in thinking this an important point, he never put into the defender's hands one of the printed forms applicable to the hire-purchase system. Against that you have the statement of the defender and his wife that they said they were unable to pay the piano at once, and that it would have to be on the instalment principle. I agree with your Lordship that that means a sale upon credit. The result of the evidence, which is not quite consistent, but as it seems to me not absolutely contradictory, is that there is nothing proved but a contract of sale with deferred payment, and I think the result which I should arrive at upon the parole evidence is confirmed by the proceedings which the pursuer thought it necessary to take, because evidently he was not very sure of his rights, and he ineffectually attempted to get the defender to sign a hire-purchase form.

The result is that I think we must return to the judgment of the Sheriff-substitute, and while one feels that the result is not altogether an equitable one, because the defender meantime retains the piano while he does not

[1] 5 R. (H. L.) 69.

seem to be in a position immediately to pay for it, yet that result I think is due entirely to the pursuer's loose mode of doing business in that he did not take care to confine his purchaser to the contract which he says he intended to make.

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LORD KINNEAR.—I have found this a question of very great difficulty on the facts, but once the facts are ascertained there is not much difficulty in applying the law to them. But as to the facts themselves I have had very great doubts, arising mainly from the circumstance pointed out by the Lord President in his opinion that the evidence before us is taken in such a way as to leave material points not only unexplained but unexpressed. The appropriate and perfectly simple method of proving a verbal contract by parole is to put the parties into the witness-box and make them depone to the words of agreement that passed between them when the bargain was made. Nothing can be simpler than to prove a contract of sale or contract of hiring by proving the verbal offer and acceptance in the terms which were used by the people making the bargain at the time. Unfortunately neither party has thought it necessary to prove either what was said by themselves or by the other party to the contract, and therefore we are left to gather as best we can the intention of the contracting parties from indirect expressions as to the conclusion at which each had arrived in his own mind, because we are not informed what they said to one another when they were making their bargain. But then I agree with your Lordship that after proof has been led and closed, and the Judges in the Sheriff Court have applied their minds to it, it would be out of the question to throw out the case either because of defects in the pleadings, which are unfortunately very observable in the present case, or because of defects in the conduct of the case. We must take it as it stands and make the best of it, and although my difficulty has been very considerable I have come to the same conclusion and for the same reason as the Lord President has expressed.

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ADAMSON, GULLAND, & STUART, S.S.C.—D. MACLEAN, Solicitor—Agents.

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*Reparation—Master and Servant—Ship in course of repair—Open and Unlighted Hatch.*—A workman, who was accustomed to take chipping and scaling jobs, was engaged to execute chipping work on a ship which was undergoing extensive repairs in a shipbuilding yard. In going to the place on board the ship where his work was to be done he fell into an open hatchway on the middle deck and was injured.

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On 15th July 1904 the Sheriff-substitute (Davidson) pronounced this interlocutor:—"Finds that the pursuers sold to the defender . . . a piano at the price of £26, payable by instalments of 15s. per month; that the defender has failed to pay the instalments as arranged . . . that the pursuers in these circumstances have no claim for delivery of the piano, their proper remedy being an action for the price; therefore assoilzies the defender."*

The pursuers appealed to the Sheriff (Guthrie), who, on 17th October 1904, pronounced this interlocutor:—"Finds that about 25th November 1902 the defender obtained possession of a pianoforte belonging to the pursuers, pianoforte dealers, upon the understanding that it was to be paid for on the instalment system; the price of the piano being fixed at £26, and the instalments at 15s. per month: Finds that the pursuers, as the defender knew, carry on an extensive trade in pianofortes upon the hire-purchase system, their customers signing a contract providing, *inter alia*, that instalments shall be paid, and that the property in the piano shall not pass to the customer until the whole fixed price is paid, and that the pursuers shall be entitled to resume possession on failure duly to pay the instalments: Finds that the defender has failed to pay a number of instalments admittedly due, having paid in all only £3, 5s.: Finds that, on being required on account of his failure to pay to deliver up the pianoforte, the defender claimed that he had bought it, said that he would pay the balance of the price, and refused to sign a hire-purchase contract: Finds that the pursuers all along regarded the piano as having been delivered to the defender on a hire-purchase contract: Finds that it was agreed that the piano should be for a month on approbation, so that a hire-purchase contract was not at first executed, and that by an oversight on the part of their manager or other official there was delay for some months in sending a formal hire-purchase contract to

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month, and if I could see my way to pay sums over and above that, I was to do so. I have had a legal training. I am aware of the hire-purchase system."

Mrs Dickson, the defender's wife, examined,—"I remember in the month of November 1902 a representative of pursuers calling at my house with the view of selling a piano. He said we would get the piano by paying 15s. every month. . . . My husband and I were present on that occasion. Nothing was said about a hire contract. The piano was delivered on these terms."

* "NOTE.—The pursuers aver what is known as a hire-purchase agreement; the defender a sale, the price payable by instalments. The first-named of these bargains differs essentially from the second. A sale with deferred payment of the price is a sale pure and simple; the bargain about the price is merely a subsidiary one. A hire-purchase transaction is a sale with special conditions; one being suspensive, to the effect that in a certain event the sale is to be held as void. It appears to me that it rests with the person who wishes to establish that special form of contract, to do so by clear evidence; there is a presumption in favour of a simple sale. Here there is the evidence of Mr Grant on the one side, and of the defender and his wife on the other. It may be argued that the pursuers could not, in the nature of things, be expected to have any other evidence. But there is a piece of very valuable evidence which they might have had, and which it is their custom in similar transactions to procure, I mean a signed contract of hire purchase, for which they have printed forms. I cannot but feel that the absence of such a contract increases the presumption against them. . . ."

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the defender for signature: Finds that in these circumstances it is not proved either that there was a sale or a hire-purchase contract, there being no mutual agreement to transfer the property, and possession having been given by the pursuers upon a supposed hire-purchase contract to the terms of which the defender did not agree: Finds therefore that the defender has no title of possession: Recalls the interlocutor of 15th July 1904, and ordains him to deliver as craved, and decerns: Finds that the pursuers are entitled to retain the sum paid as aforesaid, on account of the use the defender has had of the pianoforte, reserving any further claims: Finds the pursuers entitled to expenses, including those of the appeal." *

The defender appealed, and argued;—The contract was not one of hiring, but a sale with deferred payments. The periodical payments stipulated for were instalments of the price. The amount of these payments was out of proportion to any payments that could reasonably have been stipulated for merely as hire for a piano of this value. The contention of the pursuers that the contract was one of hire purchase was wholly inconsistent with their own averments and the conclusion of their action. The evidence of the pursuers' manager was that he offered the defender this piano at a certain sum, and that the defender accepted the offer. The hire-purchase form of agreement was not produced by the pursuers at the date of the contract, and when, long afterwards, they tendered it to the defender for signature he consistently and properly refused to sign it. If the pursuers had intended the contract to be one of hire purchase, they should have made that clear to the defender at the time, and, on their own admission, they had not made it clear to him. The defender having bought the piano and being willing, in accordance with the contract, to pay the instalments of the price as soon as he could, the action should be dismissed. The principle of no *consensus ad idem*, which was the ground of the Sheriff's judgment, was quite inapplicable in the circumstances.

Argued for the pursuers;—The contract here was the very common form of contract known as hire purchase. Such a contract was truly a hire and not a sale, and, accordingly, the action was in proper form. The pursuers' case was established by the admission of the defender that he got the piano on the "instalment principle," and that he was aware of the hire-purchase system. To take a piano on "the instalment principle" meant taking it on the hire-purchase system. The

* "NOTE.— . . . Sheriff Davidson in his judgment deals with the case as it stands upon a strict view of the pleadings. But even so, I doubt, with all respect, whether the sound view of the situation is not the reverse of what he has held, viz., that in truth both parties made the hire-purchase agreement referred to in the receipts which passed between the parties. There can be little doubt that the price was fixed by the pursuers on the footing that they were making one of their usual contracts, and that it would have been higher if the very easy terms of sale contended for by the defender had been agreed to. But there is not the usual formal agreement, and, as I have indicated, the defender *may* have honestly thought that he was buying outright. I think that the absence of a plea in law, which can always be supplied, is not a reason why it should not be held, as it seems right and reasonable to hold, that when the instrument was delivered and approved there was no *consensus in idem*. In other words, there was mutual mistake in regard to the nature of the contract, so that there was no valid contract at all, and the true owner is entitled to restitution.—(Erskine iii. 1, 10; Bell's Prin. 11 (5), 526-531 *sqq.*)"

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could see the hatchway"—there is an obvious mistake there, it must either be "after the man" or "they could see the hatchway"—"but when he first descended from daylight he could not see it."

I agree. I think that that is the result of the evidence. I think that it is quite clear that this is a place in which there was some light, doubtless a dim and uncertain light; but it was a place on the deck of the ship, and that ship at that time was undergoing thorough repair. Operations were being conducted all over it. Therefore, it seems to me, it was within the view of anybody who had any knowledge of such places that hatches would be liable to be left open, just as this hatch had been left open, for what was, after all, a very necessary purpose—of allowing access to the deck below. This is not the case of a man unaccustomed to such a place, and I do not think that it is of any advantage to make general observations as to what particular circumstances might create liability to an outsider. What we are dealing with here, was the case of a man accustomed to this class of job, going to his job on to a ship which, he knew, was in the hands of the repairer. He goes down into a place dimly lighted, a place where, as the learned Sheriff-substitute finds, he could have seen well enough if he had only waited until such time as the pupils of his eyes had had time to expand. Instead of waiting he goes straight ahead in the dark, or what is the dark to him, and then he stumbles and has an accident. It seems to me that, under these circumstances, there is really no negligence whatsoever on the part of the defenders; and, on the other hand, there was clear carelessness on the part of the pursuer himself.

It seems to me that the case is really on all-fours with what was truly decided in the case of *Forsyth* v. *Ramage & Ferguson*.[1] That decision was, I think, an absolutely proper one; but it is cited in an unfortunate way when it is cited, as it was in the case of *Jamieson*,[2] as if it laid down a proposition about a ship in the course of construction. There is no magic in the words "in the course of construction." *Ramage & Ferguson's* case[1] was decided on relevancy; it was not a case where there had been proof. The whole question was whether there was a relevant averment of negligence on the part of the defenders, and it was so treated by Lord President Inglis. Of course, in seeing whether there was a relevant case, it was of great moment to point out that it is not relevant to say that in a ship in course of construction there are a great many holes and unfenced places about, because everybody knows that in a ship in the course of construction there must so be. "In the course of construction" was simply mentioned as indicating what is the natural condition of a ship while it is being built. This is only one particular illustration of a much more general rule, and the general rule is this, that you must take a place according to its natural circumstances; and, accordingly, I think that, when you go down a ship which is in the course of repair, you must expect that, very likely, hatches will be open, and must exercise ordinary caution. On this ground, I think the Sheriff-principal's judgment was right, and that the appeal ought to be refused.

Lord Adam.—I am of the same opinion. The facts, in respect of which

[1] 18 R. 21. [2] 19 R. 898.

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this action was raised, occurred on board a ship called the "Janetta," which at the time was, I understand, under repair, and for the purpose of repair had been handed over to the defenders—the contractors for the repair—and was entirely in their occupation. We were told she had been taken into their yard, and was entirely in their occupation; and that various squads of workmen were about the ship doing these repairs, besides the squad with which the pursuer was connected. That was the state of matters on board the ship. Now, the pursuer, on the morning of the accident, was hired by a man Barrie, in the employment of the defenders, who was in use to hire men for the defenders. It is not disputed that he was hired by Barrie, who was in fact in the employment, and was on the occasion in question a servant, of the defenders.

These being the facts, I do not think that there is any necessity of considering what might have been the case if the pursuer had been an outsider. We have to deal with the case of a servant—the pursuer—who was in the employment of the defenders. Well, unfortunately, on that morning, when going down to his work, he had to go down a hatchway, and, no doubt, coming out of broad daylight, he did not see about him when he first came down, and, in a moment or two, he stumbled and fell against an open hatchway, but was saved from going down to the bottom by falling against an iron bar. But, in so falling, he was very considerably injured, and it is in respect of these injuries the present action is raised.

Now, the fault which is alleged against the defenders is this: it is complained that this hatchway was uncovered at the time, and there is no doubt that that was so. Other workmen had been at work at the hatchway a short time before, and they had not covered the hatchway when leaving. It was said, in the first place, that that was fault; that they should have covered the hatchway, and that the defenders are responsible for that. And it was said that, not being covered, it was insufficiently lighted, that there was no artificial light, and that it should have been artificially lighted, because it was uncovered; and it is in respect of the hatchway being uncovered, and, in that condition, not being sufficiently lighted afterwards, that it was said that the defenders were liable. Now, I could quite have understood if it could have been said in this case that it was a duty on the defenders, or part of their system, to see that all hatchways were constantly covered, or, if not constantly covered, were always properly lighted, upon a ship of this kind, and that the neglect of that duty would have made them liable. But that is not said, and it cannot be said, because all these hatchways must necessarily be uncovered from time to time. On this particular occasion this hatchway was uncovered, because the workmen who had been working there after they finished their job neglected to cover it. Surely the foreman of the gang who left it uncovered was responsible for having left it uncovered. This being a limited company cannot make any difference in the world. A company like this cannot be supposed to have a man to go about after every gang to see that no hatchways are left uncovered. There is no such duty upon limited companies or upon individual employers. If the workmen had a duty to cover the hatchway, and if the hatchway is left uncovered it is the fault of the fellow-workmen. As there is no case here under the Employers Liability Act, it humbly appears to me that there is

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no other liability. The case we have to deal with is not a man going into a place where he was entitled to suppose that everything was secure, and that there were no traps or no hatches or no holes that he might fall down. That is not the case. We have the case of a workman who was being employed to do work with which he was acquainted, carried on in ships, and he must be presumed to have known that there must be open hatchways necessary for the accommodation of other workmen on board. It was laid down in the case of *Ramage & Ferguson*[1] that a man must be careful and proceed with great caution if it is dark, if he cannot see, if he is in a strange place, and should take such care as was necessary for his safety. Accordingly, if the light was insufficient, it was, in my humble judgment, the pursuer's own fault that he met with this accident.

LORD M'LAREN.—I am not of opinion that it has been proved in this case that the man Barrie, who engaged the pursuer, was an independent contractor, so as to shift the objective of responsibility from Henderson & Co. to him. But it does not appear to me that the question of fact has much, if any, bearing upon the decision of the case, because no intelligible case has been made of fault on the part of an employee of Henderson & Co. which would raise a question of common employment. Therefore, it seems to me that the question is whether the master has duly fulfilled the obligation, which every master undertakes, of making reasonable provision for the safety of the workmen who are engaged in performing his work. Now, that obligation, in the nature of things, can never be of an absolute, unqualified kind. There is hardly any employment where it is possible to secure the workman against risks which are incident to his trade; and, certainly, where a work of building—whether it be shipbuilding or masonry—is in progress, the unavoidable risks—the risks against which a master cannot guard his workpeople—are very much greater than in the case of men who are working in a completed establishment. Those others, again, may be exposed to risks of a different kind. When the late Lord President gave an exposition of his views on this question in the case of *Forsyth* v. *Ramage & Ferguson*,[1] he certainly did not intend to lay down an arbitrary rule confined to the case of buildings which were in the course of construction, because his Lordship there pointed out that, in the case of a ship in the course of construction, there were many risks against which it was impossible to guard, and especially in openings being necessarily left where they would not be left in the case of a completed ship. Now, that might either be because the ship had not reached the stage at which coverings for these openings would be provided, or it might be that, cover or no cover, they were necessarily left open for the accommodation and convenience of the men engaged in the work. It was the second point which his Lordship cited as the unavoidable risk, but not, as I think, with the view of excluding the first; and, of course, the same proposition applies to a ship which, although not in course of construction, is undergoing extensive repairs, on which many parts that are usually closed or covered have to be removed. The case, therefore, appears to me to be in point, allowing for

[1] 18 R. 21.

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the variations of fact which must occur in all cases that are cited for comparison. While in that case the question was relevancy, and while here we have to consider the liability resulting from the facts as proved, I can come to no other conclusion than that, in this case, the hatch which was left open was necessarily left open for the convenience of persons engaged in the repair work on the ship. Then as regards the lighting, there is no doubt it was necessary that some light should be provided; but it is in evidence that a parcel of candles was sent on board for the use of the workmen, and that each of the men had his candle before him; and it is clear that the pursuer, if he had wished a candle to guide his steps in going down to the lower deck, might have had one. I, therefore, am unable to see that there was any fault on the part of the defenders, either of the nature of failure to perform their duty by covering the hatches or by lighting them; and I agree that we should adhere to the judgment of the Sheriff.

LORD KINNEAR.—I have come to the same conclusion. The pursuer's counsel, in stating his case to us, did not base his claim upon the ground on which it was admittedly based in the Sheriff Court, and did not maintain that there was any liability on the part of the defenders arising out of a contract of employment, whether by the common law operating upon that contract or by virtue of the Employers Liability Act. He made no claim as a servant in the employment of the defenders upon the ground of liabilities arising out of the contract of service at all. But he founded upon a rule of law, which he says is quite established, as it probably is, that persons, when resorting to business premises, on the business of the owner or occupier of such premises, and using reasonable care for their own safety, are entitled to expect that the owner or occupier, on his part, will use reasonable care to prevent a danger to them from some unusual source of danger known to him and not known to them, or, in other words, as it is put in one of the cases, are entitled to expect that he will not allow his premises to be converted into a trap for persons who come to them upon business. Now, I think it may be very reasonable to maintain that there is such a rule, and that, on the other hand, it is applicable as much to a ship in dock as to houses and factories on land. But then it assumes that a man, using reasonable care for himself, is entitled to expect that he will be exposed to no such risk as, it afterwards turns out, he has been exposed to, and by which he has been injured; and I agree with your Lordship in the chair, and all your Lordships, that it is impossible to say that a man in the position of this pursuer, who says he was employed as a rivetter, to go on board a ship undergoing extensive repairs, and to help in chipping the rust off the shell of the boat, is entitled to expect that there will be no such thing as an open hatchway on the ship, the hold of which is being occupied by workmen engaged in repairing, and, therefore, that he will run no risk from tumbling down hatchways if he does not take reasonable care of himself. The pursuer, in this case, was exposed to no unusual danger and to no such danger as a man taking reasonable care for himself might not have expected to meet.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff, dated 26th October 1904: Find that on

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13th May 1903 the pursuer was employed as a chipper on certain repairs that were being done by the defenders on the s.s. 'Janetta' at their works at Meadowside: Find that on proceeding to his work he tripped and fell upon a hatchway on the bridge-deck and was hurt: Find that the accident was not due to any negligence on the part of the defenders or of those for whom they are responsible, but that it was due to the want of care on the part of the pursuer: Therefore assoilzie the defenders from the conclusions of the action, and decern," &c.

J.& J. GALLETLY, S.S.C.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

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June 2, 1905. Hetherington v. Galt.

THOMAS CHALMERS HETHERINGTON, Complainer (Respondent).—*Clyde, K.C.—MacRobert.*

ALEXANDER GALT, Respondent (Reclaimer).—*Craigie—D. Anderson.*

*Property—Boundaries—Line of trees planted as boundary under verbal agreement between adjacent feuars—Question with singular successor—Bounding Title—Measurements—"Or thereby"—Measurements inaccurate—Contemporanea Expositio.*—Two adjacent plots of ground, belonging to different persons, were described in their titles by a plan and by measurements, qualified in the latter case by the words "or thereby." Neither plan nor measurements were strictly accurate. The mutual boundary was adjusted by verbal agreement between the proprietors and marked by a line of trees, planted at their mutual expense. *Held* that this arrangement, followed by possession in accordance therewith, was binding upon a singular successor without notice.

*Common Property—Trees near boundary of adjacent properties.—Opinion* (*per* Lord Stormonth-Darling, Ordinary) that trees whose stems are wholly on one side of the boundary of two adjacent properties, but which stand so near the boundary as to extend their roots into the other side of it, are not the common property of both proprietors.

2D DIVISION. LdStormonth Darling.

IN August 1904 Thomas Chalmers Hetherington, proprietor of a property known as St Kitts, situated in Colinton Road, Edinburgh, presented a note of suspension and interdict against Alexander Galt, proprietor of a property known as Trengweath, also situated in Colinton Road, and adjoining St Kitts.

The complainer craved interdict against the respondent from cutting down or otherwise interfering with any of the trees growing along or upon the boundary between St Kitts and Trengweath.

The respondent proposed to cut down three trees which he maintained were wholly situate within his property, but which the complainer maintained were on the boundary. The question between the parties therefore came to be, what was the mutual boundary of the two properties.

The note having been passed, and interim interdict granted on caution, proof was allowed and led.

The facts were as follows:—By feu-charter, recorded 27th April 1883, John Dick Peddie and others, as trustees for the Craiglockhart Estate Company, disponed to George Thomas Beilby the two plots of ground afterwards known as Trengweath and St Kitts respectively.

The description of the plots in the feu-charter was as follows:—"In the first place [Trengweath], All and whole that piece of ground measuring 1 rood 24 poles 19 yards or thereby imperial measure, and bounded as follows, viz.:—On the north or north-west by a line

running parallel to and at a distance of 6 feet south or south-east from the southern or south-eastern boundary of the public road from Edinburgh to Colinton, along which it extends 80 feet or thereby; on the west or south-west by unfeued ground belonging to us, along which it extends 220 feet or thereby; on the south or south-east by ground agreed to be feued to the said James Duncan, along which it extends 80 feet or thereby; and on the east or north-east by the piece of ground hereinafter disponed in the second place, along which it extends 220 feet or thereby: And in the second place [St Kitts], All and Whole that piece of ground measuring 2 roods 16 poles 29 yards or thereby imperial measure, and bounded as follows, viz.:—On the north or north-west by a line running parallel to and at a distance of 6 feet south or south-east from the southern or south-eastern boundary of the said road from Edinburgh to Colinton, along which it extends 120 feet or thereby; on the west or south-west by the piece of ground before disponed in the first place, along which it extends 220 feet or thereby; on the south or south-east by ground agreed to be feued to the said James Duncan, along which it extends 120 feet or thereby; and on the east or north-east also by ground agreed to be feued to the said James Duncan, along which it extends 220 feet or thereby . . . As the said two pieces of ground are delineated and coloured green on a plan or sketch thereof annexed and signed as relative hereto."

By disposition, recorded 15th May 1883, Beilby disponed Trengweath to Henry Kenward Shiells. The description in the disposition was the same as in the feu-charter.

The following narrative is taken from the opinion of the Lord Ordinary (Stormonth-Darling):—"When Beilby and Shiells came to lay off their grounds it was found that the plan of the whole block appended to the feu-charter was not perfectly accurate. The plan shewed a rectangular block measuring 200 feet both in front and at the back, of which St Kitts was to have 120 feet or thereby, and Trengweath 80 feet or thereby, front and back. The actual measurement shewed about 201 feet on the Colinton Road and about 199 feet to the back. There was a clause requiring the erection of boundary walls on all sides of both feus, but the feuars arranged with the superiors that they should not insist on the erection of a wall between the two feus, and that the line of march should be indicated by a row of trees. The feuars proceeded to have this done, and the trees were bought and planted at joint expense, on a line mutually agreed on and staked out before the planting was commenced. The line drawn was practically straight, except where a slight bend into the ground of St Kitts was made in order to leave more room for the drive up to the door of Trengweath, which was in a cutting. The trees were planted before Whitsunday 1884. No writing passed, but the two feuars continued to possess their respective grounds in accordance with the agreement. When any trees in the row had to be cut, as sometimes happened, it was done by mutual consent. About eight years ago Mr Beilby put up, at his own expense, a light fence of wire netting, and as this was mainly to keep animals of his own from straying into his neighbour's ground, he erected the fence on his own side of the row of trees and entirely at his own expense. All this stands upon evidence which is absolutely uncontradicted.

"The complainer acquired St Kitts from Mr Beilby on 6th April 1902. He was told at the time of his purchase about the agreement

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as to the row of trees, and so long as Shiells remained owner of Trengweath, there was no change of possession. But Shiells sold Trengweath to the respondent in May 1904, with entry at Whitsunday 1904, and there is a conflict of evidence as to whether Shiells informed the respondent's agent, as undoubtedly he ought to have done, of the agreement about the row of trees. In this state of matters, I cannot hold it proved that he did give the information. Certainly the respondent himself never heard of it till 11th July 1904, when the complainer, having heard that the respondent proposed to fell some trees in the row, wrote to him telling him of the old agreement, and offering to see him on the subject. Unfortunately this suggestion was not adopted, and the matter passed into the hands of the law-agents."

The descriptions in the disposition of St Kitts by Mr Beilby to the complainer, and in the disposition of Trengweath by Mr Shiells to the respondent, were the same as those in the feu-charter.

The trees planted in 1884 to form the boundary, except those in the bend, were all slightly—not more than about a foot in any case—to the west or Trengweath side of a line drawn from north to south 80 feet from the western boundary of Trengweath. The respondent's surveyor witnesses deponed that these trees were also nearly all very slightly, but wholly, to the Trengweath side of a line drawn 120 feet from the eastern boundary of St Kitts.

On 6th December 1904 the Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having considered the closed record, proof, and productions, suspends, interdicts, prohibits and discharges in terms of the note of suspension and interdict: Declares the interdict formerly granted perpetual, and decerns." *

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* "OPINION.—This is an unfortunate dispute about a very small matter between the owners of two adjoining villas on the outskirts of Edinburgh, the action being one of suspension and interdict. The actual question raised is whether the respondent, who is the owner of the villa called Trengweath, is to be interdicted from cutting down, or otherwise interfering at his own hand with, any of the trees which the complainer, who is owner of the villa called St Kitts, asserts to be growing on the boundary between the two properties. The respondent at present only proposes to cut down three trees which are said to be too close to the others, and, I daresay, would be better away. But that is not a question for me, and the problem really involved is what is the true boundary between the feus. If the trees are on the line of march, they are undoubtedly common property, and cannot be removed without the consent of both proprietors.

"The feus were given off practically at the same time in 1883, although, for convenience, the feu-charter was taken in name of Mr Beilby, who was to have the larger of the two feus, viz., St Kitts, and he disponed to Mr Shiells, who was to have the smaller feu, viz., Trengweath. The feu-charter was recorded on 27th April 1883, and the disposition not till 15th May. But the dimensions of the two feus were separately described in the feu-contract, and this description, so far as it related to Trengweath, was exactly reproduced in the disposition by Beilby to Shiells. I do not think that anything turns on the fact that, for conveyancing purposes, Beilby was for a short time vested in the right to both plots of ground. So far as the present question is concerned, I think that the transactions must be regarded as simultaneous"—(His Lordship then narrated the facts, *ut supra*).

"The respondent's case is that he is not bound by any verbal agreement between the former proprietors, even though followed by prescriptive possession, and that, having bought on the faith of the recorded titles, he is

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The respondent reclaimed, and argued;—A line drawn 80 feet from the western boundary of Trengweath in accordance with the respondent's title gave him all the trees except in the bend, and a line drawn 120 from the eastern boundary of St Kitts gave the respondent nearly the whole of them. Both the titles here were bounding titles.[1] The line of trees was not consistent with the titles. Assuming the arrangement to have been made to make the trees the boundary, it involved the conveyance to the complainer's author of property which was within the respondent's title and not within the complainer's. The respondent could only be bound by such an agreement if it was embodied in a writing registered in the Register of Sasines. He was only bound by what appeared in the titles on faith of which he

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entitled to the boundary as therein defined. His plea would, I think, be well founded if the complainer's contention involved any material deviation from the boundary in the titles. But it cannot be said that there is any material deviation. The titles do not define the boundary except by measurements, which are not precisely accurate, and do not profess to be so, for every measurement is qualified by the words 'or thereby.' If there had been 120 feet for St Kitts and 80 feet for Trengweath, both in the front and at the back, it would have been possible to draw a mathematically straight line from the point at which these measurements met in front to the point where they met at the back. There being a foot more than the titles gave for both plots in the front, and a foot less for both plots at the back, some slight re-adjustment was necessary; and when the persons with the full right to make the adjustment made it in a way satisfactory to themselves, and exhibited the line by marks visible on the ground, and possession for more than twenty years followed, I cannot hold that even a singular successor is entitled to reopen the whole question. I should say the same even if there had been no inaccuracy in measurement, and the slight deviation in the line of march had been caused by something in the lie of the ground—something, in short, which was not merely a matter of temporary or personal convenience. No doubt a row of trees is not a fence, but marchstones are not a fence, and if the boundary had been indicated by marchstones so near the boundary given in the titles as sufficiently to indicate their purpose, I cannot doubt that a singular successor would have been held bound by them. The deviation in this case is so slight as to be measured only by inches. Mr Bennett, the surveyor who was examined for the respondent, gives the exact distance of some of the trees from the imaginary straight line in the titles, and the distance is in no case more than a foot, generally only a few inches. No doubt his measurements all have the effect of throwing the line of trees into the respondent's property, but when a line intended as a march, and prescriptively possessed as a march, is so close an approximation to the title-boundary as that, it is, I think, sufficiently covered by the qualifying words 'or thereby,' and so no question of bounding title really arises.

"At all events, it seems to me that the existence of the row of trees ought to have put the respondent on his inquiry. It would be vain for him to say that the wire-netting fence misled him, and he does not say so. This fence is of a slight construction, with none of the substantiality of a mutual fence; and it is not in a straight line. Neither the respondent nor his agent professes to have considered the question of boundary from anything which they saw on the ground; their sole reliance is on the titles. A pur-

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[1] North British Railway Co. v. Magistrates of Hawick, Dec. 19, 1862, 1 Macph. 200, 35 Scot. Jur. 94; Stewart v. Greenock Harbour Trustees, Jan. 12, 1866, 4 Macph. 283, 38 Scot. Jur. 148; North British Railway Co. v. Hutton, Feb. 19, 1896, 23 R. 522.

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bought. The row of trees was not sufficient to put the respondent on his inquiry. If anything on the ground indicated the boundary, it was the wire fence. *Ex facie* of the titles there was no vagueness in the boundaries. It had never before even been contended that the words "or thereby" could make a definite boundary indefinite. "Or thereby" merely meant as nearly as can be ascertained and represented by surveyors. As regards the alleged difficulty arising from inaccuracy in the measurements, there would have been no difficulty in giving the respondent's author the full 80 feet to which he was entitled under the description, as both plots then belonged, and had been originally conveyed to the same person, and he was bound, if it was possible, to give the full amount which his disposi-

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chaser is not bound to inspect the ground which he is purchasing for any glaring deviation from the description in the titles, but when measurements in that description are qualified by inexact words like 'or thereby,' I do not think that he is safe to rely on the measurements being minutely accurate, and I do think he is bound to take note of any visible object which may serve to explain the description.

"None of the cases cited seemed to me of much assistance, and I do not myself remember any that would be, unless, perhaps, *Strang* v. *Steuart*, 2 Macph. 1015, affirmed 4 Macph. (H. L.) 5. In that case there are some clear expressions of opinion to the effect that adjoining proprietors may contract with each other that a fence shall be erected at mutual expense as a march fence, or that a fence not originally so erected may be treated as such, and, if so treated for the prescriptive period, must be recognised and maintained as a march fence by singular successors. The actual proof in that case did not satisfy the Court that there had been any adoption of the fence (which consisted of a hedge and ditch) as a march. Here the case is not one of adoption, and the proof of agreement is clear. If agreement had been proved in *Strang* v. *Steuart*, it is plain that the judgment would have been the other way. There was a difference between that case and the present inasmuch as the titles there merely described the two properties as bounded by each other. But I think I make sufficient allowance for the difference when I concede that the respondent here would not have been bound by the agreement made and acted on by the former proprietors, if it had involved any material deviation from the boundary indicated in the titles, and if there had been nothing on the ground to mark what the boundary so agreed on was.

"The complainer maintained as an alternative argument that if the trees in question are on the respondent's side of the march, they are so near the march, and derive so much of their nourishment from the complainer's soil, that they must be regarded in law as common property. There are passages both in the Digest and the Institutes (Dig. xli. 1, 7, 13, and Inst. ii. 1, 31) which bear that if a tree was planted so near a boundary as to extend its roots into the land of a neighbour, it was regarded by the civilians as common property. But I do not think that this rather vague rule has ever been adopted by the law of Scotland. Certainly in the somewhat analogous case of a proprietor's tree extending its branches over the ground of his neighbour, the case of *Halkerston*, (1781), M. 10,495, shews that the result is not to give the neighbour any joint right of property in the tree, but merely to give him a right to demand that the owner of the ground in which the tree stands shall lop the overhanging branches.

"Accordingly I think the sole question here is whether the trees proposed to be cut are on the march, in which case they are common property, or on the respondent's ground, in which case they are wholly his. Being of opinion that they are on the march, I shall make the interdict formerly granted perpetual."

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tion to the respondent's author bore to convey. In any view, the arrangement as to the boundary could only be effectual against the respondent if it had been followed by possession for the prescriptive period. There had not been even twenty years' possession, for the trees were planted in 1884, and there had been no possession beyond the wire fence since 1902. With regard to the case of *Strang* v. *Steuart*[1] and the opinions there expressed,[2] the Judges did not say how an agreement with regard to a march fence could be proved in a question with a singular successor. The question there was with regard to expense and upkeep of a march fence, and there was no question of conveyance of property.

Argued for the complainer and respondent;—The measurements were all wrong if taken strictly, but they were meant to be merely approximate, and were advisedly qualified by the words "or thereby." The boundary as indicated by the measurements was ambiguous. It was found when laying off the ground that the measurements could not be exactly satisfied in fixing the boundary. The titles in this respect required interpretation. They were interpreted by the arrangement between the proprietors to fix the boundary on the line of the trees, and the interpretation was shewn on the ground by the trees. There was no better way of interpreting an ambiguous description than to find how it was interpreted by the feuars when the ground was laid off, and by looking at the ground itself and what was on it. This was a question of interpretation of the title, not of prescriptive possession. It was a question of identifying a doubtful boundary, and the boundary was fixed in a way not contradictory but interpretative of the titles, and shewn upon the ground by the line of trees. The arrangement once made was binding upon singular successors. An agreement to give one of the proprietors additional ground might not have been binding on a singular successor, but here the agreement was merely to fix the true boundary line. But in any view, fixing the boundary by the line of trees did not involve any greater deviation from the title than was covered by the words "or thereby." This was so, even if the complainer had got 8 inches or a foot too much. In England it had been said that "or thereabouts" might cover 10 or even 20 acres in 100.[3] Possession on the agreement fixing the boundary was not necessary,[4] certainly not prescriptive possession. The boundary was shewn on the ground, and was patent to a purchaser. He was bound to look and see what the boundary *de facto* was, and especially so where the boundary was doubtful. If he purchased a property with the boundary so patent, he must be held to have acquiesced in getting only what was on his side of that boundary.[5] Although possession was not necessary, it was proved that the possession here had been in accordance with the agreement as to the boundary, and that for more than twenty years. Where there was dubiety as to the boundary on the titles the state

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[1] March 31, 1864, 2 Macph. 1015, 36 Scot. Jur. 510, aff. 4 Macph. (H. L.) 5.

[2] *Per* Lord Cowan, 2 Macph. at p. 1024, and *per* Lord Neaves at p. 1028.

[3] Davis v. Shepherd, (1866), L. R., 1 Ch. 410, *per* Lord Cranworth, L. C., at p. 416.

[4] Strang v. Steuart, 2 Macph. 1015, *per* Lord Cowan at p. 1024.

[5] Muirhead v. Glasgow Highland Society, Jan. 15, 1864, 2 Macph. 420, 36 Scot. Jur. 201.

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of possession decided the question.[1] Here the position was that the complainer had a title to 120 feet, and had possessed 120 feet, while the respondent had a title to 80 feet, but had not possessed 80 feet. That was enough to decide the present controversy in favour of the complainer.

At advising,—

LORD JUSTICE-CLERK.—The facts to be considered in this case are (1) that the plot of ground which is divided into two feus, now belonging to the parties to this case respectively, was, according to the original feuing plan, rectangular, measuring 200 feet both front and back; (2) that when it came to be divided it was found that it was not rectangular, but measured 201 feet at the front and 199 feet at the back, so that it was not possible in dividing it up into two feus to draw any line of division which should give correctly rectangular plots; (3) that an arrangement was come to and assented to by the superior, that instead of erecting a boundary wall between the two feus, the line of division was to be marked off by a line of trees, planted at the joint expense of the feuars, and in a line staked off by mutual agreement; (4) that this line was by agreement made not exactly straight, it being a convenience to one of the feuars that at one point, to make the approach to his house more convenient, a slight curve should be made in the line fixed to bound the properties; (5) that the trees were planted accordingly and the feus possessed in accordance with the arrangement come to; (6) that when it was thought desirable to thin the trees, those to be removed were agreed upon by both feuars; (7) that when the complainer took his feu from Mr Beilby, in whose name the original feu-charter of the whole ground had been taken, he was informed of the arrangements above noted, and he and the then feuar of the other feu, Mr Shiells, acted in accordance with the agreement; (8) that Shiells sold to the respondent, but it is not proved that he told him of the arrangement.

These being the facts, the present dispute has arisen in consequence of the respondent proposing to fell some of the trees as being on his feu without the consent of the complainer, and declining to confer with him on the matter.

In considering what are the rights of parties I lay out of view altogether the fact that a light wire fence was erected by Mr Beilby on his own ground, as I do not see how that can affect the question at issue. It is not in any sense of the nature of a permanent erection, and was not intended as a designation of march boundaries, and was never treated as such.

It is to be noted that, in addition to the fact that the measurements are not in accordance with the description, the titles expressly modify each measurement given by the words "or thereby," and therefore if the respondent takes his stand, as he does, upon the titles, he is faced by this expression, which, if it means anything at all, must mean that slight variations might be unavoidable, and would in the establishment of the two feus call for some adjustment on the division of the plot. Had he inquired, as I agree with the Lord Ordinary he was called on to do, he would have ascertained that adjustment had been made and the march settled by the planting

[1] Girdwood v. Paterson, June 3, 1873, 11 Macph. 647, 45 Scot. Jur. 406.

of the trees. Any deviation there is from a straight line is of the slightest, and the words "or thereby" may reasonably be held to cover it. I am of opinion with the Lord Ordinary that, although the line of trees is not in a strict sense a fence, they are just as sufficient a mode of marking a boundary as march stones, and that if adjoining feuars choose to use them as such, such an adjustment of the march may bind a singular successor. I make no comments on the cases quoted, except to say that I adopt the Lord Ordinary's view on them.

On the whole matter, I see no ground for interfering with the judgment under review, and would move that it be affirmed.

LORD KYLLACHY.—In this case I agree with your Lordship and the Lord Ordinary. The case as presented to us perhaps touched some questions of delicacy—questions, I mean, as to the extent to which singular successors are affected by things done or suffered by their predecessors in title. But when the exact situation is understood, I think it is fairly clear that the Lord Ordinary's judgment may be sufficient without trenching on any rule of law and keeping well outside the region of controversy. The important considerations are, it appears to me, these:

(1) In the first place it is proved, and indeed not disputed, that the row of trees in question was planted by the respective authors of the complainer and respondent at mutual expense, and at the time when the original feu was divided between them.

(2) In the next place, it is also proved that it was so planted in order to denote the line of march between the two properties from north to south, as that line of march had been adjusted and settled between them, which it required to be, *inter alia*, by reason of certain difficulties in the measurements contained in the titles.

Again it is, I think, also clear that the adjustment so made, although probably more or less connected with the existence of the said difficulties, was in itself quite consistent with the titles—that is to say, consistent not only with the original feu-charter, but also the disposition in the respondent's favour. It was so consistent for this, if for no other, reason, that all the measurements in the titles were throughout qualified by the words "or thereby," leaving a latitude clearly, in my opinion, sufficient to cover the alleged minute discrepancies or variations on which the respondent founds.

These are, it appears to me, the important facts, and such being the position (the adjustment made being consistent with the title, and being also proper and necessary and followed by possession) I have, I confess, no difficulty in concluding that the adjustment of the march was and is effectual not only as against the original owners but also against singular successors. It was so, in my opinion, if for no other reason, on the principle of *contemporanea expositio*, followed by possession and actings of parties which were themselves similarly interpretative, and by the interpretation involved in which it cannot be doubted that singular successors are affected and bound.

LORD KINCAIRNEY.—I have considered this case very carefully, and concur in the opinion of the Lord Ordinary and of your Lordships. The question

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is not without nicety and novelty. A row of trees is not a very common kind of fence, but in this case it certainly was in appearance, as it is proved to have been in fact, intended to indicate the march between these two properties. There was nothing else to indicate the boundary. The netting was not in fact meant as a fence. There was no agreement that it should be so. I think it is the same as if it had been a hedge or a wall. The configuration of the ground required some divergence from a mathematical line between the two subjects, and the terms of the title specially provided for it. I think the row of trees formed a march fence within the latitude allowed by the title. It was not against, but in accordance with, the right of parties as expressed in the titles.

THE COURT adhered.

ROSS SMITH & DYKES, S.S.C.—T. F. WEIR & ROBERTSON, S.S.C.—Agents.

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M'Ewan v. Magistrates of Perth.

DAVID M'EWAN, Pursuer (Respondent).—*Chisholm, K.C.*—*R. D. Melville.*

THE LORD PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF PERTH, Defenders (Appellants).—*Guthrie, K.C.*—*Constable.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1) *and* (2)—*Factory—Warehouse—Uncovered yard used for storage of material—Factory and Workshop Act*, 1901 (1 *Edw. VII. cap.* 22), *sec.* 104 (1).—A workman was injured while breaking stones in the employment of the Corporation of Perth by an accident which occurred in a yard in Perth belonging to the Corporation. The yard was uncovered, but at the side of it was a large shed in which implements were kept and work was done in wet weather. The yard was principally used to store materials for the repair of roads and drains and for other works executed by the Corporation either on its own account or to a small extent for private individuals, and it contained bings of stone which the workman was employed in breaking at the time of the accident. No mechanical power was used in the yard.

*Held* that the yard was not a warehouse in the ordinary sense of the word, and therefore not a factory within the meaning of the Workmen's Compensation Act, 1897.

*Opinions* (*per* the Lord Justice-Clerk and Lord Kyllachy, *dub.* Lord Kincairney) that the reference to warehouses in sec. 104 (1) of the Factory and Workshop Act, 1901, was not to warehouses in general, but merely to warehouses used in connection with docks.

*Statute—Construction—Headings in Statute—Factory and Workshop Act*, 1901 (1 *Edw. VII. cap.* 22), *sec.* 104.—The Factory and Workshop Act, 1901, in a section headed "Docks," provides, sec. 104, that "(1) The provisions of this Act with respect to . . . accidents . . . shall have effect as if every dock, wharf, quay, and warehouse . . . were included in the word 'factory.'"

*Opinions* (*per* the Lord Justice-Clerk and Lord Kyllachy) that such a heading, as distinguished from a marginal rubric, was part of the statute, and was to be taken into account in construing the section.

2D DIVISION. Sheriff of Perthshire.

IN an arbitration under the Workmen's Compensation Act, 1897, at the instance of David M'Ewan, stonebreaker, Perth, against the Lord Provost, Magistrates, and Councillors of Perth, the Sheriff-sub-

* Decided March 16, 1905.

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stitute (Sym) at Perth awarded compensation, and at the request of the burgh stated a case for appeal.

The case set forth:—"The respondent was employed by the Road Department of the Corporation of Perth to break stones. These stones consisted of old street pavement and causeway blocks. . . . A piece of dirt, or a chip of stone, injured one of his eyes. . . . The place in which the accident happened was a yard belonging to the Corporation, part of their gas undertaking, but used at the time by the Road Department. . . . The yard was about 60 poles in extent, 100 yards long by 17 wide. It was used for storage of pipes, concrete, and other materials used in the making and repairing of drains and roads. It contained also the bings of stone which the respondent and other men were breaking. . . . At the side of it was a large shed, 30 feet long by 23 feet wide, in which implements were kept, and which was used for men to work in in wet weather. No mechanical power was used in the yard. The materials in the yard were used in the repair of roads under the charge of the Road Department, and in carrying out works ordered by the Corporation, and which private individuals had elected to leave it to the Corporation to do, and had to pay for; also, to a small extent, in doing work by contract for private individuals.

"It was maintained that this yard was a 'warehouse' in the sense of the Workmen's Compensation Act, and that it was not necessary to bring it within the definition that it must be a place in which manual labour was exercised for gain, and in which mechanical power was used in aid of a manufacturing process carried on in it." *

The Sheriff-substitute "was of opinion that 'factory' covers every 'warehouse,' and that 'warehouse' covers a place of deposit of goods as well as a place of sale, and therefore covered this yard."

The question of law was,—"Was the yard which I have described a 'warehouse,' and therefore a 'factory,' within the meaning of the Workmen's Compensation Act?" †

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* In the case the Sheriff-substitute referred to Stevens v. General Steam Navigation Co., L. R. [1903], 1 K. B. 890, and Willmott v. Paton, L. R. [1902], 1 K. B. 237.

† The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts:—

Sec. 7. "(1) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work. . . .

"(2) In this Act" *(inter alia)*—

"'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power."

The Factory and Workshop Act, 1901 (1 Edw. VII. cap. 22), (which under the Interpretation Act, 1889 (52 and 53 Vict. cap. 63), comes in place of the Factory and Workshop Acts, 1878 to 1895), is divided into ten PARTS, of which the Fifth is—

"PART V. SPECIAL MODIFICATIONS AND EXTENSIONS."

Part V. Embraces sections 87 to 106 of the Act, grouped under seven headings, viz.:—"(i.) *Tenement Factories.*" "(ii.) *Cotton Cloth and other Humid Factories.*" "(iii.) *Bakehouses.*" "(iv.) *Laundries.*" "(v.) *Docks.*" "(vi.) *Buildings.*" "(vii.) *Railways.*"

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Argued for the appellants;—The yard could be a factory only if it was a "warehouse." The Acts did not contain any definition of "warehouse," consequently the word must be construed in its ordinary meaning. The appellants' yard was not a warehouse in the usual and proper sense of the term. A warehouse was a place used mainly for commercial purposes,[1] and did not include every place in which goods were deposited. But even if it were a warehouse in the ordinary sense of the word, it was not a warehouse to which any provision of the Factory and Workshop Act applied. The reference to "warehouse" in section 104 of the Factory and Workshop Act, 1901,[2] was not to warehouses in general, but only to warehouses associated with, or contiguous to, a dock, wharf, or quay, or to warehouses *ejusdem generis*.[3] This appeared from its collocation with the words "dock, wharf, and quay" in section 104, and from the heading "Docks," which, being part of the statute, must be considered in construing the section.[4] This heading differed from that to the corresponding

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The Fifth heading embraces one section only—the 104th—as follows:—

"(v.) *Docks.*

"104—(1) The provisions of this Act with respect to—

(i.) Power to make orders as to dangerous machines (section seventeen);

(ii.) Accidents;

(iii.) Regulations for dangerous trades;

(iv.) Powers of inspectors (section one hundred and nineteen); and

(v.) Fines in case of death or injury (section one hundred and thirty-six);

shall have effect as if every dock, wharf, quay, and warehouse, and all machinery or plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory,' and the purpose for which the machinery or plant is used were a manufacturing process; and as if the person who by himself, his agents, or workmen, uses any such machinery or plant for the before-mentioned purpose were the occupier of the premises; and for the purpose of the enforcement of these provisions the person having the actual use or occupation of any dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof, and the person so using any such machinery or plant shall be deemed to be the occupier of a factory.

"(2) For the purpose of this section the expression 'plant' includes any gangway or ladder used by any person employed to load or unload or coal a ship, and the expressions 'ship' and 'harbour' have the same meaning as in the Merchant Shipping Act, 1894."

The corresponding section (sec. 23) of the Factory and Workshop Act, 1895 (58 and 59 Vict. cap. 37), was in the Part of that Act entitled "SPECIAL RULES AND REQUIREMENTS," and was under the heading "*Docks, &c.*"

[1] Green v. Britten & Gilson, L. R. [1904], 1 K. B. 350.

[2] 1 Edw. VII. cap. 22.

[3] Colvine v. Anderson & Gibb, Dec. 18, 1902, 5 F. 255, *per* Lord M'Laren at p. 259.

[4] Inglis v. Robertson & Baxter, July 11, 1898, 25 R. (H. L.) 70, *per* Lord Herschell at p. 76; Nelson v. M'Phee, Oct. 17, 1889, 17 R. (J. C.) 1, *per* Lord M'Laren at p. 2; Lang v. Kerr, Anderson, & Co., Feb. 26, 1878, 5 R. (H. L.) 64, *per* Cairns (L. C.) at p. 66; Rayson v. South London Tramways Co., L. R. [1893], 2 Q. B. 304, *per* Esher (M. R.) at p. 307; Hammersmith Railway Co. v. Brand, 1868, L. R., 4 Eng. and Ir. App. 171, *per* Lord Chelmsford at p. 203.

section in the Act of 1895, which was "Docks, &c."[1] This yard was not a place to which the provisions as to notice of occupation (sec. 127) or registration (sec. 129) could apply, and the reference to "business" in section 127 shewed that the warehouse must be one used for commercial purposes.[2]

Argued for the respondent;—This yard was a warehouse in the ordinary sense of the word. In Webster's Dictionary warehouse was defined as "a storehouse for wares or goods." It was not essential that it should be a place conducted for purposes of gain in the ordinary sense,[3] and in any event a certain amount of profit was made by the Corporation on the operations carried on there. The term warehouse was not modified by the words "dock, quay, or wharf" in section 104 of the Factory and Workshop Act, 1901,[4] but included all warehouses wherever situated. The yard was not excluded from the definition of a warehouse merely because it was uncovered.[5] Being a remedial statute, the Workmen's Compensation Act should be construed liberally.

At advising,—

LORD JUSTICE-CLERK.—Two questions present themselves in this case, (1) whether the place described in the facts as found by the Sheriff can be properly designated as a "warehouse," and (2) whether, if it can be so designated, such a warehouse is one to which the Factory Act of 1901 applies, by which it is declared that the provisions of the Act with regard to accidents shall have effect "as if every dock, wharf, quay, or warehouse," &c., were included in the word "factory."

My opinion is that both these questions should be answered in the negative. Taking all the facts stated by the Sheriff, they do not in my judgment describe a warehouse in any true sense. The Sheriff proceeds on the ground that the "word warehouse covers a place of deposit of goods as well as a place of sale, and therefore covers this yard." Such a view is sufficiently startling. It seems to be the logical sequence from it that any place in which goods are stored is a warehouse, with the result in sequence that it is a factory, and that therefore any employee connected with the owner who meets with an accident is entitled to compensation on the footing that he was employed in a "factory" in the sense of the Factory Act. That is a view to which I cannot give my assent. There is no definition of "warehouse" to guide us in interpreting its meaning, and therefore it must be interpreted according to its ordinary meaning, and most certainly it is not an ordinary meaning of the word warehouse that it "covers a place of deposit of goods," *i.e.*, every place where goods are deposited. If it does not cover every place, then some places must be differentiated from others, and it is difficult to conceive how any place where goods were

[1] Factory and Workshop Act, 1895 (58 and 59 Vict. cap. 37), sec. 23.

[2] 1 Edw. VII. cap. 22, secs. 127, 129.

[3] Henderson v. Corporation of Glasgow, July 5, 1900, 2 F. 1127, *per* Lord President (Blair Balfour) at p. 1134; Mooney v. Edinburgh and District Tramways Co., Limited, Dec. 20, 1901, 4 F. 390.

[4] Willmott v. Patou, L. R. [1902], 1 K. B. 237; Green v. Britten & Gilson, L. R. [1904], 1 K. B. 350; Ramsay v. Mackie, Nov. 19, 1904, *supra*, p. 106.

[5] Factory and Workshop Act, 1901, sec. 149 (5).

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deposited could be held not to be a warehouse if this storing yard for road mending materials and plant must be held to be a warehouse. It is impossible to believe that any sane person could describe it as a warehouse except upon the view of the Sheriff, for which there seems to me to be no foundation—that deposit of goods *per se* creates a warehouse at the place where the deposit is made.

This view makes it unnecessary to consider the second question, viz., whether supposing this place to be a warehouse the statutory provisions apply to it so as to bring it within them. I am of opinion that they cannot. The word "warehouse" where it occurs is in such collocation that it is to me plain that it cannot apply to such a place as we are dealing with, even though it fell under the ordinary description of a warehouse. It occurs under a division of the statute which is headed "Docks," and there is high authority for saying that such a heading should be looked to in considering to what the clauses under it apply, these headings being part of the statute as distinguished from the marginal rubrics, which are not parts of it, but only inserted by the printer for convenience of reference, and which may be modified at any time to cover amendments that have been made while the bill was under consideration. If this be so, I see no ground for holding that the word "warehouse" under that heading is to be held to refer to any warehouse a hundred miles inland and having no connection with a dock or similar place. And I should hold it to be a totally strained and unnatural reading to apply it to such a place where the whole context, both before and after it, plainly points to the subject-matter that is being dealt with being connected with shipping work. For the words are "as if every dock, wharf, quay, and warehouse, and all machinery and plant used in the process of loading or unloading or coaling any ship in any dock, harbour, or canal were included in the word 'factory.'" It was pointed out to us, and the Sheriff refers to it in the case, that it has been held in England that the meaning of the word "warehouse" is not modified by the above collocation. That is, in other words, to say that a word in the middle of a sentence is to be divorced from all association with the heading under which it is found or with the rest of the sentence which is before and after it, and be read as if it stood by itself. I find myself unable to do so. To do so would be to carry the principle of giving a liberal reading to a remedial statute to a very extreme point, contrary, as I hold, to all reasonable rules of construction, under which words are not to be divorced from their context and given a reading as if they stood by themselves. The clause seems to me to be plainly intended to deal with subjects connected with water transit, and I am not prepared to isolate one word and thereby give it an extended meaning, which it is plain to me cannot have been intended when the clause was passed, and which can only be reached by ignoring the whole context in which the word is found.

On these grounds I come to the conclusion that the only question of law on which our opinion is asked should be answered in the negative.

LORD KYLLACHY.—The question in this case is whether the yard or enclosed space in which this accident happened is a "factory" in the sense of the Workmen's Compensation Act of 1897. It is common ground that

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it must be held to be so if it be a "warehouse" within the meaning of the 104th section of the Factory and Workshop Act of 1901. For if it be such a warehouse it is a place to which beyond doubt some provisions of the Factory and Workshop Act apply. And being such a place it falls within the definition of the word "factory" contained in section 7, sub-section 2, of the Compensation Act. On the other hand, it is equally common ground that, unless it be a warehouse in the sense of section 104 of the Factory and Workshop Act, it cannot upon any other ground be brought within the scope of the Compensation Act. That is to say, it cannot in any other way become a "factory," either directly under the Act of 1897 or indirectly under the Act of 1901.

Accordingly the case depends on the just construction of section 104 of the 1901 Act. And as to that section there are two points to be noted.

The first point is, that it is a section which stands by itself under a separate heading, viz., "(v.) Docks," and forms under that heading one of the seven compartments of Part V. of the Act, of which part the six other compartments are—(1) Tenement Factories, (2) Cotton Cloth and other humid factories, (3) Bakehouses, (4) Laundries, (6) Buildings, (7) Railways.

The second point is this, that the purpose of the 104th section is to apply to docks, wharfs, quays, warehouses, &c., certain provisions of the Factory Act, viz., those relating to "Dangerous Machines," "Accidents," "Dangerous Trades," "Powers of Inspection," and "Fines in case of death or injury," the enacting words being directed to making that application which is declared to operate "to the same effect as if such dock, wharf, quay, warehouse, &c., were included in the word 'factory.'" In other words the context of the section deals merely with docks, and premises and plant used in connection with docks.

It is perhaps a third observation that in the previous Act of 1895 the corresponding compartment or section is headed "Docks, &c.," and that in the present Act—the consolidating Act of 1901—the expression is "Docks" without the "&c."

In these circumstances if the word "warehouse," occurring in a section or compartment so headed, and having such a context, is to be construed in the usual way and on ordinary principles, I confess to being quite unable te see how by any stretch of construction it can be read as covering a yard in the city of Perth "used for the storage of pipes, cement, and other material used in the making of roads," and for the breaking of road metal and its storage in bings. It appears to me that, if any effect is to be given to the heading of the section and to the context in which the word in question occurs, the reference must be held to be not to warehouses generally, but to dock warehouses—warehouses used in connection with docks. And as to the effect of "headings" in Acts of Parliament (as distinguished from mere marginal notes), I have as yet heard nothing to displace or to qualify the doctrine laid down by the House of Lords in the case of *Inglis* v. *Robertson & Baxter*,[1] and in the previous case of *Hammersmith Railway Co.* v. *Brand*,[2] and also by the Court of Justiciary in the case of *Nelson* v. *M'Phee*, October 17, 1889.[3]

[1] 25 R. (H. L.) 70. [2] L. R., 4 E. and I. App. 171. [3] 17 R. (J. C.) 1.

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It is said that it has been held in England that the Compensation Act of 1897 may apply to a warehouse which has no connection with docks, and is not even *ejusdem generis* with dock warehouses, but so far as appears the effect to be given to the "heading" or "head line" of the 104th section of the Factory Act was not there raised or considered. Nor does it appear to have been pointed out that the word "&c." used in the Act of 1895 had been, as I have said, dropped in the consolidating Act of 1901. In any case I cannot, speaking for myself, be a party to ignoring both the heading and the general tenor of the 104th section. Nor am I prepared upon any ground of policy to construe that section in a manner opposed, as it seems to me, to the ordinary principles of construction.

It is not, however, necessary in this case to decide anything adverse to any previous decision or expression of judicial opinion. For supposing it to be held that the word "warehouse" falls to be read without reference to heading or context, and in its ordinary sense as used in common speech, I am still of the same opinion. I do not consider that the word "warehouse" in any proper or usual sense includes every store or depot in which persons, public or private, may store goods or materials which they are using from time to time or intend to use in the future. Farmers have such stores; owners of estates have them; public bodies have them; and it would, I think, be a very extreme conclusion that such stores or depots should be held as warehouses, and as such subject not only to the provisions of the Workmen's Compensation Act, but by consequence also to the whole provisions of the Factory and Workshop Act with respect to "inspection," "fines in the case of death or injury," and the other matters which I have mentioned. I consider that, taking the word "warehouse" in its widest sense as commonly used, it can only apply to premises wholly or mainly used for commercial purposes, and that it cannot therefore apply to the yard or depot in question.

I am therefore of opinion that the question of law stated by the Sheriff falls to be answered in the negative.

LORD KINCAIRNEY.—This is a stated case under the Workmen's Compensation Act, 1897. The respondent, David M'Ewan, was employed by the appellants, the Magistrates of Perth, to break stones, and while so engaged he suffered an injury to one of his eyes, and he now sues for compensation from his employers, and the Sheriff-substitute has decided in his favour.

The appellants, the Magistrates of Perth, have raised only one question, and subject to that question they, as I understand, admit the respondent's right to compensation. But they maintain that he is not entitled to the benefit of the Act, because the place where the accident happened is not covered by its terms.

The place is distinctly described by the Sheriff-substitute. It was, he says, a yard 100 yards long by 17 wide. It was used for storage of materials employed in making and repairing drains and roads. It contained also the bings of stone which the respondent and other men were breaking. At the side of it was a large shed in which implements were kept, and which was used for men to work in in wet weather. "No mechanical power was used in

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the yard." The materials were used in the repair of roads, and in carrying out works ordered by the Corporation, "and which private individuals had elected to leave it to the Corporation to do and had to pay for, and also to a small extent in doing work by contract for private individuals."

The Sheriff-substitute has expressed the opinion "that 'factory' covers every warehouse," and that "'warehouse' covers a place of deposit of goods as well as a place of sale, and therefore covered this yard." His meaning is that the place which he describes and calls a place of deposit of goods is a warehouse in the sense of this Act, and that if it is a warehouse it is a factory. I think the latter proposition was not disputed, and the Sheriff expresses the question of law submitted thus—"Was this yard a warehouse, and therefore a factory within the meaning of the Act?"

The question depends primarily on the first part of the 7th section of the Act, under which section the respondent must bring his case, and which provides (section 7, subsection 1) that "this Act shall apply only to employment by the undertakers as hereinafter defined on or in or about a railway, factory, mine, quarry, or engineering work." The rest of the subsection clearly does not apply, and it is unnecessary to quote it. The question is, whether this yard was a railway, factory, mine, quarry, or engineering work, and it would be absurd to suggest that the yard should be held to be described or covered by the words or terms railway, mine, quarry, or engineering work, the yard being certainly none of these. The only question is, whether it can be said to be a "factory" in the sense of the Act. That is a term which depends for its meaning almost entirely on the Workmen's Compensation Act and on the Factory Acts. Now, the 2d subsection of section 7 seems to profess to interpret the word "factory." It does not, strictly speaking, do so, but refers for the interpretation to other statutes, viz., the Factory Acts, and it provides that "factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and "also that it includes any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshops Act, 1895."

This application seems made by section 23 of the Factory Act of 1895, which provided (but it is itself repealed) that certain sections and provisions of the Factory Acts enumerated "shall have effect as if—(*a*) every dock, wharf, quay, and warehouse were included in the word 'factory.'" From which it follows undoubtedly that the term "factory" as used in the 7th section of the Workmen's Compensation Act includes a warehouse (that is the point of importance), for it does not signify to this case whether docks, wharfs, and quays should be factories, since it is certain that the yard in question cannot possibly be held to be either a dock or a wharf or quay. But it is said that it may be described as a warehouse, which is an unlikely but not an impossible interpretation, so that the matter seems to stand thus—The Act applies to factories, and a warehouse is a factory. Hence the Act applies to warehouses. Now, that a warehouse is a factory is a result arrived at by an interpretation of the words of the Act, and there is no doubt about it. But that conclusion cannot avail the respondent unless he can go a step further, and shew that the yard in question is a warehouse in the sense of the Workmen's Compensation Act. Not

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only that a warehouse is a factory, in which I think he succeeds, but also that the yard in question is in the sense of the Workmen's Compensation Act a warehouse, which is a much more difficult but also a more special point.

Now, this latter is a question to the solution of which the Act gives very little assistance. The Act has not a very copious interpretation clause, but it does give interpretations of various terms. But there is no interpretation of the word warehouse, probably because it was thought that none was required, and that seems to indicate that the Legislature intended that the word should receive its ordinary and, so to speak, popular and colloquial meaning, and I think the question is whether the word warehouse used in its ordinary meaning, since it has no statutory meaning, can be properly applied to the yard described in the stated case. It seems to me that cannot be done without a very strained and artificial interpretation, and I think that this case may be most simply solved by saying that no one would speak of this open yard, the chief purpose of which is to serve as a place of storage for materials and stones used in repairing the roads and drains of the town, as a warehouse, or as a place to any extent of the nature of a warehouse. The materials were not stored for sale, but merely heaped together for sake of convenience. That was the use to which the yard was ordinarily put. As I read the case, none of the materials were sold, but it may be that some profit was made if the burgh with their materials performed the work which they had ordered to be done by others. But that was not the general use or purpose of the yard. It was not a house, and it was not used for the storage of wares, so that it is at least very difficult to see the propriety of calling it a warehouse.

If such a gathering of stones and road materials were held to be a warehouse, which I think in the ordinary sense it is not, it is difficult to see where such methods of interpretation would stop. Every stackyard in the country would, for as strong or stronger reasons, be converted into a warehouse and a factory, and so, so far as I can see, would every heap of metal collected by a roadside to be broken and laid on the road. I think the Act has never been so interpreted, and that such an interpretation would be absurd.

I do not think that there are any special grounds derived from the terms of the Act which can be urged in favour of the view which the Sheriff-substitute has taken. There are considerations the other way. It has been argued for the appellants that the term warehouse as used in the Act should be read with a restricted meaning, and as confined to such warehouses only as were contiguous to the sea, and were naturally collocated with docks, wharfs, and quays, and signified only such warehouses as are usually found at docks, and harbours, and ports—such, for example, as bonded warehouses,—and that the Act would not apply to inland warehouses. This was argued on account of the manner in which the word is collocated with docks, wharfs, and quays throughout the Act, and also on account of the headings of the different sections of the Factory and Workshops Acts, 1895 and 1901, particularly the headings of "Docks, &c.," in the Act of 1895 before section 23, and the heading of "Docks" being the fifth division of the Act of 1901. It was maintained that these headings, unlike the side headings, formed

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parts of the statute, and that they had the effect of limiting the meaning of the word warehouses to warehouses at or near a dock or quay, or at least to warehouses of the same kind as those usually found at docks and quays. Assuming that these headings in the Factories Act are to be read as parts of the statute, I do not differ from the conclusion derived from that argument in this case, but I confess I feel some doubt as to the legitimacy of the argument. I feel some hesitation in accepting the view that these headings could have the effect of striking out of the statute all warehouses which were not contiguous to the sea. My view of the case does not necessitate such a sweeping conclusion, and I reach the same result by what I conceive to be an easier route, and I would prefer to reserve my opinion on these questions. Further, it is settled in the English Courts that contiguity to the sea is not essential to premises being designated as a warehouse, although apparently it may be a consideration which may bear on the question—*Willmott* v. *Paton*[1] and *Green* v. *Britten*.[2]

Reference was made in the argument to the fact that this yard was uncovered. It seems to have been settled in England that premises might be a warehouse though uncovered; still I think that that is a circumstance which might add to the difficulty of holding such premises to be so when the word warehouse is used in its ordinary meaning.

I am for recalling the judgment of the Sheriff-substitute, and finding that the yard was not a warehouse within the meaning of the Act.

LORD YOUNG was absent.

THE COURT answered the question in the case in the negative.

J. CAMPBELL IRONS & CO., S.S.C.—BONAR, HUNTER, & JOHNSTONE, W.S.—Agents.

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CAYZER, IRVINE, & COMPANY, Appellants.—*Campbell, K.C.*—*R. S. Horne.*

JAMES DICKSON, Respondent.—*Watt, K.C.*—*W. T. Watson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. c.* 37), *sec.* 7—*Factory—Dock—Ship in dry dock undergoing repair—Factory and Workshop Act*, 1895 (58 *and* 59 *Vict. c.* 37), *sec.* 23.—The Factory and Workshop Act, 1895, sec. 23 (1) enacts that certain specified provisions of the Factory Acts, 1878 to 1895 "shall have effect as if (*a*) every dock, wharf, quay . . . were included in the word factory . . . and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay . . . shall be deemed to be the occupier of a factory."

The Workmen's Compensation Act, 1897, which provides for compensation to persons injured in or about a "factory," enacts, sec. 7, that in that Act, "'factory' . . . includes any dock, wharf, quay . . . to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895."

Shipowners took a ship into a dry dock, which they had hired for the purpose of repairing the ship. A workman, who had served as ship's carpenter on board the ship during one voyage, and was engaged for her next voyage, in the interval between the voyages was employed by the shipowners in the work of repairing the ship. While engaged in un-

[1] L. R. [1902], 1 K. B. 237. [2] L. R. [1904], 1 K. B. 350.

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shackling the ship's cable, in order to turn it end for end, he fell into the dock, and sustained injuries from which he died.

*Held* that when the accident happened he was employed as a workman in the repair of a ship in or about a "factory," in the sense of the Workmen's Compensation Act, 1897, and that the shipowners were liable to pay compensation.

In an arbitration under the Workmen's Compensation Act, 1897, in the Sheriff Court at Glasgow, the widow of James Dickson, ship carpenter, as an individual, and as tutrix and administratrix-in-law for her pupil children, sought compensation in respect of his death from Cayzer, Irvine, & Company, shipowners, Glasgow.

The Sheriff-substitute (Boyd) awarded compensation, and at the request of Cayzer, Irvine, & Company stated a case, which bore that the following facts were established:—"(1) That the respondent is the widow of James Dickson . . . and has three children of the marriage . . . and that she and her children were wholly dependent upon the earnings of the deceased. (2) That on 11th March 1904 the appellants, between voyages, for cleaning and repairs, docked their s.s. 'Clan Fraser' in No. 3 Graving Dry Dock, Govan, which they had hired from the Clyde Navigation Trustees. 3. That James Dickson was engaged by the appellants as ship's carpenter on board this vessel. 4. That he had served during the previous voyage and was engaged for the voyage for which the vessel was preparing, and in the interval in dock he was employed by the appellants on board in the work of repair. 5. That on 11th March 1904 he was engaged on the forecastlehead in turning the ship's cable end for end, and while removing the shackle of the cable which passed through the ring of the anchor, he overbalanced and fell to the bottom of the dock and sustained injuries from which he died on the same day. 9. That the operation of unshackling the ship's cable on which the deceased was engaged at the time of the accident is, as a rule, done in dry dock, but that in emergencies it is done at sea, and it forms part of the duty of a ship's carpenter."

On these facts the Sheriff-substitute found in law that the accident happened to the deceased James Dickson when employed on, in, or about a factory within the meaning of the Workmen's Compensation Act, 1897; that the accident arose out of and in the course of his employment; and that the appellants were the undertakers of the employment in the sense of the Act. He accordingly awarded compensation, and found the appellants liable in expenses.

The question of law for the opinion of the Court was:—"Was the employment in which the deceased James Dickson was engaged at the time of his death an employment to which the Workmen's Compensation Act applies?"

Argued for the appellants;—Even if it was taken as settled on the authority of *Raine* v. *Jobson & Company*[1] and other cases[2] that the dock was a constructive factory, the work in which the respondent was engaged at the time of the accident was not part of the

[1] L. R. [1901], A. C. 404.

[2] Merrill v. Wilson, L. R. [1901], 1 K. B. 35; Griffin v. The Houlder Line, Limited, L. R. [1904], 1 K. B. 510, rev. [1905], A. C. 220; Reid v. The Anchor Line, Feb. 6, 1903, 5 F. 435; Barrett v. Kemp Brothers, L. R. [1904], 1 K. B. 517; Stevens v. General Steam Navigation Co., L. R. [1903], 1 K. B. 890.

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ordinary work of this constructive factory. He was engaged in the ordinary employment of a seaman, and not on anything ordinarily incidental to work in this factory. There must be some connection between his employment and the business of the factory, and in this case, his work being the unshackling the ship's cable, there was no such connection.[1] The work of the factory was the repair of the ship, and the unshackling of the cable had no relation to the process of repair, but was part of the ordinary work of a seaman. It was work which, as was stated in the case, the respondent in his capacity of ship carpenter might be called on to do at sea. A ship carpenter came within the definition of "seaman," which included "every person" (with certain specified exceptions) "employed or engaged in any capacity on board any ship."[2] Seamen were excluded from, or at least were not included in, the class of workmen benefited by the Workmen's Compensation Act, 1897, and the mere fact that the ship was at the time of the accident in a dock, and the dock was a factory, did not entitle a seaman to compensation for injury sustained in performing his duties as a seaman.[3]

Counsel for the respondents were not called upon.

LORD PRESIDENT.—This is a very short point. It is stated by the learned Sheriff-substitute that James Dickson, the man who was injured, had been employed during the previous voyage as a ship's carpenter on board the vessel, and that the voyage had come to an end. He was also engaged for the next voyage which had not yet commenced. In the interval the shipowners employed him in assisting in the work of repairing the vessel which was then lying in No. 3 Graving Dry Dock, Govan, hired for the purpose from the Clyde Navigation Trustees. Under these circumstances it is clear that the dock became for the purposes of the Act constructively a factory.

The deceased man was engaged in work in or about this constructive factory, and therefore, as he was injured in the course of his work, the case is ruled by the decision in *Raine v. Jobson*,[4] in the House of Lords, unless it can be made out that the work in which he was engaged was not connected with the ordinary and usual work of this constructive factory.

The Sheriff finds that the work in which Dickson was engaged was unshackling the ship's cable in order to turn it end for end. He also finds that Dickson was employed in the work "of repair."

I find no difficulty in holding that the operation of unshackling the cable with a view to turn it end for end was a work of "repair." I see no reason to limit the meaning of repair to the supply or mending of something broken. We are told, it is true, by the Sheriff that unshackling the ship's cable is an operation which may take place in emergencies at sea, and that if done at sea such repair would be part of the proper work of the ship's carpenter. The Sheriff has found, however, that he was engaged in "the repair" of the ship, and, that being so, I think no distinction can be drawn between

[1] Owens v. Campbell, Limited, L. R. [1904], 2 K. B. 60.

[2] Merchant Shipping Act, 1894, sec. 742; The Queen v. Judge of City of London Court, 1890, L. R., 25 Q. B. D. 339; Thomson v. Hart, Oct. 27, 1890, 28 S. L. R. 28.

[3] Houlder Line, Limited, v. Griffin, L. R. [1905], A. C. 220.

[4] [1901], A. C. 404.

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this case and that of *Raine* v. *Jobson*,[1] and that it is governed by that decision.

LORD ADAM.—I concur.

LORD M'LAREN.—Comparing the case of *Raine* v. *Jobson*,[1] with the more recent authority cited, *The Houlder Line, Limited*, v. *Griffin*,[2] but which has not yet appeared in the official reports, it is quite plain that the Supreme Court of Appeal has kept clearly in view the distinction between the case where the dock is hired by the shipowner for the purposes of repairing a ship, and the case where a ship is being repaired while lying in the water-space of the dock, and surrounded by the structure of a dock which is under the administration of a company or public body.

In the present case the dock was at the exclusive disposal of the shipowners, by whom it had been hired, and the repairs were being executed by workmen employed by them. One of these was a ship's carpenter who had been employed on the vessel during the previous voyage, but who at the time when he met with the accident was not engaged as a seaman but as a workman employed to execute repairs.

The fact that the particular operation on which he was engaged—viz., turning the ship's cable end for end—was such work as a ship's carpenter might be required to do at sea under his contract as a seaman, cannot be held to exclude him from the benefit of the Act unless the mere fact of his being a seaman is sufficient to debar him even although he may happen to be employed at the time as a landsman under a contract of a different description.

LORD KINNEAR.—I agree with your Lordships that it is quite clear that the dock in this case was constructively a factory.

It is not disputed that the deceased was employed in this factory, but it is said that the operation in which he was actually engaged was not work concerned with the business of the factory. The Sheriff states, however, that as matter of fact he was employed in the work of repair, which is the very business of this so-called factory, for the work of this factory is the repair of the ship.

If so, the only point is that the deceased was doing work which he might have been required to do while at sea, and in an emergency, but the mere fact that he might on some other occasion have to do elsewhere in a different capacity—that of a seaman—the work which he was doing when the accident happened to him in the capacity of a workman employed by the undertakers cannot be held to exclude him from the provisions of the Act.

THE COURT answered the question of law in the affirmative.

WEBSTER, WILL, & Co., S.S.C.—M. J. BROWN, SON, & Co.—Agents.

[1] L. R. [1901], A. C. 404.
[2] 21 T. L. R. 436, L. R. [1905], A. C. 220.

COYLTON COAL COMPANY AND ANOTHER, Appellants.—*Sol.-Gen. Salvesen—Munro.*
MRS JANE BROWN OR DAVIDSON, Respondent.—*Campbell, K.C.—Hunter.*

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*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (1) *and* (2)—*Mine*—"*About*" *mine*—*Railway Company's Siding*—*Private Road to mine*—*Coal Mines Regulation Act*, 1887 (50 *and* 51 *Vict. cap.* 58), *sec.* 75.—A workman employed as a carter at a coal mine sustained fatal injuries while transferring timber to a colliery cart from a railway waggon at a railway siding belonging to and in the occupation of a railway company. The place where the accident occurred was about 400 yards from the pit, the distance being made up of (1) railway siding (123 yards), (2) the breadth of a public road, and (3) a private cart road leading to the pit (259 yards). *Held* that the workman was not injured in the course of employment "on or in or about" "a mine" within the meaning of the Workmen's Compensation Act, 1897, sec. 7.

2D DIVISION. Sheriff of Ayrshire.

IN an arbitration under the Workmen's Compensation Act, 1897,* before the Sheriff-substitute at Ayr (Shairp), Mrs Jane Brown or Davidson, widow of William Davidson, carter, Rankinston, Ayrshire, claimed compensation from the Coylton Coal Company, carrying on business at Littlemill, Rankinston, and James Morton, coalmaster there, the only known partner of that company.

The Sheriff-substitute having awarded compensation, the defenders in the arbitration appealed upon a stated case.

In the case the Sheriff-substitute stated as follows:—

"I found the following facts admitted or proved:—That the said Jane Brown or Davidson is the widow of the said William Davidson; that he died on the 28th day of November 1903; that on the previous day, when he met with the accident after mentioned, he was in the employment of the said Coylton Coal Company as a carter at their said pit (*i.e.*, their pit at Littlemill, Rankinston, Ayrshire), . . . that his death resulted from the personal injury caused to him, on or about 27th November 1903, when he was knocked to the ground by a beam of timber while he, in the course of his said employment, and acting under the instructions of the defenders, was unloading timber on to the said Coylton Coal Company's cart from a railway waggon standing in a lye belonging to and in the occupation of the Glasgow and South-Western Railway Company, at the point marked with a red cross on the plans Nos. 5 and 6 of process; that the said lye was in the proximity of and about a quarter of a mile from the said Coylton Coal Company's No. 1 pit,

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts, sec. 1, subsec. (1),—"If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." Sec. 7, subsec. 1,—"This Act shall apply only to employment by the undertakers as hereinafter defined on or in or about," *inter alia*, a "mine." Subsec. (2), "In this Act . . . 'mine' means," *inter alia*, "a mine to which the Coal Mines Regulation Act, 1887 . . . applies." The Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58) by sec. 75 declares that "mine" includes "all the shafts, levels, planes, works, tramways, and sidings both below ground and above ground, in and adjacent to and belonging to the mine."

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and that entry to said lye from the highway was obtained through the railway company's gate, as shewn in said plans; that, although it was not proved that the said Coylton Coal Company had any special arrangement with the railway company in regard to said lye, all the said Coylton Coal Company's carting to and from said pit, except 'two or three carts that went up to the householders in the Rows,' was done to said lye, along the coal company's private road, and the exit of that road on to the highway was opposite the entrance to said lye, as shewn in said plans. . . .*

"Upon these admitted or proved facts, and having in view the opinion expressed by Lord President Robertson in the case of *Bell & Sime, Limited*, v. *Whitton*, 16th June 1899, 1 F. 943, I found that the said place where the said William Davidson was, in the course of his said employment, accidentally injured was 'specially connected by use' with the said Coylton Coal Company's No. 1 pit; was 'at no considerable distance' therefrom, and was thus 'about' the said pit, within the meaning of section 7 of the Workmen's Compensation Act, 1897, and that the said Jane Brown or Davidson, the widow and sole dependant of the said William Davidson, was accordingly entitled to compensation from the said Coylton Coal Company, under the said Workmen's Compensation Act, 1897. . . ."

The question of law was:—"Whether, in the circumstances stated, the said place where the said William Davidson was, in the course of his said employment, accidentally injured as aforesaid, was 'about' the said Coylton Coal Company's No. 1 pit or mine, within the meaning of section 7 of the said Workmen's Compensation Act, 1897?"

Argued for the appellants;—The workman here was not injured in the course of employment on or in or about a mine. To satisfy the word 'about,' physical or local contiguity was necessary, and it was not sufficient that the injuries had been sustained while engaged on business connected with the mine, railway, or factory, as the case might be.[1] The rule as to contiguity had been applied where the injuries were sustained by a mine employee on a private line belonging to the mine but at some distance from it.[2] The reason was that the benefits of the Act were confined to premises where dangerous businesses were carried on. The private road here was not part of the mine in the sense of the Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 75. It was not a "siding," or a "tramway."

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* From these plans it appeared that the private road referred to, which led from the pit to the public road, was 259 yards in length from the pit to the gate into the highway, that the railway lye was on the opposite side of the public road from the private road, and that the distance from the gate leading into the lye, opposite to the gate into the private road, to the place where Davidson was injured, was 123 yards.

[1] Fenn v. Miller, [1900], 1 Q. B. 788, *per* A. L. Smith (L. J.), at p. 791, and Collins (L. J.), at p. 793; Brodie v. North British Railway Co., Nov. 6, 1900, 3 F. 75; Caton v. Summerlee and Mossend Iron and Coal Co., Limited, July 11, 1902, 4 F. 989, *per* L. J. C. at p. 991; Ferguson v. Barclay, Sons, & Co., Limited, Nov. 12, 1902, 5 F. 105, *per* L. J. C. at p. 107, and Lord Moncreiff at p. 108; Barclay, Curle, & Co., v. M'Kinnon, Feb. 1, 1901, 3 F. 436; Turnbull v. Lambton Collieries, Limited, 1900, 16 T. L. R. 369; Pattison v. White & Co., Limited, 1904, 20 T. L. R. 775; Lowth v. Ibbottson, [1899], 1 Q. B. 1003.

[2] Caton, *cit. per* L. J. C., 4 F. at p. 991; Turnbull, *cit.* 16 T. L. R. 369.

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The "mine," for the purpose of considering the distance, here meant the pit itself. The siding where the accident happened was on the opposite side of a public road from both the pit and the private road. It was owned and occupied by a railway company, not by the mine-owner. The place where the accident occurred was 400 yards from the pit, the distance being made up of railway siding, public road, and private road. There was thus here both discontiguity and too great distance. Further, the accident happened on a railway. This precluded the place being "about" a mine. An accident on one railway, mine, or factory, could not be "about" another,[1] and this applied, however close they might be to one another. The Sheriff-substitute here had proceeded upon a misconception of what the Lord President said in *Bell & Sime, Limited*, v. *Whitton*.[2] The Lord President did not mean to say that local contiguity was unnecessary.

Argued for the respondent;—(1) The fact that the injuries were sustained when the workman was on a "railway" was not enough to shew that he was not then about a "mine."[3] (2) The private road was part of the "mine."[4] The definition of "mine" was more elastic than the definition of "factory." It was true that "roads" were not mentioned in the definition. But this road was really a siding. The question whether it was part of the "mine" within the definition could not depend upon whether it had rails laid on it or not. It was not essential that a "siding" should have rails on it. The whole of this road was "adjacent" to the pit. In *Anderson* v. *Lochgelly Iron and Coal Company, Limited*,[5] the point on the private railway of the mine where the accident occurred was 800 yards from the pit. [LORD STORMONTH-DARLING.—As a Railway Commissioner I know that in railway legislation private railways of mines are called and treated as "sidings" throughout their whole length.] That was the view indicated by Lord Trayner at the argument in *Anderson*.[5] At any rate the private road was part of the "works" in the sense of the definition, and so part of the mine. The entrance to the railway siding or lye was just opposite to the entrance of the private road. The intervention of a public road made no difference. The place where the accident occurred was therefore "about" the "mine."[6] This was plain if the private road was part of the mine, but even if it was not, the total distance was not so great as to make the place in question not "about" the "mine," taking "mine" here to mean pit. (3) But apart from all this, the true view of the meaning of section 7 (1) of the Workmen's Compensation Act was that the word "about" referred to the nature of the employment and not to locality. It must be admitted that the opposite view had the support of decisions. But the question had never been properly considered, and should receive reconsideration. It might not be enough that the injured

[1] Francis v. Turner Brothers, [1900], 1 Q. B. 478.

[2] June 16, 1899, 1 F. 942, at p. 943.

[3] Monaghan v. United Collieries, Limited, Nov. 27, 1900, 3 F. 149.

[4] Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 7 (2), definition of "mine"; Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 75, definition of "mine."

[5] Dec. 6, 1904, 7 F. 187.

[6] Powell v. Brown, [1899], 1 Q. B. 157; Monaghan, *cit.*, 3 F. 149; Middlemiss v. Middle District Committee of the County Council of Berwickshire, Jan. 17, 1900, 2 F. 392; Bell & Syme v. Whitton, *cit.*, 1 F. 942, *per* Lord President at p. 943.

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person was employed by the owner of a factory or mine, on factory or mine business, *e.g.*, as a commercial traveller or messenger; but if he was employed not only on factory or mine business but in or about the factory or mine, and was injured in the course of his employment, as the workman here was, then, it was submitted, compensation was due no matter where the injuries were sustained. The spirit in which the Act should be construed was indicated in the case of *Lysons* v. *Andrew Knowles & Sons, Limited.*[1] (4) The question here was a question of fact. There was evidence on which the arbitrator was entitled to reach the conclusion he did, and his decision should therefore not be interfered with.

At advising,—

LORD JUSTICE-CLERK.—The facts in this case in regard to the accident for which compensation is claimed are that the deceased man was a carter in the employment of the appellants, that he had taken his cart to a lye of the Glasgow and South-Western Railway, there to load wood on to his cart from railway waggons, and that while so engaged a beam of timber struck him, knocked him down, and killed him. The question whether compensation is due depends upon whether, the employment being in connection with the business of a mine, the accident happened "on, or in, or about" a mine, according to the words of the statute. The facts upon which the answer to that question depends are that the deceased had brought his cart along a private road of the appellants for a distance of a quarter of a mile, that then it was taken on to a public road, crossed that road, and entered the premises of the railway company. The stated case refers to the plans lodged, and according to these plans it appears that the length of the private road is 259 yards, that the road is 25 yards wide, and that after crossing the road the cart was taken to a place in the railway company's premises, a distance of 123 yards to the place of the accident.

It can scarcely be disputed that the place of the accident was not "on or in" a mine. It did not belong to, and was not occupied by, the appellants, and they had no control over it, nor any right to interfere in any way with it. It must therefore be under the words "or about" that this claim for compensation must be maintained.

I have considered this case with care, recognising how wide an interpretation has been given in certain decided cases to the words "or about." In one case at least it has been given a wider interpretation than accords with my view of what is reasonable, and in dealing with so vague an expression as "about," the only test is one of reasonableness in the circumstances. I bow to what has been already done, and if I could see that any of the decided cases ruled the present I should not resist their application whatever misgivings I might have as to the propriety of the determination in the previous cases. Apart from decisions, I should myself have no hesitation in holding that in no reasonable sense could the word "about" in the statute be held to apply in the present case, and that the question put by the learned Sheriff must be answered in the negative. The carter had left the mine, and although still on business for the mineowner, was doing the ordinary work of a carter at a place where no dangers connected

[1] [1901], A. C. 79.

with a mine were to be encountered. He had not only left the neighbourhood of the mine, but he had left the property of the mineowner, had gone to the other side of the road, and entered a place which belonged to another owner, and which was itself a place to which the Act applied in respect that the owners of that place carried on another dangerous business, for any accident in which the owners were liable to their own employees. How in these circumstances it could possibly be held that he was still at a place which was "about" the mine which he had left I am unable to understand. He would have been a trespasser where he was unless he had gone there on business connected with the railway company, and he could not have said, if asked to state his business or to quit the premises, that he was about his master's mine. His only right to stay could be because his master had business with the railway company. But this might equally apply ten miles off or twenty miles off from his master's premises.

Turning to the decided cases, as I have said already, they have certainly gone very far in holding that places some distance off from the actual mine may be held to be "about" a mine, particularly where they are on or connected with rails running in direct continuation with rails at the mine itself. In one case, where on such a line an accident happened a long distance from the mine, it was held that the words of the Act applied. I expressed my dissent in that case, and have no cause to change my view, but, as I have said, if this case could be held to be similar I would willingly yield to a decision which expressly ruled the case under consideration. But I cannot hold that it is. That was a case where the accident took place on the property of the mineowner, and I know of no other case which goes so far in the direction of holding that a place not in any true proximity to the mine may still be held to be "about" the mine. In this case my view is that in no true sense can the place of the accident be held to be "about" the mine. It happened on premises cut off from the mine by a broad public road, and more than 100 yards within the entrance of the premises of a railway company. It seems to me to be impossible to give such an elastic interpretation to the word "about" as would bring the case within the statute.

I would therefore propose that the question in the case be answered in the negative.

LORD KYLLACHY concurred.

LORD KINCAIRNEY.—The man who was killed in this case was a workman in the employment of the Coylton Coal Company, and at the time of the accident was engaged in the work of the Company. The question for us is whether the place of the accident was about the Company's mine in the sense of the 7th section of the Workmen's Compensation Act. It happened on a railway close to a turnpike road, and at a place to which he was in use to cart material to and from the pit, and to which there was access by a gate. Opposite that gate, and on the other side of the road, there was another gate opening on a private road leading to the mine. The road was 259 yards in length. The turnpike road was 25 yards broad, and the distance between the gate opening on the lye and the place where the workman was injured was 123 yards. Thus the distance of the place of accident

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from the pit was 407 yards, or nearly a quarter of a mile. The case is somewhat narrow, but I am of opinion that the place was not about the mine. It was separated from it by a distance of a quarter of a mile and also by a turnpike road.

None of the dangers incident to a mine could be said to attach to the place of the accident.

The Sheriff-substitute has decided on the ground that the place was connected by use with the pit, but although without such connection it is possible that the statute might not have applied, still it was necessary that the workman should not only be engaged in the course of his employment but also that he should be engaged about his mine. The cases of *Fenn* v. *Miller*,[1] *Brodie* v. *North British Railway Company*, November 6, 1900,[2] *Caton*,[3] and *Ferguson* v. *Barclay, Sons, & Company, Limited*, November 12, 1902,[4] in which there was but a short distance between the place of the accident and the mine, may be referred to.

LORD STORMONTH-DARLING.—Speaking solely for myself I should have thought, if the question had been open, that there was much force in the argument urged by Mr Campbell to the effect that section 7 of the Act refers not to the locality of the accident but to the kind of employment which is to give a right to compensation. The 1st section has been described by the House of Lords in *Lysons*'[5] case as "the affirmative or leading enactment," and it declares that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." The leading idea of the statute, therefore, is to give compensation to workmen for injury arising out of their employment, even when the employer is entirely free from blame. But inasmuch as the Act was not intended to apply to every kind of employment, it became necessary to define the employment to which it did apply, and I should have thought that the sole purpose of section 7 was to do so. When the section speaks of employment "on or in or about" a railway, factory, mine, quarry, and so on, I should have thought that it introduced the idea of locality only as a means of describing particular trades or occupations, and not in order to restrict the area within which accidents occurring in the course of these particular trades were to give rise to a right of compensation. Such a construction of the statute would undoubtedly have enlarged its scope, but it would at least have avoided the obvious anomaly of allowing compensatien for injury when sustained by a workman at one part of a job and refusing it when sustained at another part although the whole job was ordered by his employer, and the employer was equally free from blame throughout. Why so much importance should have been attached to the *locus* of the accident itself I do not know, for a workman is just as much in his master's employment, acting in the course of that employment, when he is loading goods for him at a distance from his master's premises as when he is delivering the goods at his master's door.

[1] [1900], 1 Q. B. 788. [2] 3 F. 75. [3] 4 F. 989. [4] 5 F. 105.
[5] [1901], App. Cas., at p. 85.

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But I am convinced that it is now too late to go back on the series of cases both here and in England where the words "on or in or about" in section 7 have been read as referring to the workman's actual presence at the time of the accident, and so reading the section I must concur with your Lordships in answering the question of law in the negative.

THE COURT answered the question of law in the negative; sustained the appeal; recalled the award of the arbitrator; and remitted to him to dismiss the claim.

WM. C. DUDGEON, W.S.—DALGLEISH & DOBBIE, W.S.—Agents.

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June 6, 1905. MacGillivray's Trustees v. Dallas.

ALEXANDER FOWLER STEELE AND OTHERS (MacGillivray's Trustees), Pursuers and Real Raisers (Respondents).—*Mackenzie, K.C.—Macphail.* DUNCAN FORBES DALLAS AND OTHERS, Defenders (Reclaimers).—*Kennedy—J. B. Young.*

*Process—Multiplepoinding—Competency—Double Distress.*—Where a testator left legacies to various persons, and a question arose as to the construction of one of these bequests, the trustees, before making payment of certain of the legacies as to which there was no dispute, raised an action of multiplepoinding for distribution of the balance in their hands and for exoneration. *Held* that the action was incompetent in so far as it submitted for adjudication the legacies other than the one in dispute.

1ST DIVISION. LdStormonth Darling.

MRS ISABELLA GOLLAN OR MACGILLIVRAY, who died on 26th May 1903, left a trust-disposition and settlement by which she conveyed her whole estate, heritable and moveable, to Alexander Fowler Steele, Inverness, and another as trustees. By the second purpose of her settlement the testatrix directed her trustees to pay a number of special legacies, including, *inter alia*, a sum of £400 to Mrs MacGillivray or Cameron, a sum of £300 to Mrs Isabella Gollan or Dallas, and a sum of £300 to Miss Catherine Gollan. By the eighth purpose she bequeathed certain sums to certain schemes of the Free Church of Scotland. By the ninth purpose she directed her trustees to pay the residue of her estate to the said Mrs Mary MacGillivray or Cameron, and declared that "in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser, equally among them, or failing children, then to the executors or next of kin of such deceaser."

Mrs Mary MacGillivray or Cameron and Mrs Isabella Gollan or Dallas predeceased the testatrix, and were both survived by children. Catherine Gollan also predeceased the testatrix, unmarried. She left a will by which she nominated an executor, and she was survived by a brother and sister as well as by certain nephews and nieces.

A question having arisen in connection with the legacy to Catherine Gollan as to the persons to whom, under the direction in the ninth purpose of the trust-disposition and settlement, the said legacy fell to be paid, the trustees submitted a memorial for the opinion of counsel. Counsel advised that the persons entitled to payment of that legacy were the persons nearest in kin to the said Catherine Gollan at the date of her death, but suggested that in the circumstances the

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trustees should raise a multiplepoinding. The opinion of counsel further explained the following:—"In this action they should call the whole of Miss Gollan's brothers and sisters and their representatives, and also . . . other persons interested in the residue of the trust-estate in case it might be suggested that the legacy has lapsed."

The trustees thereupon brought an action of multiplepoinding and exoneration, in which the fund *in medio* consisted of the whole estate of the testatrix in their hands at the date of the action.

Prior to the date of the action the trustees had paid the legacies to those legatees who survived the testatrix, but the legacies bequeathed to persons who had predeceased the testatrix were included in the fund *in medio*.

Defences were lodged by Duncan Forbes Dallas and others, the children of Mrs Isabella Gollan or Dallas.

The trustees averred that, in view of counsel's suggestion as to the possibility of it being maintained that lapse had occurred in the case of legacies bequeathed to persons who had predeceased the testatrix, they came to the conclusion that they were not in safety to pay said legacies, including the residue, without judicial sanction or a sufficient discharge otherwise, and intimated to the persons claiming as the representatives of such predeceasing persons that payment of said legacies could not be made as arranged; that with the view of avoiding an action of multiplepoinding, they had endeavoured to obtain a discharge from the heirs *in mobilibus* of the testatrix, who would be entitled to the residue of the estate in the event of it being held that legacies to predeceasing beneficiaries had lapsed; and that the defenders, who were included among the heirs *in mobilibus* of the testatrix, refused to concur in giving such a discharge, even with regard to the legacy of £300 to Mrs Dallas.

The defenders averred that the legacy of £300 to Mrs Isabella Gollan or Dallas was improperly included in the fund *in medio*, there being no claimants on said sum other than the defenders. They stated,—"It has never been suggested by the pursuers or by anybody that the defenders are not the parties entitled to said legacy, and no other parties make any pretence to claim said legacy."

The defenders pleaded, *inter alia*;—(1) The action is unnecessary. (4) In any event, the action is incompetent, and should be dismissed *quoad* the said legacy.

On 15th November 1904 the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor repelling the defences for the defenders Duncan Forbes Dallas and others; finding the pursuers and real raisers liable only in once and single payment of the fund *in medio*; appointing all persons claiming an interest in the said fund to lodge condescendences and claims in ten days; and finding the said defenders liable in expenses in connection with the lodging of the said defences.*

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* "OPINION.—Questions as to the competency of actions of multiplepoinding are questions of process, and although they have in the past given rise to much ingenious discussion, they are not generally questions involving any very substantial interests as between the parties. I cannot say that this case is any exception to the rule.

"Now, the competency is here challenged on the ground that there is no double distress. . . .

"Now, the testatrix whose will is in question provided by the ninth

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The defenders reclaimed, and argued;—The legacy bequeathed to Mrs Dallas was clearly due to the reclaimers, her children, under the clause of conditional institution in the ninth purpose of the trust-disposition, and the trustees were bound to pay it. No competition was suggested which could render a multiplepoinding competent *quoad* this legacy.[1] The inclusion of this legacy in the multiplepoinding was wholly unwarranted, and was not justified by the opinion of counsel, which was obtained with reference to, and was limited to, the legacy to Catherine Gollan. All that the trustees were entitled to, by way of discharge from the reclaimers, was a receipt and discharge for payment of the legacy due to them.[2]

Argued for the pursuers and real raisers;—The action was competent, for, even if there was no double distress *quoad* this particular legacy, the trustees were entitled to bring the action for their own exoneration and discharge. The trustees acted on the opinion of counsel,

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purpose of her settlement, that 'in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser equally among them, or failing children, then to the executors or next of kin of such deceaser.'

"I do not require to consider at this stage whether there is any ambiguity lurking under these words. It is enough that counsel, when the trustees consulted him, advised that questions might be raised as to the meaning of the clause which I have read—in other words, as to whether the clause prevented a lapse, and, if it did prevent a lapse, who were the persons brought in by the clause. He gave this advice at a time when the trustees had paid a number of legacies about which there was no question, but when there were still certain legacies claimed by the representatives of predeceasing legatees. The important thing about the clause is that it plainly applies equally to the legacies in that position and to the residue; and when the trustees received this advice they, properly enough, set about inquiring who the next of kin of the testatrix were, in case any question might be raised as to the legacies and the residue having lapsed. Then arose the claim by the representatives of one of the predeceasing legatees to a small legacy, they being the children of the legatee. Nobody up to that point had suggested any doubt as to their right, but the trustees, having received the advice which I have mentioned, pointed out to the claimants that there might be a question, and that, if it were raised, the same question would apply to the residue; and (not unreasonably, I think) they stipulated that, if they paid the legacy without judicial authority, they should obtain from the claimants—who were also, as it happened, in the class of next of kin of the testatrix—some kind of assurance that they would not raise the question of lapse with regard to the residue. I confess I should have thought that this demand would have been assented to, because the same clause of conditional institution regulated both legacies and residue, and persons who were claiming a legacy on the ground that there was no lapse could not consistently claim residue on the ground that there was a lapse. However, the claimants of the legacy declined to give the assurance which was demanded—an assurance which was put in the form of a demand for a discharge in particular terms. I do not enter into the question as to whether these terms were the best that could have been devised, because no question

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[1] Connell's Trustee v. Chalk, &c., March 6, 1878, 5 R. 735.

[2] Laing v. Laing, March 20, 1895, 22 R. 575; Fleming v. Brown, Feb. 6, 1861, 23 D. 443.

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and, in view of that opinion and the possible difficulties arising from the lapse of bequests to predeceasing legatees, they were entitled for their own protection to the general discharge which they had asked from the reclaimers, who, as being among the next of kin of the testatrix, might claim lapsed bequests. The refusal by the reclaimers to grant such a discharge justified the trustees in bringing this multiplepoinding. The multiplepoinding was required for their exoneration, and its competency depended, not upon double distress, but upon the right to exoneration.[1] Further, there were here difficulties in the construction of the trust-deed, in particular with reference to (*a*) the bequests to the Free Church of Scotland, which might be claimed by two Churches, and (*b*) whether the clause of conditional institution in the ninth purpose applied to residue as well as to legacies.

At advising,—

LORD PRESIDENT.—This is a reclaiming note against an interlocutor of the Lord Ordinary, finding the pursuers and real raisers of a multiplepoinding liable only in once and single payment of the fund *in medio*, and appointing parties to lodge claims. The contention is that the multiplepoinding is incompetent.

The criteria on which the competency of a multiplepoinding depends are, I think, very well stated in brief form by both Lord M'Laren and Lord Kinnear, in the case of *Commercial Bank of Scotland* v. *Muir*.[1] Lord M'Laren there, at p. 221, says:—"The determination of the competency of a multiplepoinding is not quite so simple a matter as might appear from the numerous cases in which no dispute as to the competency is raised, but there must at least be a fund in neutral custody, a dispute as to the persons entitled to the fund and competing claims made to it, and in general a demand on the holder by one or more of the disputants." His Lordship goes on to point out that the degree of strictness with which these requisites have to be complied with necessarily varies according to the particular circumstances. Lord Kinnear in the same case (at p. 222) says:—"It comes to this, that we must see that the claims which are said to be competing are not mere random claims, but are real and intelligible claims upon

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was raised as to the terms of the discharge. The demand was met by a blank refusal, and it is on this refusal that the real raisers of the multiplepoinding in Article 6 of their condescendence found as creating double distress.

"The question therefore comes to be a very narrow one—whether the refusal on the part of the very persons who now say that there is no double distress to give an assurance that they will not claim the residue on the footing of lapse is equivalent to double distress. I cannot say that it is not. The existence of double distress does not require anything of the nature of a formal demand. It is enough, I think, when an action of multiplepoinding is proposed by trustees, that beneficiaries refuse to say whether they are to raise a substantial question or not. If, therefore, the action of the defenders here amounts to that—and I think it does amount to that—it seems to me that the plea of the trustees is a good one, and that the defence of incompetency fails. . . ."

[1] Mackenzie's Trustees v. Sutherland, Jan. 10, 1895, 22 R. 233, *per* Lord Kinnear, at p. 237; Commercial Bank of Scotland, Limited, v. Muir, Dec. 1, 1897, 25 R. 219.

[1] 25 R. 219.

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a fund *in medio* set forth upon grounds which may or may not be well founded in law, but which are at least stated with sufficient precision to shew that there is in truth a double claim upon one fund maintained by persons having hostile interests." I am entirely satisfied with these distinctions as general rules, and I proceed to apply them to this case.

The matter arose out of the will of a Mrs MacGillivray. So far as is material for the present purpose, it is enough to say that in the second purpose of her trust-disposition and settlement she left a set of legacies, and, *inter alia*, a legacy of £300 to a Mrs Dallas, whose representatives are the reclaimers. Mrs Dallas predeceased the testatrix, and, therefore, in accordance with the ordinary rule, if nothing more had been said, the legacies would have lapsed. But by the ninth purpose of her trust-disposition the testatrix provided as follows:—"In the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser equally among them, or failing children, then to the executors or next of kin of such deceaser."

Under this provision it was clear that if any particular legacies could not be paid because of the death of the legatee, there was substituted for the original legatee his or her children, if the legatee left children; and, failing children, the executors or next of kin of the legatee. Nobody ever seems to have thought that any other result was possible when a question arose with regard to a legacy left to a certain Catherine Gollan. Catherine Gollan predeceased the testator without children. Accordingly, the question arose as to who were her "executors or next of kin." She had left a testament, under which she had nominated an executor. She had been survived by a brother and sister, as well as by certain nephews and nieces. The question thus arose whether, under the substitution of executors and next of kin in the ninth purpose, the persons who were entitled to Catherine Gollan's legacy were her executor-nominate or her brother and sister, who were the next of kin as at her death, or whether the Intestate Moveable Succession Act came in, so that the nephews and nieces were entitled to participate. These matters having been mooted, the trustees under Mrs MacGillivray's settlement took an opinion of counsel. Counsel advised that the words "executors or next of kin" designated the class of persons who were nearest in kin to Miss Gollan at the date of her death, to wit, her brother and sister. He indicated, however, that this construction of "executors or next of kin" might not be accepted, and that—in order to exclude the possible claims of the nephews and nieces, who, on another construction of these words, would be entitled to participate—the trustees should raise a multiplepoinding. Then he added,—"To this action they should call the whole of Miss Gollan's brothers and sisters and their representatives and also . . . other persons interested in the residue of the trust-estate in case it might be suggested that the legacy has lapsed." Now, nobody had suggested that, and counsel himself did not suggest that it was likely. But the suggestion caused the trustees disquietude, and seeing that it would apply to other legacies as

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well as that to Miss Gollan, the trustees intimated that they could not pay the legacy to the children of Mrs Dallas.

The facts, therefore, were that here was a special legacy, which on the face of the settlement it was absolutely clear was given to the children of the deceased Mrs Dallas, and nobody had ever said anything to the contrary. Applying the tests your Lordships have laid down, it is quite out of the question that people are to be entitled to cause all the expense of a multiplepoinding just because at the end of a counsel's opinion on the question of discharge he put a suggestion that possibly it might be suggested that some other persons might have a right.

Accordingly, I am of opinion that when this multiplepoinding was raised, there was no ground for having a multiplepoinding in which all these legacies were included. The multiplepoinding which counsel really contemplated was one concerned only with Miss Gollan's legacy.

In ordinary circumstances the result of that view would be to dismiss the action, but then I think that certain circumstances have arisen since the multiplepoinding was brought which do shew that there is room for a multiplepoinding, though not exactly this multiplepoinding. That being so, your Lordships will be very unwilling to cause additional expense if that can be avoided.

The doubts that have arisen are these:—(1) There is a legacy to the Free Church. At the time the multiplepoinding was raised there could be no question as to who were the Free Church, because the judgment of the Court of Session had not then been reversed by the House of Lords. But it is common knowledge that after the reversal in the House of Lords there are two bodies that might claim the legacy. (2) There is another matter, which raises a question which might probably be argued. In the clause I have read there is a provision substituting the children or executors and next of kin of predeceasing persons as the only persons to whom legacies may be paid. I can conceive that a question may be raised as to whether that provision applies to the residue itself.

Both these questions seem to me to be questions which the trustees are entitled to raise in a multiplepoinding, and therefore I should not wish to turn this action out of Court. I would therefore propose that your Lordships should find that the action is incompetent in so far as it deals with this particular legacy, but, instead of the action being dismissed, that it should be remitted to the Lord Ordinary to see that the pursuer and real raiser should have an opportunity of amending his condescendence of the fund *in medio*, and thereafter proceeding with the action.

LORD ADAM concurred.

LORD M'LAREN.—I concur. I only add a sentence upon the point of the criterion of double distress in a multiplepoinding. It might at first sight appear hard on trustees that they should be put into the position of having to administer an estate where there is a doubt as to the persons entitled to it, but where the parties have not put forward competing claims. In such a case it seems to me the duty of the trustees would be, if they are advised by counsel as to which of the parties has the better right, that they should

communicate with the other party, and ask that other party whether he wishes that his legacy should be made the subject of an action—whether he makes a claim to it or not. If he says he makes no claim to it then they are in safety to pay in accordance with the opinion they have got. If he says that he does make a claim, and that they pay it to the other party at their peril, then I do not think there could be much doubt, if the sum were a substantial sum, that the trustees would be justified in taking the case into Court.

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In this particular case I agree with your Lordship there are questions—though not questions agitated when the multiplepoinding was raised—that make it desirable that the rights of parties in this estate should be the subject of judicial determination.

LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor: "Find that the action is incompetent in so far as it submits for adjudication the special legacies mentioned in article 3 of the condescendence, other than that to Miss Catherine Gollan, and remit to the Lord Ordinary to proceed in accordance with this interlocutor, and decern: Find the defenders entitled to expenses . . ."

FORRESTER & DAVIDSON, W.S.—FORBES, DALLAS, & Co., W.S.—Agents.

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Owners of the "Olga" v. Owners of the "Anglia."

DET FORENEDE DAMPSKIBS SELSKAB (Owners of the "Olga"), Petitioners.—*M'Clure.*

ROBERT SOMERVILLE AND ANOTHER (Owners of the "Anglia"), Claimants.—*Lord-Adv. Dickson—Younger.*

C. A. VAN EIJCK & ZOON AND OTHERS (Owners of the cargo of the "Anglia"), Claimants.—*Sol.-Gen. Salvesen—Spens.*

*Ship—Collision—Cross actions of damages between the two Shipowners—Decree in favour of one of the Shipowners—Petition for limitation of liability at the instance of the other Shipowner—Competency of reopening the question of damages at the instance of cargo owners—Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503 *and* 504.—A collision between the s.s. "Anglia" and the s.s. "Olga" resulted in the sinking of the "Anglia" and in the "Olga" being slightly damaged. In cross actions of damages between the owners of the "Anglia" and the owners of the "Olga," both vessels were found to be in fault, and the owners of the "Anglia" obtained decree against the owners of the "Olga" for £7149, 14s. 7d., being one-half of the value of the "Anglia" under deduction of one-half of the damage to the "Olga."

The owners of the "Olga" then presented a petition under sections 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability to £6215, 4s., being £8 per ton on a tonnage of 776·90, the tonnage of the "Olga."

The owners of the "Anglia" lodged a claim in the petition claiming to be ranked on the sum of £6215, 4s. for £7149, 4s. 7d., the sum in the decree obtained by them in the cross actions of damages.

The owners of the cargo of the "Anglia" also lodged a claim in which besides claiming to be ranked in respect of the value of the cargo, they maintained that the decree for £7149, 4s. 7d. was not binding on them; that the value of the "Anglia," on the basis of which that decree was

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reached, was a gross over-estimate of her true value; that the owners of the "Olga" had no interest to contest, and had not in fact contested, the question of the value of the "Anglia," in respect that, once it was decided that both vessels were to blame, the question of exact values became immaterial to the owners of the "Olga," whose limit of £8 per ton was reached by the finding that both vessels were to blame. The cargo owners of the "Anglia" did not aver that the decree for £7149, 4s. 7d. had been obtained collusively or of consent or by way of compromise.

*Held* that the claim of the owners of the "Anglia" having been duly constituted against the debtor by a decree *in foro*, must be taken at the amount fixed in the decree.

*Ship—Collision—Limitation of Liability—Interest—Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 503.—The Merchant Shipping Act, 1894, limits the liability for damage caused by one ship to another to £8 per ton of the ship liable in damages.

*Held* that in addition to £8 per ton of her tonnage the owners of the ship liable in damages were liable in payment of interest at 4 per cent from the date of the collision until payment or consignation of the damages.

*Ship—Collision—Limitation of Liability—Ascertainment of Tonnage—Deduction for Crew Space—Certificate of Board of Trade Surveyor—Foreign Vessel—Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 84, 503, *and Schedule VI.* (3)—*Order in Council*, 21*st November* 1895.—Section 503 of the Merchant Shipping Act, 1894, enacts, *inter alia*, that for the purposes of the section the tonnage of a steamship shall be her gross tonnage, not including any space occupied by seamen or apprentices "which is certified under the regulations scheduled to this Act with regard thereto."

Schedule VI. provides that every such space shall be inspected by one of the surveyors of ships under the Act, who is empowered to grant a certificate, and "if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

An Order in Council of 21st November 1895, issued under section 84 of the Act, decrees "that the merchant ships of the kingdom of Denmark, the measurement whereof shall . . . have been ascertained and denoted in the certificates of registry or other national papers of such ships, shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

*Held* (*following The "Franconia,"* 1878, L. R., 3 P. D. 164, Lord M'Laren concurring solely in deference to that decision) that the owners of a Danish vessel with a Danish certificate setting forth her measurements, including the tonnage taken up by crew space, were not entitled, in ascertaining the tonnage of the vessel for the purposes of section 503 of the Act, to deduct the tonnage set forth in the certificate as taken up by crew space, in respect that the space so set forth had not been certified by one of the surveyors under the Act as required by Schedule VI.

2D DIVISION. ON 18th February 1903 the s.s. "Olga" of Copenhagen, came into collision with the s.s. "Anglia" of Leith, with the result that the "Anglia" was sunk and the "Olga" sustained damage to her bows. No loss of life or personal injury was caused by the collision.

The owners of the "Olga" and the owners of the "Anglia" raised cross actions of damages on account of the collision. In these actions, which were conjoined, the Second Division of the Court, on 31st May 1904, affirming an interlocutor of Lord Low, Ordinary, found that the collision resulted from fault on the part of those in charge of both vessels, and granted decree in favour of the owners of the "Anglia" against the owners of the "Olga" for £7149, 14s. 7d., with interest at the rate of 5 per cent per annum, from 18th February 1903 until

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payment. The sum of £7149, 14s. 7d. was reached, in accordance with the usual rule, by deducting one-half of the loss (£387, 10s. 10d.) sustained by the owners of the "Olga," from one-half of the loss sustained by the owners of the "Anglia" (*i.e.* the value of the vessel, which was taken to be £14,687).

Thereafter, on 29th September 1904, the owners of the "Olga" presented a petition under sections 503 and 504 of the Merchant Shipping Act, 1894,* in which they prayed the Court "to appoint all

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* The following sections of the Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), were referred to either in the present branch of the case or in the branch of the case forming the concluding portion of this report:—

Sec. 79. "(1) In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage the following deductions shall be made from the space included in the measurement of the tonnage, namely," *inter alia*,

"(*a*) In the case of any ship—

"(i.) Any space used exclusively for the accommodation of the master; and any space occupied by seamen or apprentices, and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto."—(*See next page.*)

Sec. 84. "(1) Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being re-measured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Sec. 503. "(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say)" *inter alia*,

"(*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board that ship;

"(*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship,

be liable to damages beyond the following amounts (that is to say)" *inter alia*,

"(ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . an aggregate amount not exceeding £8 for each ton of their ship's tonnage."

"(2) For the purposes of this section," *inter alia*,

"(*a*) the tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room . . .

"Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto."—(*See next page.*)

Sec. 504. "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply . . . in Scotland to the Court of Session . . . and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any Court in relation to the same matter, and may proceed in such manner and subject

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from the pit was 407 yards, or nearly a quarter of a mile. The case is somewhat narrow, but I am of opinion that the place was not about the mine. It was separated from it by a distance of a quarter of a mile and also by a turnpike road.

None of the dangers incident to a mine could be said to attach to the place of the accident.

The Sheriff-substitute has decided on the ground that the place was connected by use with the pit, but although without such connection it is possible that the statute might not have applied, still it was necessary that the workman should not only be engaged in the course of his employment but also that he should be engaged about his mine. The cases of *Fenn* v. *Miller*,[1] *Brodie* v. *North British Railway Company*, November 6, 1900,[2] *Caton*,[3] and *Ferguson* v. *Barclay, Sons, & Company, Limited*, November 12, 1902,[4] in which there was but a short distance between the place of the accident and the mine, may be referred to.

Lord Stormonth-Darling.—Speaking solely for myself I should have thought, if the question had been open, that there was much force in the argument urged by Mr Campbell to the effect that section 7 of the Act refers not to the locality of the accident but to the kind of employment which is to give a right to compensation. The 1st section has been described by the House of Lords in *Lysons*[5] case as "the affirmative or leading enactment," and it declares that "if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." The leading idea of the statute, therefore, is to give compensation to workmen for injury arising out of their employment, even when the employer is entirely free from blame. But inasmuch as the Act was not intended to apply to every kind of employment, it became necessary to define the employment to which it did apply, and I should have thought that the sole purpose of section 7 was to do so. When the section speaks of employment "on or in or about" a railway, factory, mine, quarry, and so on, I should have thought that it introduced the idea of locality only as a means of describing particular trades or occupations, and not in order to restrict the area within which accidents occurring in the course of these particular trades were to give rise to a right of compensation. Such a construction of the statute would undoubtedly have enlarged its scope, but it would at least have avoided the obvious anomaly of allowing compensation for injury when sustained by a workman at one part of a job and refusing it when sustained at another part although the whole job was ordered by his employer, and the employer was equally free from blame throughout. Why so much importance should have been attached to the *locus* of the accident itself I do not know, for a workman is just as much in his master's employment, acting in the course of that employment, when he is loading goods for him at a distance from his master's premises as when he is delivering the goods at his master's door.

[1] [1900], 1 Q. B. 788. [2] 3 F. 75. [3] 4 F. 989. [4] 5 F. 105.
[5] [1901], App. Cas., at p. 85.

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But I am convinced that it is now too late to go back on the series of cases both here and in England where the words "on or in or about" in section 7 have been read as referring to the workman's actual presence at the time of the accident, and so reading the section I must concur with your Lordships in answering the question of law in the negative.

THE COURT answered the question of law in the negative; sustained the appeal; recalled the award of the arbitrator; and remitted to him to dismiss the claim.

WM. C. DUDGEON, W.S.—DALGLEISH & DOBBIE, W.S.—Agents.

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ALEXANDER FOWLER STEELE AND OTHERS (MacGillivray's Trustees), Pursuers and Real Raisers (Respondents).—*Mackenzie, K.C.—Macphail.*
DUNCAN FORBES DALLAS AND OTHERS, Defenders (Reclaimers).—*Kennedy—J. B. Young.*

*Process—Multiplepoinding—Competency—Double Distress.*—Where a testator left legacies to various persons, and a question arose as to the construction of one of these bequests, the trustees, before making payment of certain of the legacies as to which there was no dispute, raised an action of multiplepoinding for distribution of the balance in their hands and for exoneration. *Held* that the action was incompetent in so far as it submitted for adjudication the legacies other than the one in dispute.

1ST DIVISION. LdStormonth Darling.

MRS ISABELLA GOLLAN OR MACGILLIVRAY, who died on 26th May 1903, left a trust-disposition and settlement by which she conveyed her whole estate, heritable and moveable, to Alexander Fowler Steele, Inverness, and another as trustees. By the second purpose of her settlement the testatrix directed her trustees to pay a number of special legacies, including, *inter alia*, a sum of £400 to Mrs MacGillivray or Cameron, a sum of £300 to Mrs Isabella Gollan or Dallas, and a sum of £300 to Miss Catherine Gollan. By the eighth purpose she bequeathed certain sums to certain schemes of the Free Church of Scotland. By the ninth purpose she directed her trustees to pay the residue of her estate to the said Mrs Mary MacGillivray or Cameron, and declared that "in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser, equally among them, or failing children, then to the executors or next of kin of such deceaser."

Mrs Mary MacGillivray or Cameron and Mrs Isabella Gollan or Dallas predeceased the testatrix, and were both survived by children. Catherine Gollan also predeceased the testatrix, unmarried. She left a will by which she nominated an executor, and she was survived by a brother and sister as well as by certain nephews and nieces.

A question having arisen in connection with the legacy to Catherine Gollan as to the persons to whom, under the direction in the ninth purpose of the trust-disposition and settlement, the said legacy fell to be paid, the trustees submitted a memorial for the opinion of counsel. Counsel advised that the persons entitled to payment of that legacy were the persons nearest in kin to the said Catherine Gollan at the date of her death, but suggested that in the circumstances the

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trustees should raise a multiplepoinding. The opinion of counsel further contained the following:—"To this action they should call the whole of Miss Gollan's brothers and sisters and their representatives, and also . . . other persons interested in the residue of the trust-estate, in case it might be suggested that the legacy has lapsed."

The trustees thereupon brought an action of multiplepoinding and exoneration, in which the fund *in medio* consisted of the whole estate of the testatrix in their hands at the date of the action.

Prior to the date of the action the trustees had paid the legacies to those legatees who survived the testatrix, but the legacies bequeathed to persons who had predeceased the testatrix were included in the fund *in medio*.

Defences were lodged by Duncan Forbes Dallas and others, the children of Mrs Isabella Gollan or Dallas.

The trustees averred that, in view of counsel's suggestion as to the possibility of it being maintained that lapse had occurred in the case of legacies bequeathed to persons who had predeceased the testatrix, they came to the conclusion that they were not in safety to pay said legacies, including the residue, without judicial sanction or a sufficient discharge otherwise, and intimated to the persons claiming as the representatives of such predeceasing persons that payment of said legacies could not be made as arranged; that with the view of avoiding an action of multiplepoinding, they had endeavoured to obtain a discharge from the heirs *in mobilibus* of the testatrix, who would be entitled to the residue of the estate in the event of it being held that legacies to predeceasing beneficiaries had lapsed; and that the defenders, who were included among the heirs *in mobilibus* of the testatrix, refused to concur in giving such a discharge, even with regard to the legacy of £300 to Mrs Dallas.

The defenders averred that the legacy of £300 to Mrs Isabella Gollan or Dallas was improperly included in the fund *in medio*, there being no claimants on said sum other than the defenders. They stated,—"It has never been suggested by the pursuers or by anybody that the defenders are not the parties entitled to said legacy, and no other parties make any pretence to claim said legacy."

The defenders pleaded, *inter alia*;—(1) The action is unnecessary. (4) In any event, the action is incompetent, and should be dismissed *quoad* the said legacy.

On 15th November 1904 the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor repelling the defences for the defenders Duncan Forbes Dallas and others; finding the pursuers and real raisers liable only in once and single payment of the fund *in medio*; appointing all persons claiming an interest in the said fund to lodge condescendences and claims in ten days; and finding the said defenders liable in expenses in connection with the lodging of the said defences.*

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* "OPINION.—Questions as to the competency of actions of multiplepoinding are questions of process, and although they have in the past given rise to much ingenious discussion, they are not generally questions involving any very substantial interests as between the parties. I cannot say that this case is any exception to the rule.

"Now, the competency is here challenged on the ground that there is no double distress. . . .

"Now, the testatrix whose will is in question provided by the ninth

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The defenders reclaimed, and argued;—The legacy bequeathed to Mrs Dallas was clearly due to the reclaimers, her children, under the clause of conditional institution in the ninth purpose of the trust-disposition, and the trustees were bound to pay it. No competition was suggested which could render a multiplepoinding competent *quoad* this legacy.[1] The inclusion of this legacy in the multiplepoinding was wholly unwarranted, and was not justified by the opinion of counsel, which was obtained with reference to, and was limited to, the legacy to Catherine Gollan. All that the trustees were entitled to, by way of discharge from the reclaimers, was a receipt and discharge for payment of the legacy due to them.[2]

Argued for the pursuers and real raisers;—The action was competent, for, even if there was no double distress *quoad* this particular legacy, the trustees were entitled to bring the action for their own exoneration and discharge. The trustees acted on the opinion of counsel,

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purpose of her settlement, that 'in the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser equally among them, or failing children, then to the executors or next of kin of such deceaser.'

"I do not require to consider at this stage whether there is any ambiguity lurking under these words. It is enough that counsel, when the trustees consulted him, advised that questions might be raised as to the meaning of the clause which I have read—in other words, as to whether the clause prevented a lapse, and, if it did prevent a lapse, who were the persons brought in by the clause. He gave this advice at a time when the trustees had paid a number of legacies about which there was no question, but when there were still certain legacies claimed by the representatives of predeceasing legatees. The important thing about the clause is that it plainly applies equally to the legacies in that position and to the residue; and when the trustees received this advice they, properly enough, set about inquiring who the next of kin of the testatrix were, in case any question might be raised as to the legacies and the residue having lapsed. Then arose the claim by the representatives of one of the predeceasing legatees to a small legacy, they being the children of the legatee. Nobody up to that point had suggested any doubt as to their right, but the trustees, having received the advice which I have mentioned, pointed out to the claimants that there might be a question, and that, if it were raised, the same question would apply to the residue; and (not unreasonably, I think) they stipulated that, if they paid the legacy without judicial authority, they should obtain from the claimants—who were also, as it happened, in the class of next of kin of the testatrix—some kind of assurance that they would not raise the question of lapse with regard to the residue. I confess I should have thought that this demand would have been assented to, because the same clause of conditional institution regulated both legacies and residue, and persons who were claiming a legacy on the ground that there was no lapse could not consistently claim residue on the ground that there was a lapse. However, the claimants of the legacy declined to give the assurance which was demanded—an assurance which was put in the form of a demand for a discharge in particular terms. I do not enter into the question as to whether these terms were the best that could have been devised, because no question

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[1] Connell's Trustee v. Chalk, &c., March 6, 1878, 5 R. 735.

[2] Laing v. Laing, March 20, 1895, 22 R. 575; Fleming v. Brown, Feb. 6, 1861, 23 D. 443.

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and, in view of that opinion and the possible difficulties arising from the lapse of bequests to predeceasing legatees, they were entitled for their own protection to the general discharge which they had asked from the reclaimers, who, as being among the next of kin of the testatrix, might claim lapsed bequests. The refusal by the reclaimers to grant such a discharge justified the trustees in bringing this multiplepoinding. The multiplepoinding was required for their exoneration, and its competency depended, not upon double distress, but upon the right to exoneration.[1] Further, there were here difficulties in the construction of the trust-deed, in particular with reference to (*a*) the bequests to the Free Church of Scotland, which might be claimed by two Churches, and (*b*) whether the clause of conditional institution in the ninth purpose applied to residue as well as to legacies.

At advising,—

LORD PRESIDENT.—This is a reclaiming note against an interlocutor of the Lord Ordinary, finding the pursuers and real raisers of a multiplepoinding liable only in once and single payment of the fund *in medio*, and appointing parties to lodge claims. The contention is that the multiplepoinding is incompetent.

The criteria on which the competency of a multiplepoinding depends are, I think, very well stated in brief form by both Lord M'Laren and Lord Kinnear, in the case of *Commercial Bank of Scotland* v. *Muir*.[1] Lord M'Laren there, at p. 221, says:—"The determination of the competency of a multiplepoinding is not quite so simple a matter as might appear from the numerous cases in which no dispute as to the competency is raised, but there must at least be a fund in neutral custody, a dispute as to the persons entitled to the fund and competing claims made to it, and in general a demand on the holder by one or more of the disputants." His Lordship goes on to point out that the degree of strictness with which these requisites have to be complied with necessarily varies according to the particular circumstances. Lord Kinnear in the same case (at p. 222) says:—"It comes to this, that we must see that the claims which are said to be competing are not mere random claims, but are real and intelligible claims upon

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was raised as to the terms of the discharge. The demand was met by a blank refusal, and it is on this refusal that the real raisers of the multiplepoinding in Article 6 of their condescendence found as creating double distress.

"The question therefore comes to be a very narrow one—whether the refusal on the part of the very persons who now say that there is no double distress to give an assurance that they will not claim the residue on the footing of lapse is equivalent to double distress. I cannot say that it is not. The existence of double distress does not require anything of the nature of a formal demand. It is enough, I think, when an action of multiplepoinding is proposed by trustees, that beneficiaries refuse to say whether they are to raise a substantial question or not. If, therefore, the action of the defenders here amounts to that—and I think it does amount to that—it seems to me that the plea of the trustees is a good one, and that the defence of incompetency fails. . . ."

[1] Mackenzie's Trustees v. Sutherland, Jan. 10, 1895, 22 R. 233, *per* Lord Kinnear, at p. 237; Commercial Bank of Scotland, Limited, v. Muir, Dec. 1, 1897, 25 R. 219.

[1] 25 R. 219.

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a fund *in medio* set forth upon grounds which may or may not be well founded in law, but which are at least stated with sufficient precision to shew that there is in truth a double claim upon one fund maintained by persons having hostile interests." I am entirely satisfied with these distinctions as general rules, and I proceed to apply them to this case.

The matter arose out of the will of a Mrs MacGillivray. So far as is material for the present purpose, it is enough to say that in the second purpose of her trust-disposition and settlement she left a set of legacies, and, *inter alia*, a legacy of £300 to a Mrs Dallas, whose representatives are the reclaimers. Mrs Dallas predeceased the testatrix, and, therefore, in accordance with the ordinary rule, if nothing more had been said, the legacies would have lapsed. But by the ninth purpose of her trust-disposition the testatrix provided as follows:—"In the event of any of the persons to whom legacies are or may be bequeathed by me by these presents, or by any codicil or codicils hereto, deceasing before complete payment of the legacy to which such deceasing person would, if he or she had survived, have been entitled, such legacy shall, so far as not paid to such deceaser, be paid by my trustees to the children of such deceaser equally among them, or failing children, then to the executors or next of kin of such deceaser."

Under this provision it was clear that if any particular legacies could not be paid because of the death of the legatee, there was substituted for the original legatee his or her children, if the legatee left children; and, failing children, the executors or next of kin of the legatee. Nobody ever seems to have thought that any other result was possible when a question arose with regard to a legacy left to a certain Catherine Gollan. Catherine Gollan predeceased the testator without children. Accordingly, the question arose as to who were her "executors or next of kin." She had left a testament, under which she had nominated an executor. She had been survived by a brother and sister, as well as by certain nephews and nieces. The question thus arose whether, under the substitution of executors and next of kin in the ninth purpose, the persons who were entitled to Catherine Gollan's legacy were her executor-nominate or her brother and sister, who were the next of kin as at her death, or whether the Intestate Moveable Succession Act came in, so that the nephews and nieces were entitled to participate. These matters having been mooted, the trustees under Mrs MacGillivray's settlement took an opinion of counsel. Counsel advised that the words "executors or next of kin" designated the class of persons who were nearest in kin to Miss Gollan at the date of her death, to wit, her brother and sister. He indicated, however, that this construction of "executors or next of kin" might not be accepted, and that—in order to exclude the possible claims of the nephews and nieces, who, on another construction of these words, would be entitled to participate—the trustees should raise a multiplepoinding. Then he added,—"To this action they should call the whole of Miss Gollan's brothers and sisters and their representatives and also . . . other persons interested in the residue of the trust-estate in case it might be suggested that the legacy has lapsed." Now, nobody had suggested that, and counsel himself did not suggest that it was likely. But the suggestion caused the trustees disquietude, and seeing that it would apply to other legacies as

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well as that to Miss Gollan, the trustees intimated that they could not pay the legacy to the children of Mrs Dallas.

The facts, therefore, were that here was a special legacy, which on the face of the settlement it was absolutely clear was given to the children of the deceased Mrs Dallas, and nobody had ever said anything to the contrary. Applying the tests your Lordships have laid down, it is quite out of the question that people are to be entitled to cause all the expense of a multiplepoinding just because at the end of a counsel's opinion on the question of discharge he put a suggestion that possibly it might be suggested that some other persons might have a right.

Accordingly, I am of opinion that when this multiplepoinding was raised, there was no ground for having a multiplepoinding in which all these legacies were included. The multiplepoinding which counsel really contemplated was one concerned only with Miss Gollan's legacy.

In ordinary circumstances the result of that view would be to dismiss the action, but then I think that certain circumstances have arisen since the multiplepoinding was brought which do shew that there is room for a multiplepoinding, though not exactly this multiplepoinding. That being so, your Lordships will be very unwilling to cause additional expense if that can be avoided.

The doubts that have arisen are these:—(1) There is a legacy to the Free Church. At the time the multiplepoinding was raised there could be no question as to who were the Free Church, because the judgment of the Court of Session had not then been reversed by the House of Lords. But it is common knowledge that after the reversal in the House of Lords there are two bodies that might claim the legacy. (2) There is another matter, which raises a question which might probably be argued. In the clause I have read there is a provision substituting the children or executors and next of kin of predeceasing persons as the only persons to whom legacies may be paid. I can conceive that a question may be raised as to whether that provision applies to the residue itself.

Both these questions seem to me to be questions which the trustees are entitled to raise in a multiplepoinding, and therefore I should not wish to turn this action out of Court. I would therefore propose that your Lordships should find that the action is incompetent in so far as it deals with this particular legacy, but, instead of the action being dismissed, that it should be remitted to the Lord Ordinary to see that the pursuer and real raiser should have an opportunity of amending his condescendence of the fund *in medio*, and thereafter proceeding with the action.

LORD ADAM concurred.

LORD M'LAREN.—I concur. I only add a sentence upon the point of the criterion of double distress in a multiplepoinding. It might at first sight appear hard on trustees that they should be put into the position of having to administer an estate where there is a doubt as to the persons entitled to it, but where the parties have not put forward competing claims. In such a case it seems to me the duty of the trustees would be, if they are advised by counsel as to which of the parties has the better right, that they should

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communicate with the other party, and ask that other party whether he wishes that his legacy should be made the subject of an action—whether he makes a claim to it or not. If he says he makes no claim to it then they are in safety to pay in accordance with the opinion they have got. If he says that he does make a claim, and that they pay it to the other party at their peril, then I do not think there could be much doubt, if the sum were a substantial sum, that the trustees would be justified in taking the case into Court.

In this particular case I agree with your Lordship there are questions—though not questions agitated when the multiplepoinding was raised—that make it desirable that the rights of parties in this estate should be the subject of judicial determination.

LORD KINNEAR concurred.

THE COURT recalled the Lord Ordinary's interlocutor: "Find that the action is incompetent in so far as it submits for adjudication the special legacies mentioned in article 3 of the condescendence, other than that to Miss Catherine Gollan, and remit to the Lord Ordinary to proceed in accordance with this interlocutor, and decern: Find the defenders entitled to expenses . . ."

FORRESTER & DAVIDSON, W.S.—FORBES, DALLAS, & Co., W.S.—Agents.

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DET FORENEDE DAMPSKIBS SELSKAB (Owners of the "Olga"), Petitioners.—*M'Clure.*

ROBERT SOMERVILLE AND ANOTHER (Owners of the "Anglia"), Claimants.—*Lord-Adv. Dickson—Younger.*

C. A. VAN EIJCK & ZOON AND OTHERS (Owners of the cargo of the "Anglia"), Claimants.—*Sol.-Gen. Salvesen—Spens.*

*Ship—Collision—Cross actions of damages between the two Shipowners—Decree in favour of one of the Shipowners—Petition for limitation of liability at the instance of the other Shipowner—Competency of reopening the question of damages at the instance of cargo owners—Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 503 *and* 504.—A collision between the s.s. "Anglia" and the s.s. "Olga" resulted in the sinking of the "Anglia" and in the "Olga" being slightly damaged. In cross actions of damages between the owners of the "Anglia" and the owners of the "Olga," both vessels were found to be in fault, and the owners of the "Anglia" obtained decree against the owners of the "Olga" for £7149, 14s. 7d., being one-half of the value of the "Anglia" under deduction of one-half of the damage to the "Olga."

The owners of the "Olga" then presented a petition under sections 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability to £6215, 4s., being £8 per ton on a tonnage of 776·90, the tonnage of the "Olga."

The owners of the "Anglia" lodged a claim in the petition claiming to be ranked on the sum of £6215, 4s. for £7149, 4s. 7d., the sum in the decree obtained by them in the cross actions of damages.

The owners of the cargo of the "Anglia" also lodged a claim in which besides claiming to be ranked in respect of the value of the cargo, they maintained that the decree for £7149, 4s. 7d. was not binding on them; that the value of the "Anglia," on the basis of which that decree was

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reached, was a gross over-estimate of her true value; that the owners of the "Olga" had no interest to contest, and had not in fact contested, the question of the value of the "Anglia," in respect that, once it was decided that both vessels were to blame, the question of exact values became immaterial to the owners of the "Olga," whose limit of £8 per ton was reached by the finding that both vessels were to blame. The cargo owners of the "Anglia" did not aver that the decree for £7149, 4s. 7d. had been obtained collusively or of consent or by way of compromise.

*Held* that the claim of the owners of the "Anglia" having been duly constituted against the debtor by a decree *in foro*, must be taken at the amount fixed in the decree.

*Ship—Collision—Limitation of Liability—Interest—Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 503.—The Merchant Shipping Act, 1894, limits the liability for damage caused by one ship to another to £8 per ton of the ship liable in damages.

*Held* that in addition to £8 per ton of her tonnage the owners of the ship liable in damages were liable in payment of interest at 4 per cent from the date of the collision until payment or consignation of the damages.

*Ship—Collision—Limitation of Liability—Ascertainment of Tonnage—Deduction for Crew Space—Certificate of Board of Trade Surveyor—Foreign Vessel—Merchant Shipping Act*, 1894 (57 *and* 58 *Vict. cap.* 60), *secs.* 84, 503, *and Schedule VI.* (3)—*Order in Council*, 21*st November* 1895.—Section 503 of the Merchant Shipping Act, 1894, enacts, *inter alia*, that for the purposes of the section the tonnage of a steamship shall be her gross tonnage, not including any space occupied by seamen or apprentices "which is certified under the regulations scheduled to this Act with regard thereto."

Schedule VI. provides that every such space shall be inspected by one of the surveyors of ships under the Act, who is empowered to grant a certificate, and "if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

An Order in Council of 21st November 1895, issued under section 84 of the Act, decrees "that the merchant ships of the kingdom of Denmark, the measurement whereof shall . . . have been ascertained and denoted in the certificates of registry or other national papers of such ships, shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

*Held* (*following The "Franconia,"* 1878, L. R., 3 P. D. 164, Lord M'Laren concurring solely in deference to that decision) that the owners of a Danish vessel with a Danish certificate setting forth her measurements, including the tonnage taken up by crew space, were not entitled, in ascertaining the tonnage of the vessel for the purposes of section 503 of the Act, to deduct the tonnage set forth in the certificate as taken up by crew space, in respect that the space so set forth had not been certified by one of the surveyors under the Act as required by Schedule VI.

2D DIVISION.

ON 18th February 1903 the s.s. "Olga" of Copenhagen, came into collision with the s.s. "Anglia" of Leith, with the result that the "Anglia" was sunk and the "Olga" sustained damage to her bows. No loss of life or personal injury was caused by the collision.

The owners of the "Olga" and the owners of the "Anglia" raised cross actions of damages on account of the collision. In these actions, which were conjoined, the Second Division of the Court, on 31st May 1904, affirming an interlocutor of Lord Low, Ordinary, found that the collision resulted from fault on the part of those in charge of both vessels, and granted decree in favour of the owners of the "Anglia" against the owners of the "Olga" for £7149, 14s. 7d., with interest at the rate of 5 per cent per annum, from 18th February 1903 until

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payment. The sum of £7149, 14s. 7d. was reached, in accordance with the usual rule, by deducting one-half of the loss (£387, 10s. 10d.) sustained by the owners of the "Olga," from one-half of the loss sustained by the owners of the "Anglia" (*i.e.* the value of the vessel, which was taken to be £14,687).

Thereafter, on 29th September 1904, the owners of the "Olga" presented a petition under sections 503 and 504 of the Merchant Shipping Act, 1894,* in which they prayed the Court "to appoint all

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* The following sections of the Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), were referred to either in the present branch of the case or in the branch of the case forming the concluding portion of this report:—

Sec. 79. "(1) In measuring or re-measuring a ship for the purpose of ascertaining her register tonnage the following deductions shall be made from the space included in the measurement of the tonnage, namely," *inter alia*,

"(*a*) In the case of any ship—

"(i.) Any space used exclusively for the accommodation of the master; and any space occupied by seamen or apprentices, and appropriated to their use, which is certified under the regulations scheduled to this Act with regard thereto."—(*See next page.*)

Sec. 84. "(1) Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being re-measured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Sec. 503. "(1) The owners of a ship, British or foreign, shall not, where all or any of the following occurrences take place without their actual fault or privity (that is to say)" *inter alia*,

"(*b*) where any damage or loss is caused to any goods, merchandise, or other things whatsoever on board that ship;

"(*d*) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel by reason of the improper navigation of the ship,

be liable to damages beyond the following amounts (that is to say)" *inter alia*,

"(ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . an aggregate amount not exceeding £8 for each ton of their ship's tonnage."

"(2) For the purposes of this section," *inter alia*,

"(*a*) the tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room . . .

"Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to this Act with regard thereto."—(*See next page.*)

Sec. 504. "Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of . . . loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply . . . in Scotland to the Court of Session . . . and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any Court in relation to the same matter, and may proceed in such manner and subject

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parties having or pretending to have any right or claim in the premises to lodge their claims . . . to stop all actions or suits pending, or to be hereafter instituted in this or any other Court, in relation to your petitioners' liability, as owners of said ship 'Olga,' in respect of said collision, and to limit the liability of your petitioners as owners of the said ship 'Olga' in respect of said collision to a sum not exceeding £6215, 4s. sterling, and thereafter to distribute the same rateably among the several claimants, and to discharge your petitioners."

The petitioners set forth the interlocutors of the Lord Ordinary and the Court in the conjoined actions of damages, and averred that the gross tonnage of the "Olga" was 776·90. "The petitioners admit liability on account of said collision to the extent indicated in said interlocutors, and they also admit liability for a proportion of the loss of cargo on board the 'Anglia' at the date of the collision, but their liability is, under the 503d section of the said Merchant Shipping Act, 1894, limited to a sum not exceeding £6215, 4s., being £8 per ton on said 776·90 tons, the gross tonnage of said steamship 'Olga.'"

Claims were lodged (1) by the owners of the "Anglia," and (2) by the owners of the cargo on board the "Anglia."

(1) The owners of the "Anglia" in their claim stated,—"By the interlocutors . . . referred to in the petition, the said claimants obtained decree against the petitioners for the sum of £7149, 14s. 7d., together with interest at 5 per cent per annum from 18th February 1903, conform to extract decree herewith produced. . . .

"The claimants have been authorised by the master and crew to claim on their behalf for the amounts of the losses sustained by them through the sinking of the said s.s. 'Anglia.' The value of the effects lost by the master and crew was £80, 10s. . . .

"The tonnage upon which the liability of the petitioners is to be calculated is correctly stated at 776·90 tons, and the amount payable in respect thereof at £8 per ton is, as stated in the petition, £6215, 4s., but in addition the petitioners are bound to pay interest at the rate of 4 per cent per annum from the 18th February 1903, the date of the collision, until payment or consignation."

The owners of the "Anglia" claimed "(1) To be ranked and preferred on the fund for the said sum of £7149, 14s. 7d., with interest at 5 per cent per annum from 18th February 1903; and (2) to be ranked and preferred on the fund for the said sum of £80, 10s., with interest from 18th February 1903."

The owners of the "Anglia" pleaded;—(1) The petitioners are liable for interest on the sum stated in the petition from the date of

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to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs, as the Court thinks just."

The "regulations scheduled to this Act" referred to in secs. 79 and 503 are contained in Schedule VI. to the Act, and include "(3) Every place so occupied and appropriated [*i.e.*, occupied by seamen or apprentices] as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act [viz., surveyors appointed by the Board of Trade under section 724], who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of customs a certificate to that effect, and if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

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the collision till payment or consignation. (2) The claimants having obtained decree for the amount first claimed for are entitled to be ranked and preferred in terms of their claim. (3) The master and crew of the s.s. "Anglia" having incurred loss to the amount second claimed for, through the fault of those for whom the petitioners are responsible, the claimants are entitled to be ranked and preferred in terms of their claim.

(2) The owners of the cargo of the "Anglia" in their claim stated that the cargo was totally lost through the sinking of the "Anglia." "These claimants have therefore sustained loss and damage to the extent of the sums standing opposite their names respectively in" a schedule annexed to the petition. "The total value of the cargo appearing in the schedule is £4669, 12s. 3d."

The owners of the cargo further stated;—"The sole question between the parties to the conjoined actions referred to in the petition, to which the present claimants were not called, was whether or not the owners of the 'Anglia' were solely to blame. Once it was decided that the 'Olga' was even jointly to blame, the question of exact values became immaterial to the owners of the 'Olga,' whose limit of £8 per ton of liability was reached by the finding of both vessels to blame. The damages resultant on the finding of both to blame were therefore admitted at the full amount claimed by the owners of the 'Anglia' without further evidence or discussion. These claimants are, therefore, not prepared to admit on the information at present before them that the claimants, the owners of the 'Anglia,' are entitled to rank on the fund for the full amount contained in their decree. These claimants believe and aver that the true value of the 'Anglia' was not £14,687 as admitted by the petitioners, but £7000 or thereby; and submit that the claimants, the owners of the 'Anglia,' fall to be ranked on the fund for the sum of £3693, 15s. 6d. or thereby, less the sum of £387, 10s. 10d., being the damage found to have been sustained by the 'Olga' in said collision. These claimants further submit that the collision having been partly caused by the fault of the master and crew of the 'Anglia,' they are not entitled to rank on the fund for the value of their effects; or, at the most, are only entitled to rank for one-half of the value of the same."

The owners of the cargo claimed "to be ranked and preferred on the fund to the extent of one-half of the sums standing opposite their names in the schedule hereto annexed, with interest thereon at five per centum per annum, from the 18th day of February 1903 till payment; or, in the event of claims to a greater extent than the said fund being sustained, then the several claimants should be ranked and preferred to the said fund for the proportion thereof effeiring to their said claims."

The nature of the arguments at the hearing (on 10th January 1905) between the two sets of claimants sufficiently appears from the opinion of Lord Kyllachy.[1]

At advising,—

LORD KYLLACHY.—This is a statutory proceeding under the 503d and 504th sections of the Merchant Shipping Act, 1894. It has been initiated

[1] *Cited at the hearing:*—Currie v. M'Knight, Nov. 16, 1896, 24 R. (H. L.) 1; Ballantyne v. Mackinnon, L. R. [1896], 2 Q. B. 455; The "Alne Holme," 1882, 4 Aspinall's Maritime Cases, 591; The "Crathie," L. R. [1897], P. 178, at p. 183.

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by petition to the Court under the latter section, and in that petition an order for claims was lately pronounced. Claims having been lodged, we had the other day a discussion upon certain questions raised by these claims.

The first question is a very short one, and was hardly, I think, contested. It is whether the petitioners have to add to the fund *in medio* interest at 4 per cent from the date of the collision. As to that, all I need say is that I see no reason why such interest should not be added. It seems to have been so decided in England in the case of the "*Crathie*."[1]

The second question is also a very short one. It relates to a claim made by the owners of the "Anglia" on behalf of the master and crew, for the sum of £80, 10s., being the alleged value of effects lost in the collision. I rather understood at the discussion that the objection to this claim was not pressed.

The third question, however, is one which involves a considerable sum of money, and it is desired that we should decide it before making the usual remit. The question is this: The owners of the "Anglia" claim to be ranked for the sum of £7149, 14s. 7d., being the damages found to be due to them by the petitioners—the owners of the "Olga"—in the recent action before the Court, which determined the liability for the collision. In that action the collision was found to have been caused by the fault of both ships, and accordingly the damage to each had to be ascertained and divided. After a proof it was found by a decree *in foro* that a balance of damages was due to the owners of the "Anglia" and that this balance amounted to the sum I have mentioned. It is said, however, by certain other claimants —the owners of the cargo on board the "Anglia," who were not parties to the former action but have appeared here—that the damage awarded to the "Anglia" in the action referred to was over-estimated; that the owners of the "Olga" had (in view of their limited liability) only a slight interest to contest the amount; and (as I understood the suggestion) that they did not contest it in an adequate manner. In consequence, they (the cargo owners) contend that they are entitled to have the damage in question reassessed in this process, just in the same way as if it had never been constituted. They do not allege that the decree of constitution was obtained collusively, or of consent, or by way of compromise. But they say that for the purposes of the present proceeding all questions are open.

As to this matter, I think we may disregard some arguments with which we were favoured with respect to collision claims involving questions of maritime lien, and enforceable by actions *in rem*. For, when the present case is examined, it does not appear to involve any such questions. The claims arising from this collision are all of them—so far as appears—personal claims against the owners of the two vessels, and there is no suggestion that anybody has done diligence or taken action *in rem*, or that anybody is here claiming otherwise than for an ordinary debt. In particular, the only liability with which we are here concerned is the personal liability of the owners of the "Olga" for certain sums of damages—a liability with only this peculiarity, that it is by statute limited to £8 per ton on the gross tonnage of the vessel. This limited liability makes a process of distribution

[1] L. R. [1897] P. 178.

necessary, but so far as I can discover there is no statutory enactment or doctrine of maritime law which introduces into such process of distribution any novel or special rules. It has to be conducted, I apprehend, upon the same principles as we are accustomed to apply in other processes of distribution—some of them very familiar—as, for instance, sequestrations in bankruptcy, rankings and sale, multiplepoindings by executors who allege insolvency, and similar proceedings.

In these circumstances it appears to me to be a quite untenable proposition that the owners of the "Anglia," should be bound at the instance of other creditors to forego the benefit (such as it is) of having had their claim duly constituted (as it has been) against the debtor, by a decree *in foro* obtained in a competent Court, *causa cognita*, and upon evidence led, with which the parties to the case and the Judge were satisfied. Such a proposal would be inadmissible in a process of sequestration, and so far as I know in any other process of distribution. It may be that the evidence led by the owners of the "Anglia" was inadequate, or was not sufficiently tested, or that counter evidence might have been led which was not led. But that is a kind of observation which might be made in any case. Of course it would be a different matter if there were averments of collusion, or perhaps even of compromise. But, as I have said, nothing of the kind is suggested, and accordingly it seems to me that the claim of the owners of the "Anglia" must be taken at the amount fixed in the previous process.

The LORD JUSTICE-CLERK and LORD YOUNG concurred.

LORD MONCREIFF was absent at the hearing.

THE COURT pronounced this interlocutor:—"Find (1) that the owners of the 'Olga' are liable in interest at 4 per cent from the date of the collision; (2) that the owners of the 'Anglia' are not bound to try again in this process the amount of the claim against the petitioners, but that the same falls to be taken at the amount judicially determined in the process the owners of the 'Anglia' against the owners of the 'Olga,' *et e contra:* Find the claimants the owners of the 'Anglia' entitled to expenses as against the claimants the owners of the cargo on board the 'Anglia,' and remit," &c.

Thereafter on 14th February 1905 the petitioners (the owners of the "Olga") lodged a minute, in which they stated "that the tonnage of the steamship 'Olga' is erroneously stated in the petition at 776·90 tons, in respect that the space occupied by seamen and apprentices, amounting to 39·54 tons, has not been deducted from the gross tonnage in terms of the Merchant Shipping Act, 1894, section 503 (2) (*a*)* before bringing out the tonnage on which the petitioners' liability falls to be assessed. The petitioners therefore pray the Court for leave to amend the petition by substituting a tonnage of 737·36, and a corresponding sum of £5898, 17s. 7d. (to which the liability of the petitioners falls to be limited) for the tonnage of 776·90, and the sum of £6215, 4s. stated in the petition."

The claimants, the owners of the "Anglia" and of her cargo, main-

* The sections of the Merchant Shipping Act, 1894, on which this question turned, are quoted *supra*, p. 741.

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tained that the petitioners were not entitled to the deduction claimed, in respect that the space on board the "Olga" had not been "certified under the regulations scheduled to this Act" in terms of sec. 503, subsec. (2), of the Act, inasmuch as that space had not been inspected and certified by a surveyor appointed by the Board of Trade—Merchant Shipping Act, 1894, Schedule VI. (3).

The petitioners did not dispute that the space in question had not been so inspected and certified, but they founded on an Order in Council, dated 21st November 1895,* and they produced a Danish certificate of registry and nationality, which bore that the gross tonnage of the "Olga" was 776·90 tons, that her net register tonnage was 470·52 tons, and that included in the deductions bringing out the net register tonnage was space for the accommodation of the crew amounting to 39·54 tons—all British measurement.

The arguments at the hearing sufficiently appear from the opinions of Lord Kyllachy and Lord M'Laren.[1]

At advising,—

LORD KYLLACHY.—In this case I have, in common with both your Lordships, been disposed to sustain if possible the deduction for which the petitioners the owners of the "Olga" contend. We all, I think, recognise the anomaly which may result if the petitioners' claim to that deduction is refused.

But the question has to be determined not upon grounds of policy but upon the legal construction of certain clauses of the Merchant Shipping Act of 1894 (sections 77 to 87, and section 503), and as to that statute we find ourselves in this position, that its enactments—or enactments substantially similar contained in previous statutes—have been construed adversely to the claim now made by (1) the Court of Appeal in England in the case of the "*Franconia*,"[2] and (2) by the present President of the Admiralty Division in the recent case of the "*Cathay*."[3] The question before us therefore is, whether upon our examination of the statutory enactments we

* The Order in Council of 21st November 1895, which proceeded on the narrative, *inter alia*, of sec. 84 of the Merchant Shipping Act, 1894, and on the further narrative,—"And whereas it has been made to appear to Her Majesty that the tonnage regulations of the Merchant Shipping Act, 1894, have been adopted by the Government of His Majesty the King of Denmark, and that such regulations are now in force in that country, having come into operation on the 1st day of April 1895,"—decreed as follows:—"Now, therefore, Her Majesty (in pursuance and exercise of the powers hereinbefore mentioned) is hereby pleased, by and with the advice of Her Privy Council, to decree that the merchant ships of the kingdom of Denmark, the measurement whereof shall on or after the 1st day of April 1895 have been ascertained and denoted in the certificates of registry or other national papers of such ships, shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

[1] *Cited at the hearing by the petitioners*:—The "Cordilleras," L. R., [1904], P. 90. *By the claimants*:—The "Franconia," 1878, L. R., 3 P. D. 164; The "Cathay," 1904, 9 Aspinall's Maritime Cases, 100.

[2] L. R., 3 P. D. 164.

[3] 9 Aspinall's Maritime Cases, 100.

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feel compelled to differ from the conclusions and the reasoning of the learned Judges by whom the two cases in question were decided.

Now, speaking for myself, I should in any circumstances have had great diffidence in so differing. For although not binding upon us, the decisions in question must be accepted as decisions of high authority, especially as being decisions upon the construction of a British statute and relating to a subject-matter as to which the laws of the two countries are the same.

As it happens, however, having had the benefit of a full argument, and having examined—I hope carefully—the various sections of the Merchant Shipping Act of 1894 to which our attention was directed, I have come to the same conclusion as the learned Judges in England, and indeed have come to consider that there is no escape from their reasoning.

The broad view of the matter seems to be this: The 503d section of the statute introduces in favour of shipowners a certain limitation of liability in the case of collision—a limitation which has to be estimated according to tonnage, and which in the case of steamers (the case before us) has to be estimated according to gross tonnage, subject only to a single deduction, viz., the space appropriated to the use of seamen and apprentices, and this single deduction is to be allowed only if and when the space in question has been certified under certain regulations in a schedule annexed to the Act, one of which regulations is this:—"Every place so occupied and appropriated as aforesaid shall, whenever the ship is registered or re-registered, be inspected by one of the surveyors of ships under this Act, who shall, if satisfied that the same is in all respects such as is required by this Act, give to the collector of customs a certificate to that effect, and if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage." Failing compliance with this condition the estimate has to be made on gross tonnage, and that has to be so in case of all steamers, British or foreign, which claim the benefit of the relief conferred by the 503d section of the statute.

*Prima facie* therefore there seems no escape from the conclusion that the petitioners' steamer (which it is admitted has not had its seamen's accommodation inspected and certified in terms of the statutory condition) is excluded, not from the benefit of the relief afforded by the enactment but from the benefit of the deduction from gross tonnage which is here claimed, and which somewhat enhances the amount of relief.

The suggestion, however, of the petitioners is this: They say that compliance with the condition required is in the case of foreign vessels practically impossible; and that that being so, the exaction of the condition is inconsistent with the provisions of the 84th section of the statute—provisions applicable to vessels belonging to foreign nations whose tonnage regulations have—as is admitted to be the case here—been approved by Order in Council under the said section.

The 84th section is a short one, and is thus expressed—"(1) Whenever it appears to Her Majesty the Queen in Council that the tonnage regulations of this Act have been adopted by any foreign country, and are in force there, Her Majesty in Council may order that the ships of that country shall, without being re-measured in Her Majesty's dominions, be deemed to be of the tonnage denoted in their certificates of registry or other national

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papers in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship."

Now, I do see what may be called the anomaly of exacting from foreign vessels compliance with a condition which is to them impossible. I can see that that may possibly be a defect in the Act of Parliament, and may possibly have been the result of oversight. But I do not, I confess, see how the application to foreign ships of the condition in question, whatever its merits, involves any inconsistency with the 84th section of the statute or the Order in Council made under it. For, so far as I can discover, the condition involves no distinction between British and foreign ships with respect to the acceptance for the purposes of the 503d section of either their gross or registered tonnage as appearing in the certificate of registry. The gross tonnage is in both cases accepted (subject to a single deduction). The registered tonnage is in both cases disregarded. The difference, if there be one, is at best only this, that in estimating a tonnage which is something between gross and registered tonnage—viz., the tonnage of the 503d section—there is a condition prescribed which, as it happens, foreign vessels cannot in practice fulfil.

It is no doubt true that compliance with the same condition (the condition as to the surveyor's certificate) is required under the 79th section of the Act before the same deduction (crew space) can be included among the deductions which make up the difference between gross and registered tonnage—deductions which for that purpose are set forth in the certificate of registry. And in view of this circumstance it has been argued (1) that if this were the case of a British steamship, whose certificate of registry set forth and allowed the deduction in question as a deduction affecting registered tonnage, her certificate of registry must have been accepted as conclusive evidence that all statutory conditions had been duly complied with; and (2) that, that being so, the certificate of registry of this Danish ship, setting forth as it does and allowing the same deductions, must, under the 84th section and the Order in Council have the same privilege. But it appears to me that this argument, supposing it to be otherwise sound, is founded upon an assumption which I cannot accept—an assumption which was rejected in the English cases, and in support of which we had really no argument. The assumption is that everything which appears on the register certificate of a British ship is for all purposes, including the special purpose of the 503d section, to be taken as *probatio probata* and not examinable. I am bound to say that I can find no statutory warrant for such an assumption. In other words, I, as at present advised, see no sufficient ground upon which we could have allowed this deduction although the "Olga" had been a British steamship as to which it was proved that in estimating her register tonnage the deduction made in respect of seamen's accommodation had been improperly made. The certificate of registry may in the case both of British and of Danish ships be *prima facie*, or perhaps even conclusive, evidence of the register tonnage. That is to say, it may be so in all questions (such as liability for dues, &c.) where register tonnage is the rule. I say nothing upon that question, which is not before us, and which may involve different principles. But supposing that point con-

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ceded, it does not, I think, follow that the result must be the same in a case like the present where register tonnage is not the rule, and where the question relates, not to register tonnage, but, as I have already said, to a special tonnage, set up for the purposes of the 503d section—a tonnage intermediate between gross and register tonnage—and which must, as it seems to me, be ascertained just in the manner which the 503d section prescribes.

LORD M'LAREN.—Under the 503d section of the Merchant Shipping Act, 1894, which limits the liability of owners for injury to a ship or cargo to £8 per ton, it is provided, subsection (2) (*a*), that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use, "which is certified under the regulations scheduled to this Act with regard thereto." The schedule referred to is the 6th schedule to the Act, which provides, *inter alia*, that every place so occupied and appropriated shall be inspected by one of the surveyors of ships under the Act, who is empowered to grant a certificate, and (the schedule proceeds to say) "if the certificate is obtained, but not otherwise, the space shall be deducted from the register tonnage."

The question in this case is whether the owners of the "Olga" are entitled to have the space which is appropriated to seamen and apprentices deducted from her tonnage in estimating their liability under the limitation to £8 per ton. According to the argument of the claimants it is a condition of the right to such deduction that a certificate shall have been obtained from a surveyor of ships under the Merchant Shipping Act; and in the case of a British ship I do not doubt that the right is so conditioned.

But in the case of the "Olga," which is a Danish ship, the right to a deduction for what has been called crew space does not depend on the 503d section and relative schedule alone, but depends on the combined effect of that section and the 84th section, and of an Order in Council dated 21st November 1895, made in pursuance of the 84th section.

The 84th section provides in substance that whenever it shall appear to the Queen in Council that the tonnage regulations of the Merchant Shipping Act have been adopted by any foreign country, an Order in Council may be made to the effect that the ships of that country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers. Such an Order in Council has been made applicable to Danish ships.

Now, if this question had arisen for decision for the first time, I should have come without doubt or hesitation to the conclusion that what was meant (in the 84th section) by the tonnage regulations of the United Kingdom being adopted by any foreign country was not that the foreign vessels were to be sent to London or Leith to be measured by a British surveyor, or that a British surveyor was to be sent to Copenhagen whenever a Danish ship was to be measured, but that the ships were to be measured in their own country according to the rules of the Merchant Shipping Act, 1894, and that the necessary certificates were to be granted by qualified surveyors licensed by the proper authority in the country of the ship's nationality.

Keeping in view that the carrying trade of the United Kingdom is the

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greatest in the world, and that very great attention has been given by our Parliament and Government to the regulation of merchant shipping, it was not unnatural that we should in a manner invite foreign nations to adopt our tonnage regulations in the only way in which such regulations could be adopted, viz., by equivalent enactments or regulations of the foreign country. But it could not be supposed that English surveyors would be employed for the purpose, and I do not think it is sound construction to say that in the case of a foreign vessel the certificate of an English surveyor is a condition of the right to a deduction for crew space.

But further, I think this question is not left to the decision of courts of law, because the provision of the 84th section is that when it appears to Her Majesty in Council that the tonnage regulations have been adopted, then an order may be made. I think, therefore, that it was for the Privy Council, in the execution of the powers of the 84th section, to consider whether the Danish regulations were equivalent to the British regulations, allowing for necessary geographical and personal variations, and as the Privy Council were satisfied and the Order was made, the Court must assume that the spaces measured and described in the ship's registry are those to which the Merchant Shipping Act applies.

I am, however, much impressed by the inconvenience of having different interpretations of the same enactment in force in different parts of the United Kingdom, and as I understand that the majority of the Court are prepared to adopt the interpretation of the clause which has the support of a judgment of the Court of Appeal in England, I shall not withhold my assent. But in case any similar question should be carried to a higher Court, I should wish it to be understood that I only concur in the judgment proposed out of deference to the judgment of the Court of Appeal, and the practice which has followed upon it.

The LORD JUSTICE-CLERK concurred with Lord Kyllachy.

LORD YOUNG and LORD KINCAIRNEY were absent.

THE COURT pronounced this interlocutor:—"Refuse to allow the petitioners to amend the petition as proposed, and find that the sum for which the petitioners are liable in respect of the collision mentioned in the petition is £6215, 4s., with interest at 4 per cent from 18th February 1903: Find the petitioners liable to the claimants in the expenses relating to the discussion on the said minute, as for one appearance, and remit the same to the Auditor to tax and to report: Order the petitioners to consign in bank the sum of £6215, 4s., with interest at 4 per cent from 18th February 1903, and on the petitioners consigning said sum with interest, limit the liability in respect of said collision to the sum of £6215, 4s., with interest thereon as aforesaid."

ALEXANDER MORISON & Co., W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—BOYD, JAMESON, & KELLY, W.S.—Agents.

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June 6, 1905. Playfair v. Kelso Ragged Industrial School.

DAVID WARDLAW BROWN TAIT AND ANOTHER (Thomas Johnston's Trustees), Pursuers and Real Raisers.
MRS AGNES JOHNSTON OR PLAYFAIR AND ANOTHER, Claimants (Reclaimers).—*Wilson, K.C.—Constable.*
KELSO RAGGED INDUSTRIAL SCHOOL AND OTHERS, Claimants (Respondents).—*Chree—A. M. Hamilton.*

*Charitable and Educational Bequests and Trusts — Bequest to Ragged School—Identity of Institution—Change in methods of attaining objects—School sold and funds devoted to providing clothes and books for destitute children.*—A bequest was made to a Ragged Industrial School which had been established in 1857 by an association "to rescue" destitute children, "and to fit them for the duties of life by imparting to them a good, common, and Christian education." The members of the society had power to alter the constitution. Originally, and till after the testator's death, the society conducted a school of its own. Owing to the provision of free education it closed and sold its school, and thereafter devoted its funds under an amended constitution to providing destitute children with clothing and books to enable them to attend the board school. Vesting of the legacy was postponed until an event which occurred after these changes had been introduced.

*Held* that the bequest had not lapsed by failure of the legatee, the institution not having lost its identity, although it had altered its methods of attaining its objects.

2D DIVISION. Lord Low.

THOMAS JOHNSTON, grocer and wine-merchant in Kelso, died on 26th March 1888, leaving a trust-disposition and settlement, dated 2d February 1888, by which he conveyed his whole means and estate, heritable and moveable, to trustees for the purposes therein mentioned. With regard to the residue of his estate he directed his trustees, on the death of his housekeeper, to whom he gave a liferent, to pay "two-eighth parts thereof to the Kelso Ragged Industrial School" "for the purposes of the said School." The testator provided that the capital residuary provisions in the settlement should "vest at and only upon the decease of the survivor" of himself and his housekeeper, and should "be payable as soon as conveniently may be thereafter."

The testator was survived by his housekeeper. She died on 6th February 1903. Upon her death the residuary legacies became payable. A question then arose as to whether the legacy to the Kelso Ragged Industrial School had not lapsed owing to the object of the bequest having ceased to exist.

The facts which gave rise to this question were as follows:—The Kelso Ragged School was started in 1857 by an association of contributors. In 1859 a constitution and rules were framed, the material portions of which are quoted *infra*.* Down to 1888, at a date subse-

* "I.—ORIGINAL CONSTITUTION and RULES of the Kelso Ragged Industrial School.

"CONSTITUTION.

"1. This school shall be called the Kelso Ragged Industrial School.

"2. Its object shall be to rescue destitute and morally deserted children from idleness and evil temptations, and to fit them for the duties of life, by imparting to them a good, common, and Christian education, and by training them to habits of order and industry.

"3. The school shall be constituted and supported by an association consisting of all annual subscribers of five shillings and upwards, and of all donors of sums not under five pounds, to whom alone it shall belong, at a

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quent to the death of the testator, the institution in accordance with its original constitution provided education for destitute children in a school of its own in Kelso, and also till 1888 conducted a refuge or home for such of the girls as had no proper home. It also provided food and clothing for the children attending the school. After free education was introduced the society discontinued the provision of education. On 4th June 1888 the Home or Refuge was closed. On 24th December 1889 the school was finally closed. The school buildings were then sold, and the price was added to the general funds. The society thereafter employed its funds primarily in clothing and secondarily in supplying with books children of the same class as those formerly educated by it during their attendance at school. On 28th January 1890 at a special meeting of the members of the association certain alterations and amendments on the constitution and rules of 1857 were unanimously adopted. The amendments proceeded upon the preamble that "in consequence of the alterations occasioned by the operation of the Education Acts, and the provision of free education, it is expedient that the constitution of the Kelso Ragged Industrial School and the rules relating thereto should in some respects be varied and amended." The material parts of the amendments are quoted *infra*.* The society's operations under the altered constitution continued to be carried on under the name of the Kelso Ragged Industrial School.

In these circumstances the testator's testamentary trustees, as pursuers and real raisers, brought a multiplepoinding in which the fund

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general meeting duly called, to appoint directors and office-bearers, and to sanction or alter any article of the constitution.

"*Objects of the Day School.*

"The children shall receive an allowance of food daily.

"They shall be daily trained to the worship of God by praise and prayer, and instructed from the Holy Scriptures.

"The branches of ordinary education shall be reading, writing, arithmetic, geography, and vocal music; and to the girls also sewing and knitting.

"So soon as the means are adequate, the boys shall be taught some industrial employment, as shoemaking, tailoring, or carpentry; the girls shall also be taught washing and cooking of plain food, and a refuge shall be provided for such of the latter as have no proper homes."

The "ordinary routine of the school" was prescribed, and included, besides the usual subjects the following:—"5. Oral religious instruction in catechism, with occasional repetition of psalms, hymns, prayers, texts, parables."

* *Amendments of January* 1900.

"1. In addition to the objects of the charity mentioned in the said constitution, they shall be—first, to provide destitute or poor children with clothing, so as to enable them to attend for educational purposes the board schools, or other places of education, in decency and comfort; and next, when in the opinion of the directors the funds of the charity shall be sufficient for the purpose, to provide such children with food, and also with books required for their education.

"2. The government and administration of the charity shall be vested in sixteen directors. . . .'

By articles 3 and 4 certain directors, *ex officio* and appointed, were nominated.

"5. The directors hereby appointed, and other the directors for the time being, shall have power to elect new directors, other than *ex officio* directors, to fill up any vacancies which may from time to time take place. . . ."

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*in medio* was the sum of £827, being the amount of two-eighths of the residue of the testamentary estate.

Claims were lodged for (1) the Kelso Ragged Industrial School and the honorary treasurer and honorary secretary of the said school; and (2) Mrs Agnes Johnston or Playfair, wife of James Turnbull Playfair, grocer, Coldstream, and Mrs Margaret Johnston or Dalgleish, widow of James Dalgleish, blacksmith, Coldstream, who were the testator's heirs *in mobilibus* and next of kin.

The claimants the Kelso Ragged Industrial School alleged that they were the Kelso Ragged Industrial School mentioned in the trust-disposition and settlement, and claimed to be ranked and preferred to the whole fund *in medio*, or, alternatively, that the legacy being a charitable bequest the whole fund *in medio* should be handed over to the claimants, or to such persons as the Court might appoint, subject to a scheme for its administration approved by the Court.

The claimants the testator's heirs *in mobilibus* and next of kin claimed the whole fund *in medio* equally between them.

They pleaded;—1. The bequest by the late Thomas Johnston to Kelso Ragged Industrial School having failed either (1) by the object of the bequest having ceased to exist, or (2) by such object having materially changed in scope and character, the share of residue as bequeathed has fallen into intestacy. 2. The claimants being entitled to the intestate moveable estate of the deceased Thomas Johnston, are entitled to be ranked and preferred in terms of their claim.

On 13th January 1905 the Lord Ordinary (Low) pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties in the Procedure-roll, repels the claim for Mrs Agnes Johnston or Playfair and another, No. 14 of process: Sustains the claim for the Kelso Ragged Industrial School, Kelso, and others, No. 10 of process, and ranks and prefers them on the whole fund *in medio* in terms of their said claim; and decerns in the preference accordingly." *

* "OPINION.—There is no dispute what the object was which the truster had in view, because there was, at the date when the trust-disposition and settlement was executed, and at the date of the truster's death, an association in Kelso which carried on work there of a charitable and educational character under the name of the Kelso Ragged Industrial School. It is not disputed that that was the association which the truster had in view, and that if the bequest had vested at the date of his death, the association to which I have referred would have been entitled to the legacy. But the legacy did not vest till the death of the liferentrix, an event which occurred in 1903, and the heirs *in mobilibus* of the truster claim that the legacy has fallen into intestate succession upon the averment that at the latter date the Kelso Ragged Industrial School, which was the object of the truster's bounty, had ceased to exist. If that association had actually ceased to exist, if it had been discontinued and wound up, I should have thought that the claim of the next of kin was well founded, because it seems to me that this was a bequest to a special institution, and that it was no more capable of being used as a general charitable bequest than if it had been a bequest to an individual, so that the question comes to be whether the institution named by the truster is still in existence. Well, there is no doubt that in one sense it is in existence. An association calling itself the Kelso Ragged Industrial School still exists, and it is the same institution which existed when the trust-disposition and settlement was executed, and it has existed from its institution in 1857 down to the present day without any break or interval whatever. But then the claimants say though there

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The claimants the testator's heirs *in mobilibus* and next of kin reclaimed, and argued;—This was a bequest for a particular purpose, not for a charitable purpose generally. The identity of the institution favoured had been lost. The prime object of the charity as originally constituted was religious education, including the catechism, to be given in a school conducted by the Society itself. The school had ceased to exist, and there was no security that the Board School would provide religious education. The Board might discontinue teaching the catechism, or even cease to give any religious education at all. Moreover, the directors under the new constitution were co-opted, and not elected as they were originally. The charity as now conducted was not the institution contemplated in the bequest. The object of the bequest had therefore failed. Where in the case of a bequest to a particular charity, and not generally for charitable purposes, the object of the bequest failed, the legacy lapsed just as in

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is an institution which carries on a certain work at Kelso under the same name, the objects and the character of its work have so changed that it is not, and cannot be said to be, the industrial school which the truster intended to favour. That, I think, is the sole question in the case, and it is one which requires a little consideration. The association, as I have said, was first instituted in 1857, and its constitution was framed in 1859. Under that constitution the object of the association is stated to be 'to rescue destitute and morally deserted children from idleness and evil temptations.' That is the object of the association. And then the manner in which that object is proposed to be attained is stated to be 'by imparting to them a good, common, and Christian education, and by training them to habits of order and industry.' Very naturally, and indeed inevitably, in 1857, when that constitution was framed, the main method of carrying out the object of the association was by providing a school in which education could be supplied, and accordingly we find that the greater part of the original constitution and of the rules appended to it deal with this school and with nothing else. But there is specially reserved in the constitution powers to the members of the association in general meeting to alter any article of the constitution. Now, shortly after the truster's death, a political event occurred which very much changed the position of the association, because free elementary education was given to this country, and the directors of the association at once recognised that that made it necessary for them to consider what would be the best means of carrying out the main purpose of the association—namely, 'the rescue of destitute and morally deserted children from idleness and evil temptations.' It was no longer necessary, and therefore was most inexpedient, to spend money in giving them an education which the State was providing, and so a general meeting of the association was called, and they amended the constitution of the association, as they were entitled to do, in order to meet the changed circumstances. The alteration which they made was this—that instead of providing the school which the State now provided, they determined to expend the means at their disposal in providing clothing to enable children of the character referred to in the deed of constitution to attend the Board School or other place of education in decency and comfort, and then, if there should be sufficient funds over, to provide them with food and also with books required for their education. It seems to me that that was a diversion of the funds of the institution entirely in accordance with the original purposes of the trust, and although it was not carrying on its main purpose precisely in the way contemplated or which was appropriate at the time of the original institution, it was as nearly as possible on the same lines, because, although it was no longer necessary to provide education, what was done was to enable the children to profit from the education supplied by

the case of a legacy to an individual.[1] In such a case the doctrine of *cy près* did not apply. The case of *Marsh* v. *Attorney-General*,[2] cited for the respondents, was a case of an institution merely chosen as the channel for a charitable purpose.[3] This case was not within that class, but within the rules laid down in *Clark* v. *Taylor*.[4]

Argued for the claimants and respondents the Kelso Ragged Industrial School;—The identity of the institution had not been lost. There had merely been a modification in the constitution and purposes, which was not beyond the powers of the Society, and was carried out in the way provided by the original constitution. This was a bequest to an institution which had power to alter its constitution. It could not lose its identity by duly exercising that power.[5] It might not be able to change its objects, but it could vary the means of attaining its objects. The limits of its powers were the same as the discretionary powers of the Court in such matters.[6] This institution had not altered its objects, but, at most, merely its methods of attaining its objects. No object had been taken up which had not been originally contemplated, and no object originally contemplated had been abandoned. The provision of food and clothing was one of the original purposes. The object of the Society was not a school, but the rescue of destitute children by means of education. That object was originally only attainable by conducting a school. Now, it was more suitably attained by enabling poor children to attend school under such conditions as to be able to benefit from the education provided free by the public. The directors although no longer elected were liable to be superseded by the association. There was no case in which a bequest had been held to have failed where, as here, the institution still existed, and was attaining its objects, with only some change in its methods. The respondents referred to *Marsh* v. *Attorney-General*.[2]

LORD KYLLACHY.—I am quite satisfied with the Lord Ordinary's judgment. He puts the decision, I think, upon the right ground when he says that this is not a bequest generally for charitable purposes, but a bequest to a particular institution, the only question really being whether, since the date of the will this institution has lost its identity by reason of certain changes that have occurred. I agree with the Lord Ordinary that the

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the State by giving them clothing to enable them to attend school in decency, by supplying them with books, and, if necessary, giving them food. I therefore think that in a very plain sense the object of the testator's bounty is still in existence, and that the Kelso Ragged Industrial School is still carrying on the work. I shall therefore repel the claim of Mr Constable's clients, and sustain the claim of the Kelso Ragged Industrial School."

[1] Young's Trustee v. Deacons of Eight Incorporated Trades of Perth, June 9, 1893, 20 R. 778; *In re* White's Trusts, 1886, L. R., 33 Ch. D. 449; Clark v. Taylor, (1853), 1 Drewry, 642.

[2] (1860), 30 L. J. Ch. 233.

[3] Tudor on Charities, p. 34.

[4] 1 Drewry, 642.

[5] Bannatyne v. United Free Church of Scotland, Aug. 1, 1904, H. L. reports in present volume, p. 1, L. R. [1904], A. C. 515.

[6] Ferguson Bequest Fund v. Commissioners on Educational Endowments, March 15, 1887, 14 R. 624, *per* L. P. Inglis at p. 627.

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question must be answered in the negative. The constitution is the same, and the objects are the same. The only changes are (1) with respect to the persons charged with the management, and (2) with respect to the ways and methods by which the funds are applied in carrying out the objects of the institution. I think the interlocutor is right, and should be adhered to.

LORD KINCAIRNEY.—I agree, and have nothing to add.

LORD STORMONTH-DARLING.—I agree with your Lordships and with the Lord Ordinary.

LORD JUSTICE-CLERK.—I am of the same opinion.

THE COURT adhered.

A. S. DOUGLAS, W.S.—J. & J. TURNBULL, W.S.—W. & J. BURNESS, W.S.—Agents.

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June 8, 1905.
Christie's Trustees v. M'Dougall.

WILLIAM CHRISTIE AND OTHERS (Christie's Trustees) Pursuers (Respondents).—*Craigie, K.C.—Inglis.*
PATRICK M'DOUGALL, Defender (Reclaimer).—*M'Lennan, K.C.—A. M. Anderson.*

*Superior and Vassal—Casualty—Entry—Statutory Action for Declarator and Payment of Casualty—Competency—Effect of Implied Entry when fee empty—Conveyancing (Scotland) Act*, 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4, *subsecs.* 2, 3, 4.—A feu-charter granted in 1835 stipulated for payment of a certain feu-duty and for payment the first year of entry of each heir or singular successor of double the feu-duty "in name of entry," and subinfeudation was prohibited. These conditions were fenced with an irritant and a resolutive clause. The original vassal A died infeft in 1842, and the lands remained in non-entry until 1903, when his heirs were impliedly entered by recording in the Register of Sasines an extract of a decree pronounced in their favour by the Sheriff of Chancery, but they did not pay a casualty. In the same year they disponed part of the subjects to B, a purchaser, who was impliedly entered by recording the disposition in his favour.

In an action against B by the superior for declarator and payment of the casualty, raised in the statutory form provided by the Conveyancing Act of 1874, the defender pleaded that the action was incompetent in this form, and that the only action that could be competently raised against him was an ordinary petitory action founded on the contractual obligations in the feu-charter. The Court *held* that, as there was no vassal in life who had paid a casualty on entry, and as by the law prior to 1874 a declarator of non-entry could, in these circumstances, have been brought, the present action, as the statutory equivalent of a declarator of non-entry, was competent.

*The Church of Scotland* v. *Watson*, *supra*, p. 395, and *Dick Lauder* v. *Thornton*, 17 R. 230, *distinguished.*

1ST DIVISION. Lord Low.

THIS was an action of declarator and for payment of a casualty, brought, in the form provided in Schedule B annexed to the Conveyancing (Scotland) Act of 1874, by the marriage-contract trustees of Mr and Mrs John Christie, as the superiors of a shop and pertinents No. 7 Spittal Street, Edinburgh, against Patrick M'Dougall, the proprietor of the said shop.

The action was raised in the following circumstances:—

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By feu-charter, dated 29th April 1835, James Bridges, clerk to and on behalf of the Commissioners acting under certain Acts of Parliament, feued to David Callum, a builder in Edinburgh, an area of ground in Spittal Street and Bread Street, Edinburgh, and Callum took infeftment in the same by instrument of sasine in his favour, dated and recorded in the same year.

By the terms of the feu-charter subinfeudation was prohibited, and by the reddendo clause a casualty of double the feu-duty became payable the first year of the entry of each heir or singular successor. These conditions were fenced by an irritant and a resolutive clause.

Callum erected a tenement of shops and houses on the ground feued to him. He died in or before October 1842, but during his lifetime he had sold all the premises erected by him, with the exception of four shops and two half flats, of which he remained the proprietor at the time of his death.

Callum's estates had been sequestrated in 1838, and a trustee appointed, in whose favour he executed a disposition of the four shops and two half flats, but the trustee never took infeftment in these subjects, the feudal title to which still remained in Callum. In the following year a heritable creditor of Callum entered into possession of these subjects, and he and his successors continued in possession of them as heritable creditors until December 1902.

By decree of the Court of Session, dated 3d March 1903, the sequestration of David Callum was declared at an end, and on 18th June 1903 Miss Christina Callum and Miss Elizabeth Callum (who were then his heirs) obtained a decree from the Sheriff of Chancery finding that they were entitled to procure themselves infeft in the *dominium utile* of the four shops and two half flats, and they proceeded to make up their title thereto by recording an extract of this decree in the Register of Sasines on 4th August 1903, and thus became impliedly entered in the subjects in virtue of the 4th section of the Conveyancing (Scotland) Act, 1874.* They paid no casualty to the superior.

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* The Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), by section 4, subsection (1), abolishes renewal of investiture, and by subsection (2) enacts that "every proprietor who is at the commencement of this Act or thereafter shall be duly infeft in the lands shall be deemed and held to be, as at the date of the registration of such infeftment in the appropriate Register of Sasines, duly entered with the nearest superior . . . to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice." By subsection (3) it enacts that "such implied entry shall not prejudice or affect the right or title of any superior to any casualties, feu-duties, or arrears of feu-duties which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right for recovering, securing, and making effectual such casualties, feu-duties, and arrears, or for irritating the feu *ob non solutum canonem*, and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always, that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act, or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his

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On the 9th November 1903 the Misses Callum disponed to Patrick M'Dougall, the present defender, the shop No. 7 Spittal Street, being a portion of the four shops and two half flats of which they had become the proprietors. M'Dougall recorded this disposition in the Register of Sasines.

On 26th February 1904 the pursuers, Christie's trustees, who were then the superiors of the four shops and two half flats, raised this action against Patrick M'Dougall in which they sought to have it found and declared that in consequence of the death of David Callum, the vassal last vest and seised in the said shop, No. 7 Spittal Street, a casualty of £50, 4s. became due to the pursuers and is still unpaid, and that the full rents, maills, and duties of the said shop do belong to the pursuers until the said casualty and expenses be paid; and they also asked that the defender be decerned to make payment to them of the said sum of £50, 4s., being the casualty foresaid. The summons, as before mentioned, was in the form provided in Schedule B annexed to the Conveyancing (Scotland) Act, 1874.

The pursuers averred;—(Cond. 9) "The said four shops and two half flats and others held by the said David Callum fell into non-entry by his death, and in consequence thereof a taxed composition or casualty of £50, 4s., being a duplicand of the feu-duty of £25, 2s. over and above the feu-duty for the year affecting the said subjects, became due and exigible by the superiors, but no composition or casualty has been paid to the superiors in respect of the death of the said David Callum as regards said four shops and two half flats and others."

The pursuers pleaded;—(1) The defender having refused to pay to the pursuers the taxed composition or casualty of £50, 4s. referred to in the summons, the pursuers are entitled to declarator and decree for payment as concluded for, with expenses.

The defender pleaded, *inter alia*;—The action is irrelevant.

On 8th November 1904 the Lord Ordinary (Low), after hearing counsel in the Procedure-roll, pronounced this interlocutor:—"Finds, decerns, and declares that in consequence of the death of David Callum, wright and builder in Edinburgh, who was the vassal last vest and seised in All and Whole the shop No. 7 Spittal Street, Edinburgh, consisting of front shop, two apartments, and conveniences, with the cellars under the same, and also the coal cellar under the shop, all as particularly described in the summons, a casualty of £50, 4s. became due to the pursuers, as superiors of the said subjects, and is still unpaid, and that the full rents, maills, and duties of the said shop No. 7 Spittal Street and others after the date of this interlocutor do belong to the pursuers, as superiors foresaid, until the said casualty and the expenses after mentioned be otherwise paid to the pursuers; and decerns and ordains the defender to make payment to the pursuers of the sum of £50, 4s., being the casualty foresaid," &c.

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entering." And by subsection (4) it enacts that "no lands shall, after the commencement of this Act, be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action . . . and the summons in such action may be in or as nearly as may be in the form of schedule B hereto annexed."

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The defender reclaimed, and in addition to the pleas argued before the Lord Ordinary he advanced two new contentions which had not been maintained in the Outer-House. It is with the first of these, namely, that the action in its present form was incompetent, that this report alone deals. On that point the defender argued;—This was the statutory equivalent for an action of non-entry, and there being a vassal entered here (*i.e.*, the Misses Callum) an action of non-entry could not have been brought. The only action competent here was an ordinary petitory action based on the contractual obligations contained in the feu-charter.[1]

On that point the pursuers argued;—The last vassal who had paid a casualty was dead. By the law prior to 1874 the superior would have had the remedy of an action of non-entry, for which this action was the statutory equivalent. All that could be pleaded against that was the implied entry of the Misses Callum, who had not paid a casualty; but implied entry could not prejudice a superior's right to recover a casualty.[2] *Dick Lauder* v. *Thornton*[3] and *Church of Scotland* v. *Watson*[4] were clearly distinguishable, for in these cases the fee was full through the existence of a vassal who had paid a casualty. If necessary the pursuers were prepared to add to the summons a conclusion founded on the contractual obligations in the feu-charter.

LORD PRESIDENT.—(After referring to the points raised in the Outer-House, proceeded)—That disposes of the reclaiming note so far as the pleas urged before the Lord Ordinary are concerned, but in this Court two other pleas were put forward by the defender. The first was that here there was no room for the statutory action, and in support of that plea the defender cited the cases of the *Church of Scotland* v. *Watson*[4] and *Dick Lauder* v. *Thornton*.[3] Now, these two cases decided this, that where you have a prohibition of subinfeudation fenced with irritant clauses, the compulsitor which a superior has in these circumstances to enforce the recovery of his casualty (whether it be taxed or not) depends on the contractual right which is expressed in the feu-charter; and consequently the action is a purely petitory one, helped out by declaratory conclusions of the irritancy to make it effective, but is not the old action of a declarator of non-entry. That is quite clear, but it is not to the point in the present case. The defender has ignored the fact that in both these cases the fee was full, while here the fee is empty. The last entered vassal died in 1842, and no one has paid a casualty as heir or singular successor since that date. I see no reason for holding, and no reason has been suggested to us, that there is anything inconsistent in both rights existing in the superior together—that is to say, the common law right of declarator of non-entry or its modern statutory equivalent, and also the right to sue on his contract, if the feu-charter gives him a contractual right. There may be puzzles in working out these contractual rights in cases where the charter deals with a whole

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[1] Church of Scotland v. Watson, Jan. 14, 1905, *supra*, p. 395, Lord Kinnear, at p. 408; Dick Lauder v. Thornton, Jan. 23, 1890, 17 R. 320.

[2] Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 4, subsec. 3.

[3] 17 R. 320.

[4] *Supra*, p. 395.

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superiority which has *de facto* been subsequently divided into separate portions, but it is sufficient to deal with these puzzles when they arise for decision. In this case the pursuers' counsel says,—"It does not matter what my contractual rights may be, for here I am suing at common law on the ground that my fee is empty, and I am entitled to the payment of a casualty before I enter another vassal." Section 4, subsection 3, of the Conveyancing Act of 1874 preserves all rights of the superior to the enforcement of his casualty in spite of the implied entry granted to the successors of a vassal by that Act. Now, the only entry pleaded here is the implied entry of the Misses Callum, who admittedly never paid a casualty, and consequently, in virtue of the subsection I have referred to, that entry cannot be pleaded as a defence to this action. It appears to me quite clear that if the Act of 1874 had not been passed the pursuers here would have been entitled to raise an action of declarator of non-entry, and therefore I do not think any relevant defence can be stated to the form in which the present action has been brought.

Lord Kinnear.—(After dealing with the other points argued before the Court, proceeded)—The only remaining point is whether the pursuer has a good action in the form in which this action was originally brought. The defender founded on something which I am reported to have said in the case of the *Church of Scotland* v. *Watson and Others*[1] as suggesting that an implied entry under the statute might fill the fee, and so be a good answer to the statutory action in room of a declarator of non-entry. But this is contrary to the express words of the statute, and I do not think the observation cited, when read with reference to its context, will bear the meaning ascribed to it. I held both in that case and in *Dick Lauder* v. *Thornton*[2] that when a disponee had completed a title on an *a me* holding only, so as entirely to dispossess the disponer and take up the position of vassal in his room, the superior was entitled to enforce against him all the prestations of the feu-charter or contract, because he could not hold the land by virtue of the superior's grant without complying with the conditions of the grant. But then a superior cannot enforce the conditions of a charter as against an entered vassal on the express ground that he has taken infeftment, or, in other words, has entered, and at the same time deny that he has entered and allege that the fee is empty. It appeared to me therefore that when a superior claimed to enforce the terms of the charter as against an entered vassal, his proper action was an action on the contract, and not the statutory action in lieu of the declarator of non-entry. But, on the other hand, he is not bound to rely on the contract if there is no other vassal in life except a disponee who has entered by implication of the statute. He is quite entitled in that case to bring the statutory action on the ground that there is no vassal in the fee, and the implied entry will afford no defence to that action. It will still be perfectly competent, if the vassal entered by implication is found to be liable or admits his liability for a casualty, to refer to the terms of the charter or contract for the purpose of ascertaining the amount due. But the action will not

[1] *Supra*, p. 395.

[2] 17 R. 320.

be an action upon the contract, but the statutory action. But in the present case this question does not arise. There is no vassal in life who has paid a casualty, and therefore there is no pretence for saying that the action is brought sooner than a declarator of non-entry could have been raised under the old law. The superior has no vassal except the defender, who is undoubtedly liable for the casualty, and it seems to me immaterial whether the liability is enforced under the original or under the new conclusion of the summons.

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LORD ADAM and LORD M'LAREN concurred.

THE COURT adhered.

JAMES F. MACKAY, W.S.—W. R. MACKERSY, W.S.—Agents.

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June 8, 1905.*
Roscoe v. Mackersy.

MRS ANNIE GRIERSON LEE OR ROSCOE AND SPOUSE, Pursuers (Respondents).—*Graham Stewart—Sandeman.*
WILLIAM ROBERT MACKERSY, Defender (Reclaimer).—*M'Lennan—A. M. Anderson.*

*Right in Security—Sale by heritable creditor—Advertisement—Time—Titles to Land Consolidation (Scotland) Act*, 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 119.—The Titles to Land Consolidation (Scotland) Act, 1868, sec. 119, enacts that a heritable creditor may, on the expiration of three months after demand for payment, sell the subjects "on previous advertisement . . . published once weekly for at least six weeks subsequent to the expiry of the said three months."

The holder of a bond and disposition in security exposed the subjects under the power of sale on 23d March 1904. The first advertisement had appeared on the morning of 10th February 1904.

*Held* that as forty-two days had elapsed between the morning of the first advertisement and the morning of the exposure the provisions of the statute in regard to advertisement had been complied with.

*Opinion* that if an advertisement appeared once in each of six consecutive weeks it was not necessary that forty-two days should have elapsed between the day of the first advertisement and the day of the exposure.

*Right in Security—Sale by heritable creditor—Consignation of surplus—Bank—Titles to Land Consolidation (Scotland) Act*, 1868 (31 *and* 32 *Vict. cap.* 101), *sec.* 122.—The Titles to Land Consolidation (Scotland) Act, 1868, sec. 122, enacts that the creditor shall upon receipt of the price consign the surplus which may remain after deducting the debt secured and expenses in a bank, "and the particular bank in which such consignation is to be made shall be specified in the articles of roup."

*Held* that the omission to specify the bank in the articles of roup did not infer the nullity of the sale where there was in fact no surplus.

*Expenses—Sale—Objections to title.*—The purchaser of subjects exposed to public roup under the powers of a bond who had objected to the title *found liable* in the expenses of an action for implement in respect that none of his objections were substantial.

2D DIVISION. Ld. Kyllachy.

BY articles and conditions of roup, dated 17th December 1903, Mrs Annie Grierson Roscoe, wife of Henry W. K. Roscoe, Streatley, Reading, Berkshire, with advice and consent of her husband, and her husband for his own right and interest, exposed the shop and back shop, No. 26 Montrose Terrace, Abbeybill, Edinburgh, to sale by

* Decided March 16, 1905.

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public roup, on 23d March 1904, at the upset price of £180, under the powers of a bond and disposition in security over the subjects, dated 11th, and recorded 12th June 1883, in favour of Mrs Roscoe, then Miss Lee.

At the sale on 23d March no one appeared to offer the upset price, and the sale was adjourned to 20th April, when the subjects were exposed at the reduced upset price of £130, and were sold to William Robert Mackersy, W.S., Edinburgh, at the reduced upset price.

Mr Mackersy having refused to implement the sale, on the ground that Mrs Roscoe had not tendered to him a valid and marketable title, Mrs Roscoe and her husband brought an action against Mr Mackersy concluding for decree ordaining him to implement the contract of sale by accepting a valid disposition in his favour, and paying the price, £130, with interest, and failing implement within three weeks from the date of decree, for £100 as damages.

The defender stated the following objections to the title offered by the pursuers:—

1. The minute of re-exposure annexed to the articles of roup was signed by Mr W. B. Rainnie, S.S.C., Mrs Roscoe's agent. The defender's first objection (which was not pressed in the Inner-House) was that it was incompetent for Mrs Roscoe, as the "grantee," within the meaning of sec. 3 of the Titles to Lands Consolidation (Scotland) Act, 1868, of a bond and disposition in security, thus to delegate her powers under sec. 119 of that Act—that the only case in which it was competent for a law-agent to sign on behalf of the grantee of a bond and disposition in security in connection with a sale of the security subjects, was the case expressly provided for in sec. 49 and Schedule L of the Conveyancing (Scotland) Act, 1874.

2. The defender further objected;—(Stat. 6) "The first exposure of said subjects . . . was not duly advertised in terms of" section 119 of the Titles to Land Consolidation (Scotland) Act, 1868, "the necessary full period of six weeks not having elapsed between the first advertisement in the *Scotsman* of 10th February 1904, and the date of said first exposure which took place on 23d March 1904,—the period thereby embraced being one day short of the requisite period. This failure on the part of the pursuers to observe an important requirement renders the title offered by the pursuers to the defender worthless."

3. The defender's last objection was,—(Stat. 7) "The pursuers in said proceeding failed to observe another statutory requirement in so far as . . . said articles of roup did not specify the name of the particular bank in which any surplus price that there might be was to be consigned, in terms of section 122 of said Act."

On 10th November 1904 the Lord Ordinary (Kyllachy) pronounced this interlocutor:—"Finds the objections stated by the defender to the title offered by the pursuers cannot be sustained: Therefore appoints the defender to implement and fulfil in all respects his part of the contract of sale of the subjects libelled, and that by accepting a valid disposition of the same in his favour, containing all usual and necessary clauses executed by pursuers of said subjects; also to make payment to the pursuers of the sum of £130, the price of the same, with interest as concluded for, and that within three weeks from the date hereof: Finds the pursuers entitled to expenses;

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allows an account thereof to be given in, and remits the same, when lodged, to the Auditor to tax and to report; *quoad ultra* continues the cause."*

On 3d December 1904 the Lord Ordinary pronounced the following further interlocutor:—"The Lord Ordinary, in respect the defender has failed to implement the preceding interlocutor, finds the pursuers entitled to damages: Of consent assesses the same at £25, for which sum decerns against the defender as in full of the conclusions of the summons," &c.

The defender reclaimed, and argued;—(1) The 119th section of the Act of 1868 required advertisement "once weekly for at least six weeks." That meant that a period of at least forty-two clear days must elapse between the day of the first advertisement and the day of exposure; advertisement once in each of six consecutive weeks, so that the last advertisement might be on the first day of the last week, and the exposure on the day immediately following was not sufficient; the debtor was entitled to have the advertisement before the public eye for a period of at least six complete weeks.[1] Here first exposure took place on the forty-second day after the day of the first advertisement, and it was said that the rule *dies inceptus* applied; but the rule was *in favoribilibus, dies inceptus pro completo habetur, i.e.*, the person pleading the rule must have a presumption in his

* "OPINION.—In this case the defender takes, I think, three objections to the title offered to him as purchaser of the property in question.

"His first objection is that there was no valid exposure, in respect that the minute of exposure was signed not by the creditor who was selling the property under the powers in his bond, but by the creditor's agent. As to that objection, there being no question of the agent's authority, I confess that it does not appear to me to be stateable.

"The second objection is, I think, on examination, also untenable. It is said that forty-two days had not elapsed between the date of the first advertisement and the sale. But the answer to that is, that forty-two days had elapsed—that is to say, that there had been a full period of forty-two days between the morning of the day when the first advertisement appeared and the morning of the day when the sale took place. That, I think, amply satisfied the statutory requirement, that the prescribed advertisements should be inserted during a period of six weeks preceding the sale.

"That leaves only the third objection, which is founded on this, that the articles of roup did not contain a statement of the name of the bank in which the surplus price falling to the owner of the property was to be consigned in the event of the property realising a surplus over and above the exposer's debt. I have looked into this matter, which turns upon the terms of the 122d section of the Act of 1868, and I am far from saying that, if there had been here a surplus, it might not have been possible for the defender to contend that the sale was subject to challenge by the owner of the property, in respect that there had not been the prescribed intimation to him of the bank where the surplus was to be consigned. But, in the present case, it seems enough to say that there has been, in fact, no surplus; that the sale was one in which no surplus could possibly arise; and that, therefore, the owner of the property could not, under the 122d section, make any claim or raise any question. I have come, therefore, to the conclusion that this objection is also untenable. And I am further of opinion, having considered the question of expenses, that none of the defender's objections were substantial, and that, therefore, he must be found liable in expenses."

[1] Ferguson v. Rodger, June 12, 1895, 22 R. 643.

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favour,[1] and here the presumption was in favour of the debtor, not of the creditor.[2] In any view the day on which the first advertisement appeared ought to be excluded.[3] (2) The bank in which consignation of the surplus was to be made had not been specified in the articles of roup as required by section 122 of the Act of 1868. That was fatal to the validity of the sale. The Lord Ordinary got over the difficulty by assuming that there could not possibly be a surplus, but that, however probable, could be known only as the result of the sale. In sales under the powers of a bond the statutory requirements must be strictly complied with. (3) The defender's objections were not frivolous; he was therefore entitled to his expenses.[4]

The arguments of the pursuers sufficiently appear from the opinions of the Lord Ordinary and Lord Kincairney.

At advising, the opinion of the Court (the LORD JUSTICE-CLERK, LORD KYLLACHY, and LORD KINCAIRNEY) was delivered by—

LORD KINCAIRNEY.—Two interlocutors were submitted for review by this reclaiming note. I am of opinion that both are right and ought to be affirmed.

The action is brought to enforce the sale of a shop and back shop in Montrose Terrace, Regent Road, Abbeyhill, which were sold by public roup on a second exposure on 20th April 1904, under powers in a bond, and were purchased by the defender, who has objected that the title tendered by the pursuers is not marketable. The defender's objections to the title are specified in the Lord Ordinary's opinion.

Nothing need be said about the first objection, which is plainly bad, and was, I understood, withdrawn at the debate. The principal objection is the second, which is, that the first exposure was not duly advertised in terms of the 119th section of the Titles to Land Act. The defender avers that the necessary full period of six weeks had not elapsed between the first advertisement in the *Scotsman* of 10th February and the date of the first exposure on 23d March 1904, "the period thereby embraced being one day short of the requisite period." The defender does not explain how he proposes to compute the requisite period, or whether he proposes to include the first day of advertisement and the day of exposure, or one of them, or neither. If he excludes both of these days, then it is true that there will be only forty-one days to be reckoned as falling between the first advertisement and the exposure, but if he includes either of these days there will be forty-two days between the first advertisement and the exposure.

The Lord Ordinary has expressed the opinion, on grounds which he has explained, that forty-two days elapsed between the first advertisement and the exposure, and I agree in that opinion. But the statute does not

[1] Thomson v. Magistrates of Kirkcudbright, Jan. 23, 1878, 5 R. 561, *per* Lord Justice-Clerk Moncreiff, at p. 563; Ashley v. Magistrates of Rothesay, June 20, 1873, 11 Macph. 708, 45 Scot. Jur. 440; Dig. 44, 7, 6.

[2] Nisbet v. Cairns, March 12, 1864, 2 Macph. 863, 36 Scot. Jur. 423.

[3] Lawford v. Davies, 1878, L. R., 4 Prob. 61. The defender also cited Mackenzie v. Munro, Nov. 10, 1894, 22 R. 45; Wilson, Dec. 1, 1891, 19 R. 219.

[4] Howard & Wyndham v. Richmond's Trustees, June 20, 1890, 17 R. 990.

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expressly require the lapse of any period between the one day and the other, but is expressed quite differently, because it requires the publication of the date and place of sale once weekly for at least six weeks, and it seems not doubtful that that requirement has been fulfilled, and indeed there is no averment to the contrary. There is no doubt that this sale has been advertised for six weeks weekly, so that I doubt whether this objection is supported by any relevant averment. At all events I agree with the Lord Ordinary that the objection must be repelled.

The third objection is somewhat singular. It is that the bank in which the surplus arising on the sale was to be consigned is not mentioned in the articles of roup, as required by the 122d section of the Titles to Land Act. It may be observed that the requirement is that the bank should be named at a time when it was necessarily uncertain whether there would be any surplus, so that the fact that in this case there was no surplus does not prevent the application of the section to the case nor affect the assertion that there has been an undoubted disregard of the requirement of the statute, although, as the facts have turned out, it has been a disregard which is of no consequence whatever. I find no provision in the Act that a neglect of that requirement shall, when there is no surplus, affect the competency of the procedure. I therefore am of opinion that the interlocutor of the Lord Ordinary of 10th November 1904 should be affirmed.

I do not recollect that the interlocutor of 3d December 1904 was challenged if the interlocutor of 10th November was affirmed, and I see no ground for such a challenge.

THE COURT adhered, with additional expenses.

W. B. RAINNIE, S.S.C.—W. R. MACKERSY, W.S.—Agents.

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June 8, 1905.*
M'Intosh v. Potts.

HENRY M'INTOSH, Pursuer (Appellant).—*T. B. Morison—Chree.*
MISS MARY POTTS, Defender (Respondent).—*Campbell, K.C.—J. H. Henderson.*

*Lease—Sequestration for rent—Hired Furniture—Right of owner of hired furniture to have tenant's own effects sold first.*—When an article of furniture, hired by a tenant, is sequestrated for the tenant's rent along with the tenant's own effects, and the owner of the hired article desires that it should not be sold unless the tenant's own effects prove insufficient to meet the landlord's claims, the owner of the hired article ought to apply to the Sheriff or to the judge of the roup, to have the sale of the article reserved; if the owner of the hired article does not so apply, and the article is sold while effects belonging to the tenant remain unsold, the owner has no remedy against the landlord, even although he has intimated to the landlord that the article is his property.

2D DIVISION. Sheriff of the Lothians and Peebles.

IN August 1897, Henry M'Intosh, musicseller, 130 George Street, Edinburgh, let a piano on hire to Mrs Helen M. Turnbull, residing at St Ann's Villa, Strathearn Road, Edinburgh, and the piano was taken to that house, of which Mrs Turnbull was the tenant and Miss Mary Potts the landlord.

On 20th July 1904, Miss Potts presented a petition for sequestration of the effects in Mrs Turnbull's dwelling-house in security and

* Decided June 3, 1905.

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for payment (1) of the sum of £35, being half year's rent payable at Martinmas 1903, and (2) of the sum of £35 which became due and payable at Whitsunday 1904. Warrant to sell was granted on 22d July. The piano was included in the inventory.

On 2d November 1904 the agents of M'Intosh wrote to Miss Potts' agent:—"You are aware that in May 1900 our client had some correspondence with you relative to this piano. You then refused to allow it to be removed, as it was hypothecated for the rent of that year.* We now write to say that if the rent of that year be paid our client claims the piano, and you cannot hypothecate it for the rent of subsequent years, since you have prevented our client from removing it."

Miss Potts' agent replied that she declined to give up the piano.

The sale took place on 15th November 1904. The piano was entered in the list of sequestrated effects as follows:—"Walnut-cased cottage piano, by H. M'Intosh, said to be on hire." It was sold along with the other effects. M'Intosh did not appear in the sequestration process or at the sale.

In December 1904, M'Intosh brought the present action in the Sheriff Court at Edinburgh, against Miss Potts (Mrs Turnbull being called for any interest she might have), praying for decree ordaining Miss Potts to pay to the pursuer £33 as the value of the piano.

The pursuer averred;—(Cond. 8) "After sundry procedure the defender obtained a warrant of sale under said sequestration 'to sell so much of the sequestrated effects as will pay' the two rents in question, being £70, and expenses. Under this warrant effects belonging to the said Mrs Turnbull, amounting in value to £142, 14s. 6d., being more than double the rents for which the said process of sequestration was obtained, were sold. This sale was greatly in excess of what the warrant authorised, yet notwithstanding thereof defender wrongfully and illegally sold the pursuer's said piano, over and above Mrs Turnbull's said effects, the value of which is at least £33, and for which value the defender is liable to the pursuer." (Cond. 9) "It was the defender's duty to have, in any event, sold her tenant's effects before touching the pursuer's piano, and to have stopped the sale as soon as the effects sold were reasonably sufficient to cover the sums in the warrant, and the sale so far as regards the pursuer's piano was, to the knowledge of the defender, wholly illegal and without warrant or justification of any kind." (Cond. 10) "The process of sequestration and the roup roll, which are all before the Court, are referred to."

The report of the sale and roup roll shewed that the whole effects realised £170, 1s., that £92, 19s. had been realised before the piano was put up for sale; that the piano realised £17, 6s. 6d.; that the taxes amounted to £10, 13s. 5d., including £3, 5s. 6d. retainable from the landlord on payment of rent; that the expenses of the sale amounted to £20, 13s. 7d.; and that the rent due to the defender and her agent's expenses amounted to £80, 2s. 2d. In the sequestration the Sheriff-substitute granted decree in the defender's favour for £80, 2s. 2d. less £3, 5s. 6d., the taxes retainable from the landlord on payment of the rent.

In the present action the pursuer pleaded, *inter alia*;—(2) *Esto* that the piano was properly included in the sequestration for the rents which became due (1) at Martinmas 1903, and (2) at Whit-

* This referred to a prior sequestration which had lapsed through payment of the rent.

sunday 1904; and these rents having been more than met by the proceeds of the sale of the effects belonging to the defender's tenant, Mrs Turnbull, and the defender being aware that the instrument was the property of the pursuer, said sale was illegal and unwarrantable, and the defender is liable for the value of the instrument.

The defender pleaded, *inter alia*;—(2) The pursuer's averments are irrelevant.

On 13th March 1905 the Sheriff-substitute (Henderson) pronounced this interlocutor:—"Having considered the closed record, productions, and whole process, sustains the second plea in law for the defender Miss Potts, and therefore dismisses the action as irrelevant: Finds the defender Miss Potts entitled to expenses, and remits," &c.

The pursuer appealed, and argued;—The pursuer admitted that the piano fell under the landlord's hypothec, and that the defender was entitled to sell the piano if she could not get payment of the rent otherwise. But a warrant to sell, in a sequestration for rent, must be exercised reasonably in the interests of all concerned. That was settled as in a question between the landlord and the tenant,[1] and the principle applied to the property of third parties which, although technically within the sequestration, was to the knowledge of the landlord not the property of the tenant. The principle did not depend on the contract of landlord and tenant, but upon delict—the wrongous use of diligence; and an action *ex delicto* was as much open to a third party as to the tenant. Here it was plain that the defender, if not personally, at least through her agent, knew perfectly well that this piano belonged to the pursuer, and she had no interest to have it sold since the result of the sale shewed that the tenant's own effects were amply sufficient to cover all the defender's claims in the widest view of them. It was her duty therefore to have reserved the sale of the piano to await the result of the sale of the tenant's own effects. In any view the piano had been put up for sale at a time when enough had already been realised by the sale of the tenant's own effects to satisfy all the defender's claims, and when, consequently, her warrant to sell was exhausted. Her rent and her law-agent's expenses had clearly been satisfied. She had nothing to do with the payment of the taxes, except in so far as a portion of the taxes was deducted from her rent on payment to her; and as the expenses of the sale were fixed mainly by commission, only the proportion effeiring to the effects already sold fell to be added to the sum for which she had warrant to sell. This addition did not bring her claim beyond the sum already realised, but even if it was necessary to realise a pound or two more, it was an oppressive use of the warrant, even in a question with the tenant, to put up a valuable piano when an article of much smaller value would have been sufficient.

Argued for the defender;—The pursuer admitted that the piano fell within the sequestration, but he argued that because the defender knew that the piano belonged to him it was her duty to reserve the sale of the piano to await the result of the sale of the tenant's own effects. The defender, or at least her agent, no doubt knew that the pursuer claimed the piano, but the knowledge of that claim did not impose on the defender the duty of looking after the pursuer's interests. It was for the pursuer to appear in the sequestration or at

[1] Robertson v. Galbraith, July 16, 1857, 19 D. 1016, 29 Scot. Jur. 481.

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the sale—which he had a title to do[1]—and by application to the Sheriff, or to the Sheriff-Clerk as judge of the roup, to protect his own interests as he thought best. As to the argument that when the piano was put up for sale enough had been realised to satisfy the defender's claims, that failed on the facts. It might be that a proportion of the expenses of the sale did not fall to be taken into account, and it might also be that the defender had not a direct warrant to sell for payment of the taxes, but it was the duty of the Sheriff-Clerk to retain the amount of the taxes out of the proceeds of the sale, which meant practically that the defender was entitled to sell for the amount of her claim plus the taxes, and this, with a proportion of the expenses of the sale, brought out a sum considerably in excess of the sum realised when the piano was put up for sale. Even on the pursuer's view of the amount of the defender's claims his case failed, for at the best he brought out only a very small surplus of realised proceeds over the defender's claims, and a landlord who had sequestrated for rent was entitled to go on selling the sequestrated subjects until his claims were safely covered.

At advising,—

LORD JUSTICE-CLERK.—In moving your Lordships to adhere to the interlocutor of the Sheriff-substitute, which is the course I propose, I do not desire to be held as agreeing with all that he has said. The case seems simple enough. It is not disputed that this piano fell within the sequestration, and it is not disputed that it did not matter whether it was the first or tenth, or any other number in the list of articles sold, if it was put up as a lot for sale when what had been already knocked down had not produced enough money to make up the amount due to the landlord. The case that is made is this: that the roup roll having been made up, and the sale being in progress at the time the piano was reached, it was a question whether the creditor would be cleared before it was knocked down. In my opinion it is not shewn that the creditor was so clear as to make it his duty to have stopped the sale going on. There was a slight margin above the debt due to him and expenses, without taking into account the taxes due, but it is evident that these are matters which the Sheriff-Clerk deals with in such cases. The creditor was entitled to go on selling until he was safely covered as regards his debt, and it is a matter of accident that the last article sold is one which provides a sum considerably in excess over what he is entitled to get. There was therefore no oppression as far as the selling of the piano is concerned. As to the order in which it was sold, it might have been different if the owner of the piano had taken means to prevent it being sold when there were sufficient goods to sell belonging to the tenant. He might have gone to the judge of the roup and asked that this should not be put up till the other articles had been sold. If the judge of the roup had resisted this appeal, or if the creditor had opposed the postponement, it may be that a case of oppression might have been made out. But nothing of this sort took place, and in the circumstances which occurred there is no such case.

[1] M'Kechnie v. Duke of Montrose, March 29, 1853, 15 D. 623, 25 Scot. Jur. 372; Lindsay (Christie's Trustee) v. Earl of Wemyss, May 18, 1872, 10 Macph. 708, 44 Scot. Jur. 389.

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LORD KYLLACHY.—I agree. The pursuer put his case upon two grounds —first, that it was sufficiently clear that this piano had been put up for sale after enough had been realised to pay the whole debt due to the landlord with all expenses and charges which fell to be added. To this it is a good answer that on the figures the pursuer's statement is not correct—that is to say, not correct unless we discard the taxes and a very large part of the expenses of the sale. Therefore the first ground fails.

As regards the second ground, that it was oppressive, and therefore unlawful, to put the piano up otherwise than at the end of the sale, it is, I think, enough to point out that the pursuer could, if he chose, have applied to the Sheriff and asked that the warrant to sell should be granted subject to the condition that the piano should be kept to the last; or could have attended the sale, and asked the Sheriff-Clerk, who was the judge of the roup, that the piano should not be put up till the goods truly belonging to the debtor had first been sold. He did not take either course, and I therefore am not prepared to differ from the conclusion of the Sheriff-substitute that the pursuer's statements are not relevant.

LORD KINCAIRNEY concurred.

LORD STORMONTH-DARLING.—I agree. I only desire to add that the judgment we are pronouncing being one on relevancy, we are bound to take the averments of the pursuer as explained by Mr Morison. But taking it so, it is clear that the margin of money recovered at the time when the piano was sold, over and above the debt and expenses, was too small to admit of an action of damages on the ground of oppression or illegality. It would be necessary for that purpose to shew that the creditor had gone on with the sale after the amount of his debt had been materially and considerably exceeded. As regards the pursuer's complaint that the piano need not have been sold at all, the pursuer had a clear and easy means of preventing the result by going to the Sheriff or the judge of the roup, and this course he failed to take.

THE COURT dismissed the appeal.

P. MORISON & SON, S.S.C.—WILLIAM CONSIDINE, S.S.C.—Agents.

No. 138.

June 8, 1905. Dawson v. Stewart & Shaw.

JOHN DAWSON, Pursuer (Appellant).—*Trotter.*
STEWART & SHAW, Defenders (Respondents).—*Spens.*

*Process—Proof—Jury Trial—Proof or Jury Trial—Appeal for Jury Trial—Remit to Sheriff—Judicature Act*, 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.—In an action of damages under the Employers Liability Act, 1880, the pursuer averred that while engaged in the employment of the defenders—a firm of stevedores—in discharging iron ore from a ship, a piece of ore weighing seven or eight pounds fell and caused injuries to his wrist which necessitated his going to the infirmary, "where the wound was stitched. Pursuer will be unable to resume work for a considerable time to come." He further averred that his average wages were 30s. a week. The action was raised about a week, and the record was closed ten weeks, after the date of the injury. The Sheriff having allowed a proof, the pursuer appealed for jury trial.

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the sale—which he had a title to do[1]—and by application to the Sheriff, or to the Sheriff-Clerk as judge of the roup, to protect his own interests as he thought best. As to the argument that when the piano was put up for sale enough had been realised to satisfy the defender's claims, that failed on the facts. It might be that a proportion of the expenses of the sale did not fall to be taken into account, and it might also be that the defender had not a direct warrant to sell for payment of the taxes, but it was the duty of the Sheriff-Clerk to retain the amount of the taxes out of the proceeds of the sale, which meant practically that the defender was entitled to sell for the amount of her claim plus the taxes, and this, with a proportion of the expenses of the sale, brought out a sum considerably in excess of the sum realised when the piano was put up for sale. Even on the pursuer's view of the amount of the defender's claims his case failed, for at the best he brought out only a very small surplus of realised proceeds over the defender's claims, and a landlord who had sequestrated for rent was entitled to go on selling the sequestrated subjects until his claims were safely covered.

At advising,—

LORD JUSTICE-CLERK.—In moving your Lordships to adhere to the interlocutor of the Sheriff-substitute, which is the course I propose, I do not desire to be held as agreeing with all that he has said. The case seems simple enough. It is not disputed that this piano fell within the sequestration, and it is not disputed that it did not matter whether it was the first or tenth, or any other number in the list of articles sold, if it was put up as a lot for sale when what had been already knocked down had not produced enough money to make up the amount due to the landlord. The case that is made is this: that the roup roll having been made up, and the sale being in progress at the time the piano was reached, it was a question whether the creditor would be cleared before it was knocked down. In my opinion it is not shewn that the creditor was so clear as to make it his duty to have stopped the sale going on. There was a slight margin above the debt due to him and expenses, without taking into account the taxes due, but it is evident that these are matters which the Sheriff-Clerk deals with in such cases. The creditor was entitled to go on selling until he was safely covered as regards his debt, and it is a matter of accident that the last article sold is one which provides a sum considerably in excess over what he is entitled to get. There was therefore no oppression as far as the selling of the piano is concerned. As to the order in which it was sold, it might have been different if the owner of the piano had taken means to prevent it being sold when there were sufficient goods to sell belonging to the tenant. He might have gone to the judge of the roup and asked that this should not be put up till the other articles had been sold. If the judge of the roup had resisted this appeal, or if the creditor had opposed the postponement, it may be that a case of oppression might have been made out. But nothing of this sort took place, and in the circumstances which occurred there is no such case.

[1] M'Kechnie v. Duke of Montrose, March 29, 1853, 15 D. 623, 25 Scot. Jur. 372; Lindsay (Christie's Trustee) v. Earl of Wemyss, May 18, 1872, 10 Macph. 708, 44 Scot. Jur. 389.

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LORD KYLLACHY.—I agree. The pursuer put his case upon two grounds —first, that it was sufficiently clear that this piano had been put up for sale after enough had been realised to pay the whole debt due to the landlord with all expenses and charges which fell to be added. To this it is a good answer that on the figures the pursuer's statement is not correct—that is to say, not correct unless we discard the taxes and a very large part of the expenses of the sale. Therefore the first ground fails.

As regards the second ground, that it was oppressive, and therefore unlawful, to put the piano up otherwise than at the end of the sale, it is, I think, enough to point out that the pursuer could, if he chose, have applied to the Sheriff and asked that the warrant to sell should be granted subject to the condition that the piano should be kept to the last; or could have attended the sale, and asked the Sheriff-Clerk, who was the judge of the roup, that the piano should not be put up till the goods truly belonging to the debtor had first been sold. He did not take either course, and I therefore am not prepared to differ from the conclusion of the Sheriff-substitute that the pursuer's statements are not relevant.

LORD KINCAIRNEY concurred.

LORD STORMONTH-DARLING.—I agree. I only desire to add that the judgment we are pronouncing being one on relevancy, we are bound to take the averments of the pursuer as explained by Mr Morison. But taking it so, it is clear that the margin of money recovered at the time when the piano was sold, over and above the debt and expenses, was too small to admit of an action of damages on the ground of oppression or illegality. It would be necessary for that purpose to shew that the creditor had gone on with the sale after the amount of his debt had been materially and considerably exceeded. As regards the pursuer's complaint that the piano need not have been sold at all, the pursuer had a clear and easy means of preventing the result by going to the Sheriff or the judge of the roup, and this course he failed to take.

THE COURT dismissed the appeal.

P. MORISON & SON, S.S.C.—WILLIAM CONSIDINE, S.S.C.—Agents.

No. 138.

June 8, 1905. Dawson v. Stewart & Shaw.

JOHN DAWSON, Pursuer (Appellant).—*Trotter.*
STEWART & SHAW, Defenders (Respondents).—*Spens.*

*Process—Proof—Jury Trial—Proof or Jury Trial—Appeal for Jury Trial—Remit to Sheriff—Judicature Act*, 1825 (6 *Geo. IV. cap.* 120), *sec.* 40.—In an action of damages under the Employers Liability Act, 1880, the pursuer averred that while engaged in the employment of the defenders—a firm of stevedores—in discharging iron ore from a ship, a piece of ore weighing seven or eight pounds fell and caused injuries to his wrist which necessitated his going to the infirmary, "where the wound was stitched. Pursuer will be unable to resume work for a considerable time to come." He further averred that his average wages were 30s. a week. The action was raised about a week, and the record was closed ten weeks, after the date of the injury. The Sheriff having allowed a proof, the pursuer appealed for jury trial.

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June 8, 1905.
Dawson v. Stewart & Shaw.
2D DIVISION. Sheriff of Lanarkshire.

The Court, being of opinion that the pursuer's averments disclosed a case which could not reasonably entitle him to a verdict for £40 damages, *refused* the appeal, and *remitted* to the Sheriff to proceed with the proof.

Rule of *Sharples* v. *Yuill & Company*, *supra*, p. 657, *applied*.

JOHN DAWSON, docker, raised an action in the Sheriff Court at Glasgow, against Stewart & Shaw, stevedores, for £150 as damages under the Employers Liability Act, 1880.

The pursuer averred;—(Cond. 2) "On 9th March 1905 the pursuer was in the employment of the defenders as a workman at the discharging of iron ore from the main hatch of the steamship 'Palatyne' at the General Terminus, Glasgow." (Cond. 5) When engaged in this employment the pursuer "was struck on the right wrist by a piece of ore weighing about seven or eight pounds that fell from the ship's beam directly above him, and sustained injuries to his wrist, which necessitated him going to the Western Infirmary, where the wound was stitched. Pursuer will be unable to resume work for a considerable time to come." The pursuer further averred that the accident was due to the fault of a foreman in the employment of the defenders, and that the pursuer's wages averaged 30s. a week.

The action was raised within a week of the accident condescended on.

On 17th May the Sheriff-substitute (Boyd) closed the record and allowed a proof.

The pursuer appealed for jury trial.

In Single Bills the defenders moved that the case should be sent back to the Sheriff Court for proof.

Argued for the defenders;—The record here disclosed on the face of it a claim which could not reasonably entitle the pursuer to a verdict of anything like £40; therefore, in accordance with *Sharples* v. *Yuill & Company*,[1] jury trial should be refused and the action remitted to the Sheriff Court for proof.

Argued for the pursuer;—The pursuer's averments entitled him to have the case tried by a jury. Unless a pursuer's averments disclosed a case so trumpery that no jury, acting reasonably, would award anything like £40, jury trial would be allowed.[2] The pursuer's averments shewed a case of substantial injury.

LORD JUSTICE-CLERK.—I must say if there ever was a case in which the rule should be applied which has been laid down by the Lord President in *Sharples* v. *Yuill & Company*,[1] that a case must be remitted to the Sheriff for proof if it does not appear on the averments of the pursuer that a jury could reasonably give a sum of £40—this is that case. The averment here is that owing to an accident the pursuer was wounded on the wrist, that it was necessary to have the wound stitched, and that it will be some time before he is able to return to work. That is all that he is able to state, and it indicates no case of serious injury. In these circumstances it would be an injustice, not only to the defender but to the pursuer also, to send the case to a jury.

LORD KYLLACHY.—I am of opinion that this case should go back to the

[1] May 23, 1905, *supra*, p. 657.

[2] Dickie v. Scottish Co-Operative Wholesale Society, Limited, Nov. 17, 1903, 6 F. 112.

Sheriff. *Prima facie*, the pursuer's case as disclosed on record would not justify a verdict for anything like £40 damages. The case therefore, I think, falls within the exception stated by the Lord President in *Sharples* v. *Yuill & Company*.[1]

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LORD KINCAIRNEY.—I agree. The accident happened on 9th March, and it is averred on the record, which was not closed till 17th May, that the pursuer would not be able to resume work for a considerable time. I hesitate to call that a slight injury which disables a man for work for two or three months. But that averment is very vague, and the only specific statement indicates a slight injury for which, as averred, there is no probability that a jury would award £40.

LORD STORMONTH-DARLING concurred.

THE COURT refused the appeal, and remitted to the Sheriff-substitute to proceed with the proof allowed.

STRUTHERS SOUTAR & SCOTT, Solicitors—WHIGHAM & MACLEOD, S.S.C.—Agents.

No. 139.
June 9, 1905
Macdonald v. Mackintosh.

DUNCAN MACDONALD, Pursuer (Reclaimer).—*Watt, K.C.—Garson.*
JOHN MACKINTOSH, Defender (Respondent).—*M'Lennan, K.C.—Cullen.*

*Bankruptcy—Sequestration—Discharge of trustee and of bankrupt—Abandonment of asset by trustee and creditors.*—In March 1898 Macdonald, a butcher, granted a trust-deed for behoof of his creditors in favour of Mackintosh as trustee. In December 1899 the trust was superseded by the sequestration of Macdonald's estates under the Bankruptcy Acts. In April 1902 Macdonald was discharged, but not retrocessed. The trustee in the sequestration was also discharged.

In July 1904 Macdonald brought an action against Mackintosh for decree ordaining him to account for his intromissions as trustee under the trust for creditors and for payment to the pursuer of such balance as might be found to be due. The pursuer, who admittedly sued for his own behoof, averred that the defender, while trustee under the trust for creditors, had illegally purchased or appropriated the pursuer's business; that the defender had never accounted therefor to the trustee in the sequestration; that the defender had never been discharged as trustee; and that "the trustee and creditors in the sequestration abandoned any right they had to recover any assets of the pursuer's estates in the hands of the defender as trustee foresaid."

The Court (*aff.* judgment of Lord Dundas) *dismissed* the action, holding that there was no relevant averment of abandonment.

2D DIVISION. Lord Dundas.

ON 31st March 1898 Donald Macdonald, flesher, 52 Eastgate, Inverness, executed a trust-deed for behoof of his creditors in favour of John Mackintosh, sheep and cattle dealer, Glenholme, Crown Drive, Inverness, with a consultative committee of creditors.

On 22d December 1899 the trust was superseded by sequestration under the Bankruptcy Acts. David Munro, solicitor, Inverness, was appointed trustee in the sequestration.

On 18th April 1902 the trustee in the sequestration was discharged, and Macdonald, the bankrupt, was also discharged, but was

[1] *Supra*, p. 657.

No. 139. not retrocessed. A dividend of 1½d. in the £1 was paid in the sequestration; no dividend was paid under the trust for creditors.

June 9, 1905. Macdonald v. Mackintosh. In July 1904 Macdonald raised an action against Mackintosh, concluding (after certain declaratory conclusions) for decree ordaining the defender to produce a full account "of the whole intromissions had, or which must in law be held to have been had, by the defender," as trustee under the trust for the pursuer's creditors, and for decree ordaining the defender to make payment to the pursuer of the sum of £8000 or of such other sum as should appear to be due by the defender as the balance of his intromissions.

The pursuer averred;—(Cond. 4) At a meeting of the pursuer's creditors on 31st March 1898, when the defender accepted office as trustee, "it was arranged that the defender, as trustee foresaid, should carry on the business, and that the pursuer should be employed in the shop at the wages of £2 per week," and accordingly "the defender carried on the pursuer's business of flesher, with the assistance of the pursuer, from the date of the trust-deed until the latter's services were dispensed with by the defender on 6th May 1899 as after mentioned. . . ." (Cond. 6) "Notwithstanding that the said trust-deed was granted by the pursuer primarily for behoof of all his creditors and for his own behoof *quoad* any reversion, . . . the pursuer was, towards the end of April 1899, informed . . . that the committee of creditors appointed at the meeting on 31st March 1898 had disposed of his, the pursuer's business, to the defender, and had authorised him to take possession of the shop and business for his own behoof. . . . The defender paid nothing whatever for the goodwill of the business, which was a valuable asset of pursuer's estate. His alleged purchase or appropriation of pursuer's business was illegal and greatly to the prejudice of the pursuer and his creditors. . . ." (Cond. 7) "It is averred that the defender, while acting as trustee under the said trust-deed, in or about May 1899, illegally appropriated the pursuer's said business without giving any consideration therefor, and thereafter carried it on exclusively for his own behoof. . . ." (Cond. 8) "On 6th May 1899 the defender called at the shop, 52 Eastgate, Inverness, and dismissed the pursuer from the employment of the trust. . . . The defender there and then demanded and got delivery of the keys of the shop, and took possession of the shop and its contents and of the business. . . ." (Cond. 9) "The defender has, in breach of his duty as trustee foresaid, carried on the said business formed by the pursuer, for his own behoof exclusively, and has ever since illegally appropriated the profits made therefrom to his own uses and purposes, and not for behoof of the pursuer's creditors, or of the pursuer. . . ."

(Cond. 10) "Shortly after being ousted from his shop on 6th May 1899, the pursuer began to press for information regarding his estate and the liquidation of his affairs, but without any result. With a view, it is believed, to render the pursuer notour bankrupt, and thereby prevent proceedings at his instance to compel an accounting by the defender, an action was, at defender's instigation, raised in the Sheriff Small Debt Court, at Inverness, on 20th July 1899," at the instance of a creditor against the pursuer, which resulted in the defender being made notour bankrupt, and in the sequestration of his estates. The claims ranked for in the sequestration "were unvouched and not due by pursuer. In particular, the defender ranked for £4946, 3s. 4d. which was not due to him, and which was unvouched.

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The pursuer and the trustee on the sequestrated estate were both discharged" on 18th April 1902. "No discharge has ever been granted to the defender, as trustee under the trust-deed, either by the trustee in the sequestration or by the pursuer. Notwithstanding the existence of the sequestration, the defender, as trustee foresaid, with the consent or acquiescence of the said David Munro, as trustee on the pursuer's sequestrated estates, was left in possession of the said shop, stock, and fittings, and continued to carry on the said business, and was never called on to account for his intromissions in connection with the said business. The trustee and the creditors in the sequestration abandoned that asset, and left it to the pursuer to recover it if he cared to. Except to a very limited extent . . . the defender, as trustee foresaid, has not denuded himself of the trust-estate and effects. . . ." (Cond. 16) " . . . The pursuer's agents having, on 21st January 1903, written Mr Munro whether he, as trustee, had granted such a discharge to the defender as trustee under the trust-deed, received the reply that 'the matter in question was duly considered by the trustee although no discharge was granted to Mackintosh (defender), and Mackintosh supplied the trustee with the information necessary. If Mr Macdonald (the pursuer) has a claim against Mr Mackintosh he had better enforce it himself, as the trustee did not think it advisable to take any proceedings against Mackintosh.' It is averred that the trustee and creditors in the sequestration abandoned any right they had to recover any assets of the pursuer's estates in the hands of the defender as trustee foresaid."

The pursuer pleaded, *inter alia*;—(4) The defender, as trustee foresaid, having entered upon the possession and management of the trust-estate, is bound to account for his whole intromissions therewith: *Et separatim*, he is bound to account for the profits derived from the said business subsequent to 6th May 1899, while he, as an individual, was in charge thereof, and the price on its sale.

The defender averred that he had duly discharged all his duties as trustee to the best of his ability, and had fully accounted to the trustee in the sequestration; and he pleaded, *inter alia*;—(2) No relevant case. (8) The pursuer having acquiesced in the defender's being ranked as a creditor in his sequestration, and receiving a dividend upon his claim upon the footing that he had fully accounted for his intromissions as trustee under said trust-deed, is barred *personali exceptione* from insisting in the present action.

On 11th March 1905 the Lord Ordinary (Dundas) pronounced this interlocutor:—"Sustains the second plea in law for defender: Dismisses the action, and decerns: Finds the defender entitled to expenses against the pursuer; allows," &c. *

* "OPINION.—The pleadings in this case are of inordinate length and great complexity."—(His Lordship narrated the facts in the case which were not in dispute.) "The pursuer now alleges that many things were wrongfully and illegally done and left undone by the defender as trustee, and for these he seeks now to call him to account. Some of the charges made are very difficult to understand, although they are set out at great length. For example, throughout the record, and particularly in Conds. 6 and 7, there is alleged against the defender an illegal 'purchase or appropriation' of the pursuer's business. I cannot discover any relevant averment of a purchase of the business by the defender as an individual, and though the phrase 'appropriation' recurs frequently, its meaning, and the

No. 139. The pursuer reclaimed.[1]

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LORD KYLLACHY.—This case is not exactly within the letter of any previous decision. It is a case in which a bankrupt who has been discharged but not retrocessed makes a claim, several years after his discharge and the discharge of the trustee in his sequestration, not on behalf of his creditors but for his own behoof. In these circumstances we are not embarrassed by certain recent decisions, in particular the cases of *Whyte* v. *Murray*[2] and *Geddes* v. *Quistorp*.[3] All that these cases decided was that a bankrupt had a *prima facie* title to bring an action, leaving it to the Court to say whether intimation should be made to the creditors. Here the claim is by the pursuer, confessedly on his own behalf; and, recognising that, he quite frankly accepts the situation, and avers that the creditors have abandoned

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circumstances in which it is said to have taken place, are to me exceedingly obscure, even with such assistance as is afforded by a perusal of the defender's answers."—(His Lordship then adverted to certain other averments.) "Now, if the defender had obtained from the trustee in the sequestration a formal discharge of his whole intromissions with the estate of the bankrupt, it would, I apprehend, have been hardly possible for the pursuer now to maintain against him any of the allegations which he puts forward. Unfortunately for himself, the defender did not take steps to procure a formal discharge. It appears (Cond. 10) that he made some accounting to Mr Munro, though the pursuer avers that it was a grossly inadequate one. But it is to be observed that the defender was, or claimed to be, a large creditor of the pursuer, and that he was in fact ranked by the trustee in the sequestration for £4946, 3s. 4d., upon which he received his dividend of 1½d. per £. It is difficult to conceive that he could have been thus admitted to a ranking unless Mr Munro had been satisfied that he had duly accounted for all his intromissions with the estate; and indeed it appears from a letter, dated in January 1903, which the pursuer has incorporated (Cond. 16) as a part of his pleadings, that though no formal discharge was granted to the defender, he had supplied Mr Munro with 'the information necessary,' and the whole tone of the letter, so far as it is quoted by the pursuer, seems to shew that, in Mr Munro's view, there was and is no good claim against the defender in regard to his intromissions. Moreover, the pursuer, at and before the inception of the sequestration, was admittedly on the alert, and had (Cond. 10) been pressing for information with regard to his affairs. He now denies that the claim for which the defender was ranked was a just one (Cond. 10). Yet, so far as appears, he took no objection either to that ranking or to any other step in the sequestration. An appeal was open to him against the deliverances of the trustee under section 169 of the Bankruptcy Act, 1856. Nor is any satisfactory explanation forthcoming as to why the present action was not raised until July 1904. These considerations, in my opinion, raise a very adverse impression of the pursuer's case, but I do not find it necessary to decide whether or not they amount to an absolute bar to the present proceedings, for there is another ground upon which, as I think, the case is fatally irrelevant. The theory of the action is that the pursuer is to recover for himself assets belonging to the estate of which the defender was for a time trustee, and which was subsequently

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[1] *Cited at the hearing*:—Northern Heritable Securities Investment Co. v. Whyte, Nov. 21, 1888, 16 R. 100, aff. June 16, 1891, 18 R. (H. L.) 37; Geddes v. Quistorp, Dec. 21, 1899, 17 R. 278.

[2] 16 R. 95. [3] 17 R. 278.

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the claim to him. The question therefore comes to be whether the pursuer has relevantly averred a case of abandonment. I am of opinion that he has not. All that is averred is that the trustee has been discharged, that the bankrupt has been discharged, and that a certain number of years has elapsed without anything having been done. The Lord Ordinary has held that an averment of abandonment in general terms is not enough, and I agree with him.

That makes it unnecessary to consider another ground of defence, for which I must say that I think there is a great deal to be said, viz., that the pursuer's claim is excluded by the fact, which appears upon the proceedings, that in his sequestration a state of accounts was made up and adjudicated on by the trustee, with the result that the present defender was decided to be not a debtor but a creditor of the pursuer—a creditor to the amount of about £5000. That adjudication by the trustee was capable of being appealed to the Sheriff or to this Court, but no appeal was taken; and it therefore seems to me that the state of accounts must be taken to have been finally fixed between the parties. If an appeal had been taken, as it might have been, to this Court, and we had found that the defender was a creditor to the extent of about £5000, that I suppose would have been conclusive. Our judgment would have been *res judicata* both against the bankrupt and against any new trustee who might be appointed in the sequestration. And that being so, I see no reason why the result should be different when the trustee's adjudication was acquiesced in as it seems to have been. It is not, however, necessary to express a final opinion on this point, because I agree with the Lord Ordinary that the pursuer has not relevantly averred a case of abandonment.

LORD KINCAIRNEY.—The Lord Ordinary has dismissed the action on the ground that there is not a relevant averment of abandonment. I accept that view of the case, and I am not inclined to go in the least beyond it.

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sequestrated. But if such assets exist, and could be recovered, the benefit would *prima facie* enure to the creditors of the pursuer, who have only received a dividend of 1½d. in the £, and the appropriate method of recovery would seem to be by way of a revival of the sequestration. The pursuer was apparently conscious of this difficulty, and he has sought to avoid it by the bare averment (Cond. 16, see also Cond. 10) 'that the trustee and creditors in the sequestration abandoned any right they had to recover any assets of the pursuer's estates in the hands of the defender as trustee foresaid.' Now, that, in my opinion, is not a relevant or sufficient averment of abandonment. It would require to be stated that the existence of the alleged asset was brought home to the creditors, and dealt with at their meetings, and there and then disposed of in one way or another—*Northern Heritable Securities Investment Co., Limited*, v. *Whyte*, 16 R. 100, *per* Lord President Inglis, p. 103, affirmed 18 R. (H. L.) 37, *per* Lord Watson, p. 39. There must be a transaction with the trustee and creditors. Nothing of the sort is here alleged, nor are any minutes of meetings bearing upon the matter produced or said to be in existence. It is possible that the pursuer may have some right or claim capable of statement and enforcement against the defender; but, for the reasons indicated, I am of opinion that the case as presented by this summons and record is irrelevant. I shall therefore sustain the second plea in law for the defender, and dismiss the action with expenses."

No. 139. LORD STORMONTH-DARLING.—I agree with Lord Kyllachy.

June 9, 1905. Macdonald v. Mackintosh. LORD JUSTICE-CLERK.—My view is the same.

THE COURT adhered.

BALFOUR & MANSON, S.S.C.—THOMAS LIDDLE, S.S.C.—Agents.

No. 140. JAMES ROBERTSON, Pursuer (Respondent).—*Watt, K.C.—Mercer.*
S. HENDERSON & SONS, LIMITED, Defenders (Reclaimers).—*Shaw, K.C.—T. B. Morison.*

June 16, 1905. Robertson v. S. Henderson & Sons, Limited.

*Minor and Pupil—Lesion—Enorm Lesion—Compromise of Claims under Workmen's Compensation Act—Reduction on ground of Minority and Lesion—Inadequate Consideration—Effect of offer to reinstate workman in employment.*—A workman, nineteen years of age, who had his right hand permanently disabled by an accident in the course of his employment and would have been entitled to compensation under the Workmen's Compensation Act, entered, with consent of his father, his curator, into an agreement with his employers, H. & Sons, for compensation. The agreement was contained in the following letters:—(1) A letter by the law-agent for the minor and his curator to the employers' law-agent in the following terms: "I have got my clients to agree to settle on the lines you indicated to me, viz., £25 to the lad, and £5, 5s. of expenses." "I accept your assurance that while your clients cannot guarantee a permanent situation they will do all in their power to keep him in their employment." (2) Letter by the employers' law-agent in reply,—"I have your letter in which you state that your clients are prepared to accept £25 and five guineas of expenses in discharge of all claims against" H. & Sons, "which offer I now accept." "I shall send a copy of your letter to" H. & Sons, "and draw their attention specially to the latter part of the letter."

The workman was subsequently retained in the employment of H. & Sons for three years and six months, when he was dismissed.

The workman thereupon raised an action of reduction of the agreement and of a discharge following thereon on the ground of minority and lesion.

After a proof, the Lord Ordinary (Kincairney) *held* that, as the agreement imposed no legal obligation on the employer to give employment, the money payment of £25 was the only consideration for the discharge, and that the pursuer by discharging his claim for that sum had suffered enorm lesion; and therefore reduced the discharge.

The defenders having reclaimed, the Court *reversed* the judgment, *holding* (1) that the money payment was not the only consideration for the discharge which the Court must take into account in deciding the question of lesion; and (2) that the offer of employment was a determining factor in effecting the compromise, and, looking to the circumstances of the parties at the time, was likely to be of such advantage to the minor as to make the compromise reasonable and not liable to reduction on the ground of lesion.

1st DIVISION. Lord Kincairney. (ANTE, 6 F. 770.)

This was an action for reduction, on the ground of minority and lesion, of two letters constituting an agreement, and of a discharge following thereon, whereby an injured workman, who was a minor, discharged all claims competent to him against his employers in respect of his injuries.

It was raised in the following circumstances:—

The pursuer, James Robertson, was born on 10th December 1880. In 1899 he was employed in the biscuit-making works of the defenders, S. Henderson & Sons, Limited. In November 1899, while attending to a dough-breaking machine, in the course of his employment, his right hand was caught between the rollers and crushed.

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The result of this injury was that the hand was permanently disabled. Prior to the accident the pursuer had been earning a wage of 25s. per week, but in addition to this fixed sum there were payments for overtime, which were habitually earned to a greater or less extent, so that his average wage amounted to nearly 30s. per week. After the accident his employers offered to pay him 12s. 6d. per week as compensation, being half of his fixed wage of 25s., and they continued to make this weekly payment until he returned to their employment. No memorandum of this agreement was recorded.

By the month of February 1900 the pursuer's hand had so far healed that he applied to his employers to reinstate him in their employment. This they eventually agreed to do, but refused to pay him more than £1 per week to begin with. He accepted their terms and returned to his work early in the month of March 1900. Meanwhile negotiations for a compromise of the claims competent to him for his injury had been in progress, in which the pursuer, his father, and mother, and a law-agent, had all taken part on his behalf. In the course of the negotiations the law-agent who was acting for the pursuer, wrote on 24th February 1900, to the defenders:—"You might now kindly say definitely whether you will take him back, and if so, on what terms. If you really cannot take him back, then our claim for compensation will be regulated accordingly." And again, on 9th March 1900, he wrote to the defenders' law-agent:—"My client, the young fellow who has been injured, is very desirous to be taken back without further delay, and if your clients can take him back, and pay a sum representing a commuted compensation, I have no doubt we will be able to settle." The negotiations resulted in a compromise which was embodied in the two letters passing between the parties' agents, of which reduction was sought in this action. These were:—(1) A letter written by the pursuer's agent, Mr Charles Irvine, S.S.C., to the defenders' agent, Mr R. S. Rutherford, which was in these terms:—"23d March 1900. Robertson v. Henderson & Sons, Ltd. With reference to your call yesterday, I have now seen my clients, and have got them to agree to settle on the lines you indicated to me, viz., £25 to the lad, and £5, 5s. of expenses. If, therefore, you will kindly send me your cheque and a receipt, I will undertake to get the latter signed by the lad and his father. I accept your assurance that while your clients cannot guarantee a permanent situation, they will do all in their power to keep him in their employment." (2) The defenders' agents' reply was as follows:—"23d March 1900. Robertson v. Henderson & Sons, Ltd. I have your letter of 23d inst., in which you state that your clients are prepared to accept £25 and five guineas of expenses in discharge of all claims against Messrs Henderson & Sons, Ltd., which offer I now accept on behalf of Messrs Henderson & Sons, Ltd. I shall send you the discharge to-morrow to be signed by your client and his father. I shall send a copy of your letter to Messrs Henderson & Sons, Ltd., and draw their attention specially to the latter part of the letter."

Thereafter the discharge, which was also sought to be reduced, was executed, and was in the following terms:—"I, James Robertson, residing at ten Wardlaw Place, Gorgie Road, Edinburgh, with consent and concurrence of my father, Alexander Robertson, residing there, as my curator and administrator-at-law, do hereby acknowledge to have received now and formerly from Simon Henderson & Sons, Limited, Grove Biscuit Factory, Edinburgh, the sum of £38, 2s. 6d.,

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sterling, together with the further sum of £5, 5s. sterling in settlement of my agent's fee, making in all the sum of £43, 7s. 6d. sterling, in full payment and satisfaction of all claims at my instance against the said company in respect of injuries sustained by me, the said James Robertson, to my right hand in their factory on or about the 3d day of October 1899, and in particular of all claims for compensation competent to us against the said Simon Henderson & Sons, Limited, at common law, under the Employers Liability Act, 1880, and the Workmen's Compensation Act, 1897, all of which claims are, with the consent and concurrence of the said Alexander Robertson, hereby discharged: And I, the said Alexander Robertson, warrant the above discharge at all hands. In witness whereof," &c. This discharge was signed on March 29th and 30th by the pursuer, and by his father as his curator and administrator-in-law. The sum of £38, 2s. 6d. mentioned in the discharge, was made up of the £25 agreed to be paid, and £13, 2s. 6d. being the amount of the twenty-one weekly payments of 12s. 6d. already made to the pursuer.

When the pursuer returned to his employment he was engaged at first in unskilled light work about the biscuit factory. After a year of this occupation he was promoted to the responsible position of an ovensman, which required chiefly care and attention, and entailed little or no manual labour. He continued in that position until October 1903, when he was dismissed on the usual week's notice.

He then raised this action of reduction of the letter and discharge already quoted, and averred (Cond. 4) that "proposals were then made for a settlement of the compensation due to the pursuer by the defenders, and defenders agreed, as pursuer understood, to pay pursuer the sum of £25, and a sum of £5, 5s. of expenses, and to keep pursuer in their employment. He now ascertains that there was no such obligation undertaken by the defenders." In Cond. 5 he averred:—"Prior to the said pretended settlement the defender's manager stated to pursuer's father, referring to pursuer, that 'his work was there for him,' and that he would get back his old situation. The pursuer's father when he signed the said receipt and discharge was under the belief, induced by the defenders, that the defenders could not dismiss pursuer, and had agreed to keep him in their service so long as he wished to work there. But for that he would never have signed the said discharge. The pursuer has recently ascertained that the defenders repudiate any obligation on their part to keep him in their service, and apart from this the sum paid as compensation was a mere trifle, and totally inadequate compensation in respect of the serious loss sustained by the pursuer." Cond. 7 was as follows:—"The pursuer was at the date of signing said receipt and discharge a minor. He was born on 10th December 1880. The said pretended agreement and receipt and discharge were executed and granted to his great hurt and lesion. At their date he was entitled in perpetuity, or until commuted, in terms of the Workmen's Compensation Act, 1897, to such weekly compensation up to the half of his weekly wage prior to the accident as would bring his present earnings up to the amount of his former earnings. After his injury it would have been impossible for him to obtain employment in the open market at his former work. The crippled condition of his right hand has greatly restricted the classes of employment open to him, and such work as he could do is very difficult to obtain. He has endeavoured to obtain employment of any kind since the date of his dismissal, but without

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success, and it is believed and averred that since his injury it would have been impossible for him, and will continue to be impossible for him in the future, to earn in the open market more than 15s. per week. Since his dismissal by the defenders the pursuer has made numerous applications to find employment in his own trade, but has on each occasion been refused a situation on account of the injury to his hand." Cond. 8 was as follows:—"By the said pretended settlement and discharge the pursuer has suffered great loss and lesion. The sum paid in respect of it is grossly insufficient compensation for the loss of wages which the pursuer has suffered and would continue to suffer under employment at the rate of wages paid him by the defenders from the time of his resuming work after his injury until his dismissal. The said pretended agreement for settlement does not even stipulate for wages at any particular rate during the pursuer's re-employment. In view of the defenders' refusal to continue pursuer's employment, and to pay him the same rate of wages, his loss under the pretended settlement is greatly increased, and will amount to 10s. per week in perpetuity, or until and as commuted. On commutation the pursuer would have been entitled to a sum of at least £650."

The defenders' Answer 5 was as follows:—"Admitted that the defenders repudiate any obligation to keep the pursuer in their service, and explained that they never at any time gave him such an undertaking. *Quoad ultra* denied. Explained that while the defenders informed the pursuer's father that they could give him work, they expressly declined to give any undertaking, and this was made clear to the pursuer, his father, and their law-agent." And in answer 8 they explained and averred "that said discharge was signed by the pursuer and his father on their law-agent's advice on a full and fair disclosure of all the facts necessary to form a sound judgment on the question, and in point of fact the settlement was fair and reasonable in view of the circumstances thus existing."

The pursuer pleaded;—The said arrangement embodied in the letter of offer and acceptance, and the said pretended receipt and discharge having been made and executed by or on behalf of the pursuer while in minority, and to his great hurt, prejudice, and lesion, decree of reduction should be pronounced as concluded for.

The defenders pleaded;—(3) The documents challenged not having been executed to the lesion of the pursuer, the defenders ought to be assoilzied. (4) The defenders are entitled to absolvitor in respect (*a*) that the documents challenged concluded a fair and reasonable settlement of a doubtful claim at the pursuer's instance; (*b*) that said documents were acted upon as binding upon pursuer and defenders both prior and subsequent to the pursuer's minority; (*c*) that the pursuer is barred *personali exceptione* from now challenging them; and (*d*) that *restitutio in integrum* is now impossible.

The Lord Ordinary (Kincairney) after hearing parties on the relevancy, allowed a proof before answer, and on the defenders reclaiming, the First Division adhered (reported 6 F. 770).

Proof was thereafter led, from which it appeared that the offer to restore the pursuer to his employment was the main consideration that induced the pursuer and his advisers to agree to the compromise and that they did so in the expectation that the employment would be permanent. The sum to be paid down was arranged entirely by the law-agent, and the pursuer and his relatives took no part in that

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discussion, and appeared to have taken but little interest in what figure was arrived at. The pursuer stated that from the conversation he had with the defenders' manager, he understood the promise to be that as long as the factory stood they would find something for him to do. That he signed the discharge for £25 on the understanding that he was to get permanent employment, and that it was on that footing alone that he took it. He also stated that he thought that a permanent situation was of more value than money down. That he considered it important to get experience in a good factory. That an ovensman occupies a position of responsibility, and that he considered it of value to get a training as ovensman. The father's evidence was to the same effect, that what he had wanted for his son was to get his work back, that he understood the offer to be of a permanent situation; that now that his son had been dismissed he did not consider that the bargain he had made was suitable and advantageous for his son; that it was almost criminal to give £25 for the loss of the right hand. Both the father and son admitted in cross-examination that they did not suppose he would be kept on whether he did his work well or ill. The law-agent's evidence was to the effect that although he got no guarantee that his client's employment was to be permanent, he understood the offer to be that he would be kept on as long as there was work for him to do, though no doubt he was liable to be dismissed for misconduct. On that understanding, with the addition of the offer of £25, he advised his clients to settle, though he had not at that time made any calculation as to what the pursuer's compensation under the Workmen's Compensation Act would have amounted to.

As to the cause of dismissal, the evidence was directly contradictory, the defenders' evidence being to the effect that although the pursuer's work had been for some time satisfactory, he had latterly become careless and indifferent, and that it was only after repeated warnings that he had been dismissed. While the pursuer stated that he had all along done his best to give satisfaction, that he had never been found fault with in any way, and that his dismissal appeared to him quite unaccountable, and had taken him entirely by surprise.

As to the loss suffered by the pursuer, it appeared that prior to the accident his wages had been at the rate of 25s. per week, but that they were subject to diminution if he worked less than the regulation fifty-six hours per week, and to increase by overtime payments if he worked more. He had been acting as ovensman for some time, and while in that work, with overtime, his wages had averaged about 29s. 9d. per week, but three weeks before the accident he was transferred to the dough-kneading machine, where he worked shorter hours, and so could not earn so much. After the accident, when he had been back for a year in defenders' employment, he was advanced to the position of ovensman at a wage of 22s. per week, and at that work, with overtime, he had on an average earned about 25s. per week. The pursuer's evidence was to the effect that after his dismissal he found himself seriously handicapped in his efforts to find work. That he had made every endeavour to obtain employment in other biscuit factories, but without success, and that he had tried factories of other descriptions also, but equally unsuccessfully. That all the work he had been able to obtain had been through the influence of his father, who was a park-keeper in the employment of the corporation, and who had at first got him work in one of the

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parks at 12s. per week; while at present, also through his father, he was in temporary employment on one of the corporation golf courses at 18s. per week. An actuary, who gave evidence for the pursuer, stated that he had calculated the loss sustained by the pursuer on various bases. Assuming that in the future he could only earn 15s. per week, as compared with 25s. before the accident, then his loss was £502, 6s.; or, as compared with 29s. 9d. before the accident, it was £740, 18s. Assuming he could in the future earn 18s. per week, then his loss as compared with 25s. was £375, 9s. or, as compared with 29s. 9d., was £663, 9s.

On 25th November 1904 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds that the agreement formed by the letters, dated 23d March 1900, Nos. 17 and 13 of process, and the receipt and discharge granted by the pursuer and his father, dated 29th and 30th March 1900, No. 18 of process, were concluded and granted by the pursuer when he was a minor, and were to the pursuer's great hurt, prejudice, and lesion: Therefore sustains the plea in law for the pursuer; repels the pleas in law for the defenders, and reduces, decerns, and declares in terms of the conclusions of the summons: Finds the pursuer entitled to expenses," &c.*

* "OPINION.—The defenders are biscuit-makers carrying on business in Edinburgh. The pursuer was for some time in their service, engaged in work which necessitated the use of a machine called a dough-breaking machine, and on 2d November 1899, while he was working with this machine, his right hand was accidentally caught between its rollers and was very seriously injured. Two of his fingers had to be wholly or partially amputated, and he was incapacitated for working until 3d March 1900. During that period the defenders, without (they say) admitting liability, paid him compensation at the rate of 12s. 6d. per week, which was the half of his ordinary wage, although he occasionally earned more by extra work. In March 1900 the pursuer had partially recovered, and the defenders considerately took him back to their employment. At that time a settlement was effected by two letters, dated 23d March 1900, interchanged between the agents for the parties, and by a receipt and discharge granted by the pursuer in implement of the agreement expressed in the letters. The letters were to the effect that the defenders should pay, and the pursuer accept, £25, and £5, 5s. of expenses, for a discharge of the pursuer's claims. The letter by the pursuer's agent bore,—'I accept your assurance that although your clients cannot guarantee a permanent situation, they will do all in their power to keep him in their employment.' In his reply the defenders' agent wrote that he would draw the defenders' attention specially to this clause.

"These letters were the result of previous communings and correspondence. They do not seem to have been hasty. There is no ground for supposing that the pursuer was in any way hurried. Effect was given to them by a discharge, dated 29th and 30th March 1900, by which the pursuer accepted the sums received by him as being in full satisfaction of all claims at his instance against the defenders in respect of the injuries he had sustained.

"The sum of £25 is, in point of fact, not mentioned in the receipt, which bears that £43, 7s. 6d. was the amount paid. But I understand that the apparent discrepancy is accounted for by the fact that that sum includes not the £25 only, but also other sums which had been previously paid by the defenders, and that the settlement was really what the letters express—a full discharge of the pursuer's claims for a payment of £25.

"These are the letters and the discharge which the pursuer seeks by this action to reduce.

"After this settlement the pursuer resumed his place in the defenders'

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The defenders reclaimed, and argued;—There was nothing in the nature of concealment on the part of the defenders, or of rashness on the part of the pursuer in entering upon this compromise. On the contrary it was only effected after careful consideration by the pursuer and his father and mother, and with the advice of his law-agent, and its terms had been faithfully carried out by the defenders. The contract having been entered into in these circumstances with the advice and concurrence of the minor's curator and administrator-at-law, could only be set aside on the proof of enorm lesion.[1] Enorm lesion had not been made out. The Lord Ordinary was wrong in holding that the only consideration for the discharge here was the payment of £25. The whole weight of evidence was to the effect that the offer of the renewal of the minor's employment, and the opportunity thereby afforded to him of becoming a skilled workman,

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employment, and continued in it until 20th October 1903, when the defenders dismissed him. Why they did so does not very clearly appear. Up to the date of discharge they seem to have treated him extremely well. They made and make no charge against him, but say merely that he had become careless and that his work was unsatisfactory. They affirm that that was not occasioned by the injury to his hand; but I find it difficult to resist the impression that they were not unconnected.

"The pursuer avers that he believed that it was part of the bargain with the defenders that they should retain him in their employment, and that he would not have granted the discharge but for that belief; yet the pursuer does not now maintain either that the letters contain or imply such an obligation, or that the letters and discharge can be reduced on the ground of misrepresentation or error; nor does he say, in this action at least, that he can challenge his dismissal as a breach of agreement or as a wrongous dismissal; nor does he allege any fault of the defenders or make any claim of damages on account of fault. The action is founded on a totally different ground. The pursuer concedes or alleges that the defenders did not come under any obligation to receive him permanently in their service. Indeed, his case is that they did not, and is rested solely on the ground that at the date of the discharge he was a minor, having been born on 10th December 1880, and being therefore under twenty at the date of the agreement and discharge. That is the pursuer's only plea. On that account the pursuer's father became a party to the settlement, and consents to and concurs in the discharge as the curator and administrator-in-law of his son.

"The case was debated in the Procedure-roll, when a proof before further answer was allowed, and that judgment was affirmed in the Inner-House. The advising is important, and is reported as *Robertson* v. *Henderson & Sons, Limited*, 18th June 1904, 6 F. 770.

"A proof has now been taken under this interlocutor, and the effect of it has now to be determined. I regret its length, and fear that it travels into points which have not been raised or have been abandoned. It was not, however, easy wholly to exclude inquiry about the pursuer's alleged understanding that the defenders had agreed to employ him permanently, although it is not a point in the case.

"There is therefore no question in the case about misrepresentation or error in regard to the agreement or discharge; nor any question as to the defenders' fault. Nor is it alleged that the pursuer was dismissed in breach of agreement or wrongously. There is no question except on the ground of minority and lesion. It is, I take it, to be assumed that there would have been no ground of action had the pursuer been in majority.

"In granting the discharge the pursuer was acting with the advice of a

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[1] Bell's Comm. (M'Laren), i. 131.

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were really the determining consideration. Looking to the circumstances of the parties at the time the compromise was effected, it was a reasonable compromise, and was in the best interests of the minor, and therefore could not be set aside on the ground of lesion.[1] It was admitted that the only claim which the minor could have enforced here was his right to compensation under the Workmen's Compensation Act, and it was impossible for the Court to determine what sum an arbiter might have awarded under that Act. In point of fact, the pursuer here had been kept in the defenders' employment for three years, and had thereby become a fully trained ovensman, and was now capable of earning as large or larger wages than before the accident. In such circumstances an arbiter would be entitled to declare the compensation at an end.[2] The defenders had all through the negotiations that led to the compromise refused to give any guarantee of permanent employment, and that fact was fully before

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law-agent and of a curator. But I do not understand that the defenders plead or argue that the plea of minority and lesion is on that account not open to the pursuer; and no doubt the point is well settled in that way, although it may be that a more complete proof of lesion may be required where the minor has acted with a curator than where he has not—Ersk. i. 7, 34, 36; Bell's Prin. sec. 2100; Bell's Com. i. 130. There seems, therefore, no doubt that the plea applies, and that the question of lesion must be inquired into and is practically the only question in the case.

"I think it must be taken that the pursuer got no benefit by the settlement except the £25 paid to him. It is not contended that he acquired a valid claim to a permanent engagement, and it seems to me that he took no benefit by the clauses in the letters about his re-employment which have been quoted. These imposed no obligation on the defenders. I think parties were substantially agreed that the question is simply whether, in the whole circumstances, the payment of £25 can be held to be so wholly inadequate as to constitute the discharge granted in return for it enorm lesion in the sense of the plea.

"Now, whether there was lesion or not depends on the nature and value of the right discharged of which the pursuer was deprived. It is manifest that but for the Workmen's Compensation Act there would have been no lesion at all, for the argument is taken on the footing that no fault by the defenders has been proved, and that the pursuer had no claim to reparation or compensation either at common law or under the Employers Liability Act. But under the Workmen's Compensation Act there was a right to compensation without fault; and it has not been said that in the circumstances there was at the date of the discharge anything which could prevent the pursuer from claiming compensation under that Act.

"The right which the pursuer discharged was thus his right to claim the remedy provided by the Workmen's Compensation Act, that is to say, to claim it under arbitration. The nature of the claim is very peculiar; and Mr Bevan seems to be correct when he says that it is not compensation for pains and suffering, but rather maintenance during the period of disability—Bevan on Employers' Liability, 3d. ed., p. 388. He was at the time in receipt of 12s. 6d. per week. That had been paid since the accident, but, of course, might be subject to reduction under the provisions of the Act, particularly subsections 2, 11, 12, of section 3. Now, the pursuer has been deprived of his statutory right to make that claim. He gave it up for £25. The question is whether that claim was worth more and much more

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[1] Cooper v. Cooper's Trustees, Jan. 9, 1885, 12 R. 473.

[2] Freeland v. Macfarlane, Lang, & Co., March 20, 1900, 2 F. 832; Husband v. Campbell, July 15, 1903, 5 F. 1146.

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the pursuer and his advisers at the time. The defenders had acted most reasonably in keeping the pursuer in their employment for three years, and it was entirely owing to his own fault that he was eventually dismissed.

Argued for the pursuer;—The pursuer here had clearly suffered great lesion, for he had given up for totally inadequate considerations valuable rights under the Workmen's Compensation Act.[1] He had permanently lost the use of his right hand, and was for ever most seriously handicapped in his chances of obtaining employment. Under no circumstances could an arbiter for such an injury have failed to award substantial compensation, compensation to which the sum of £25 bore no reasonable proportion. The Lord Ordinary was right in holding that the offer of employment could not be taken into consideration. The offer was a mere promise, not enforceable in any way, and the pursuer might have been dismissed a week after the discharge was executed. Although he had been tempted by the offer of employment to enter into the compromise, it was clear, now that he had been dismissed, that he had received no adequate consideration for the discharge of his rights, and that the compromise was an

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than £25. £25 is just forty times 12s. 6d., and payment of that 12s. 6d. for forty weeks would amount to £25. On this point I may refer to the opinions of the Lord President and Lord Kinnear in advising this case under the former reclaiming note.

"The Lord President, in his opinion, says that 'it is to be presumed that an arbiter will fix the amount of compensation justly and intelligently, and to prevent an injured person from having the amount due to him so fixed appears to me to be to his lesion,' not necessarily to his enorm lesion, but still to his lesion. Lord Kinnear, in his opinion, says that while the Court cannot tell what compensation an arbiter 'would have awarded or might now award, it may be possible to find that a sum fixed by agreement is less than a reasonable arbiter could have awarded, although the precise sum to be given by such an arbiter cannot be ascertained.'

"While I am not entitled to say what sum an arbiter would award to the pursuer on full inquiry, and hardly entitled to speculate upon that subject, still I seem to be warranted in coming to the opinion that this sum of £25 is less than a reasonable arbiter would have awarded, or would award in this case.

"I found that opinion on the grave nature of the injury done to the pursuer's right hand; on its probable permanence; on his consequent incapacity to earn the same wage as he formerly could earn, and also on the provisions of the Workmen's Compensation Act, which, while leaving a wide discretion to the arbiter, seems to indicate a restoration to the original wage-earning power of the injured person as frequently a guide to the amount of the compensation to be awarded. It does seem to me that £25 was greatly under the pursuer's chances before the arbiter. I require to say as much as that to warrant the finding that the lesion which the pursuer has suffered may be called enorm, while I do not say more lest I should seem in any degree to dictate to the arbiter. The matter is one for the discretion of the statutory arbiter, if the pursuer's claim be brought before him, and it will be his duty to proceed according to his own judgment on the evidence which may be laid before him, irrespective of the impression which I have formed on less complete evidence.

"On the whole, I am of opinion, that the settlement was to the enorm lesion of the minor and falls to be reduced."

[1] Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), First Schedule, 1 (6), 2, 11, 12, 13.

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improvident one, and made to his great lesion. His dismissal was purely arbitrary, and not attributable in any way to his own fault.

LORD PRESIDENT.—This case has been well debated on both sides, but I have little doubt in my own mind that the conclusion which the Lord Ordinary has come to is wrong. I think his Lordship's interlocutor is vitiated by a misapprehension as to the contentions of the parties. His Lordship proceeded on the view that the only consideration given in the bargain struck between the pursuer and the defenders was the pecuniary one of the sum of £25, and says that parties were substantially agreed that the whole question in the case was whether £25 was a payment so inadequate as to amount to enorm lesion to the pursuer. There has been no such agreement as to the question in the pleadings before your Lordships, and the question so put does not, in my view, present a correct view of the bargain.

The action is one of reduction, and that on one ground only, minority and lesion. The minority is admitted, and the question is whether the lesion has been proved. Lesion, in the sense of the authorities, must not be trifling, but must be enorm, which means that the consideration which the minor got must be immoderately disproportionate to what might have been got.

I have not had much difficulty in making up my mind as to the true state of the facts. It is clear that the accident to the pursuer was serious, resulting in the practical loss of all the fingers of his right hand. But it is clear that when he got well and returned to the service of the defenders he was still capable of doing the work of an ovensman, a position demanding rather common sense, attention, and watchfulness, than manual skill or strength. At the same time I think it is indisputable that his chance of employment in the open market was impaired. After his return the pursuer remained in the employment of the defenders for three years, and was then dismissed. He now raises this action on the allegation that the bargain he entered into was one that gave him a consideration entirely disproportionate to that he could have got under the Workmen's Compensation Act. But, looking at the whole bargain, he got not merely £25, but an engagement on the part of the defenders, that, though they could not guarantee him a permanent situation, they would, so far as they could, give him employment, as in fact they did. I cannot think this employment and the chance of gaining experience can be disregarded in the consideration. It is clear that the point was considered by the pursuer, his father and mother, and law-agent, and I think that, at the time, they were well advised to prefer this arrangement to getting a larger sum of money. If this is the true state of the facts the case is at an end, as the pursuer has failed to shew any enorm lesion. I am therefore of opinion that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied.

LORD ADAM.—I am of the same opinion. The pursuer received his injury in November 1899, when nearly nineteen years of age, and was incapacitated for work till March 1900. During that period the defenders paid him 12s. 6d. per week—half his ordinary wages. In March 1900 the

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pursuer, after consultation with his parents and his legal adviser, entered into an agreement with the defenders to settle his claims.

By a letter, dated 23d March 1900, he offered to settle his claims for £25 and five guineas of expenses on the footing that the defenders would do all in their power to keep him in their employment. The letter, which was written by his agent, concluded thus: "I accept your assurance that, while your clients cannot guarantee a permanent situation, they will do all in their power to keep him in their employment."

On the same date the defenders' agent wrote accepting the offer, and stating that he would send a copy of the letter containing it to his clients, and "draw their attention especially to the latter part of the letter."

The sum agreed on was duly paid by the defenders, and a discharge taken of the pursuer's claims. This discharge the pursuer now seeks to set aside.

Now, the bargain between the parties is to be found in the letters above referred to, and the question is, "Was the bargain so entered into to the enorm lesion of the pursuer?"

The sole ground of reduction is minority and lesion. The minority here is admitted, and the only question therefore is was there enorm lesion to the pursuer in entering into this agreement. The point to be considered is not whether the bargain has turned out well for the pursuer, but whether at the date of the agreement it was a proper and reasonable one for him to make.

It seems to me that the fallacy in the Lord Ordinary's judgment is to be found where he says,—"I think it must be taken that the pursuer got no benefit by the settlement except the £25 paid to him. It is not contended that he acquired a valid claim to a permanent engagement, and it seems to me that he took no benefit by the clauses in the letters about his re-employment which have been quoted. These imposed no obligation on the defenders. I think parties were substantially agreed that the question is simply whether in the whole circumstances the payment of £25 can be held to be so wholly inadequate as to constitute the discharge granted in return for it enorm lesion in the sense of the plea."

If that were a correct statement of the question, I should have agreed with the Lord Ordinary in holding that the bargain was to the enorm lesion of the pursuer. I think, however, that the most valuable part of the consideration of that agreement was the promise by the defenders to do all they could to give the pursuer employment. This may not have been an obligation which could have been enforced by law, but none the less it was a valuable consideration for this lad, and it was acted on by the defenders for three years in all honesty and good faith, and might have been still in force but for the boy's negligence. I agree with your Lordship in thinking that this agreement, which was made with the boy's consent, was in the circumstances a most sensible and reasonable one to make.

LORD M'LAREN and LORD KINNEAR concurred.

THE COURT recalled the interlocutor reclaimed against, and assoilzied the defenders.

JOHN A. TWEEDIE, Solicitor—R. S. RUTHERFORD, Solicitor—Agents.

ROBERT BETT AND ANOTHER, Pursuers.—*Shaw, K.C.—W. Thomson.* THE DALMENY OIL COMPANY, LIMITED, Defenders.—*Orr, K.C.—R. S. Horne.*

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*Reparation—Negligence—Master and Servant—Statutory Duty—Common Employment—Coal Mines Regulation Act*, 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 49, *Rule* 21.—The Coal Mines Regulation Act, 1887, sec. 49, enacts,—"The following general rules shall be observed, so far as is reasonably practicable, in every mine. . . . Rule 21. The roof and sides of every travelling road and working place shall be made secure. . . ."

A miner who had been injured by the fall of shale from the roof of a roadway in a mine raised an action of damages at common law against his employers, the mineowners, who were a limited company, and obtained an issue, "Whether . . . the pursuer was injured through the fault of the defenders?" It was proved that about eight days before the accident there had been an extensive fall of shale from the roof at the place of the accident, and that nothing had been done prior to the accident to support the roof at this place. The jury found for the pursuer, and awarded damages.

The defenders sought to set aside the verdict on the ground (1) that there was no fault on the part of the defenders, as they were proved to have appointed a competent manager, and (2) that, if there was fault on the part of the manager it was the fault of a person in common employment with the pursuer.

*Held* (1) that there was fault on the part of the Company in not having the roof made secure as required by the statute, and (2) that there being a duty imposed by statute on the mineowners to have the roof made secure, the defence of common employment was not available to them.

*Wilson* v. *Merry & Cuninghame*, 6 Macph. (H. L.) 84, *commented on.*

1ST DIVISION.

ROBERT BETT, miner's drawer, with the consent of John Bett, his father, as his administrator-in-law, raised an action against the Dalmeny Oil Company, Limited, concluding for £500 as damages at common law for injuries received by him while in their employment.

On 13th April 1903, while the pursuer was engaged in pushing an empty hutch from a lye along one of the main level roads in Dalmeny Shale Mine, worked by the defenders, a quantity of shale became detached from the roof of the roadway and fell on him, and severely injured him.

For some time before the accident workmen had been employed in constructing a new underground passage in the mine, and in the course of that operation had removed part of a large pillar which had been left in working the mine on the stoop and room system. About eight days before the accident to the pursuer a large quantity of shale had fallen from the roof of the roadway at the place where the fall occurred by which the pursuer was injured, but nothing was done prior to the accident to make the roof secure.

The defenders employed skilled oversmen and firemen to see to the safety of the roads, and had supplied for use in the mine all the planks and equipment necessary for that purpose. On the morning of the accident the fireman, whose duty it was to attend to the road in question, reported that he had inspected that road among others and found it safe.

The defenders pleaded, *inter alia*;—(2) The said accident not having been caused by any fault upon the part of the defenders, they ought to be assoilzied. (3) *Separatim*, the said accident having

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occurred through the fault of fellow-workmen with the pursuer, the defenders are entitled to absolvitor.

The case was tried before the late Lord President (Lord Kinross) and a jury on the following issue:—"Whether, on or about 13th April 1903, in or near the Dalmeny Shale Mine, the pursuer was injured through the fault of the defenders, to his loss, injury, and damage?" The jury found for the pursuer, and assessed the damages at £250.

The facts proved, in addition to those set forth above, are sufficiently given in the opinion of Lord M'Laren.

The defenders moved for a rule on the pursuer to shew cause why the verdict should not be set aside as contrary to evidence, and a new trial granted. A rule was granted.

Argued for the pursuer;—The defenders were bound to take all reasonable precautions for the safety of their workmen, especially where, as in this case, the work was of a dangerous character.[1] The large fall from the roof, which happened about eight days before the accident, and at the same place, was a clear warning to the defenders that the roof was insecure and needed support, and their failure to render it secure constituted negligence at common law. Further, this failure was a breach by the defenders of the absolute duty imposed on them by statute—Coal Mines Regulation Act, 1887, sec. 49, rule 21.[2] The defence of common employment, relied on by the defenders, was not applicable where an injury had been caused to a servant by the breach of an unqualified duty imposed upon his master for his protection.[3] The decision in *Wilson* v. *Merry & Cuninghame*[4] did not shew that the defence of common employment is applicable to an action for breach of a statutory duty, and the *dicta* of Lord Chelmsford in that case[5] to that effect were *obiter* and unsupported by authority. On a rule, the legal defence of common employment stated by the defenders could not properly be considered, the sole question being whether the verdict was contrary to the evidence.

Argued for the defenders;—The defenders had employed competent and skilled persons to see to the safety of the roads in the pit, and had supplied adequate material for that purpose. If there was any error of judgment or negligence on the part of the oversman, the defenders were not in law answerable for it, he being a reputed skilful person. Even if it was held proved that sufficient propping had not been inserted on the "stoop" being removed, this was not a defect of system, for the defenders were entitled to rely on the judgment of their skilled managers to decide in each case when and to what extent the roof required support. If there had been fault, it was fault on the part of persons in common employment with the pursuer, and therefore was not fault for which the defenders were liable at common law. The statutory duty, under the Coal Mines Regulation

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[1] Patersons v. Wallace & Co., July 3 and 6, 1854, 1 Macq. 748, 17 D. (H. L.) 16, 26 Scot. Jur. 550.

[2] Quoted in rubric.

[3] Kelly v. Glebe Sugar Refinery Co., June 18, 1893, 20 R. 833; Groves v. Lord Wimborne, L. R., [1898], 2 Q. B. 402.

[4] Wilson v. Merry & Cuninghame, May 29, 1868, 6 Macph. (H. L.) 84, 40 Scot. Jur. 486.

[5] *Per* Lord Chelmsford in Wilson v. Merry & Cuninghame, 6 Macph. at pp. 93 and 94.

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Act, to keep the roof secure did not add to the civil responsibility of the defenders. The Act imposed a penalty for the breach of the regulations, but it did not have the effect of giving the pursuer a right of action which he would not have had apart from the Act, or take away from the defenders the defence of common employment open to them at common law. The decision in *Groves* v. *Lord Wimborne*[1] was not inconsistent with this principle, for the statutory duty which the defendant there neglected was a peremptory and unqualified direction, under the Factory Acts, to fence dangerous machinery, which left no room for the exercise of discretion on the part of the employers. In this case, on the other hand, the statutory rules were to be observed only "so far as is reasonably practicable," so that the question of what was necessary to keep the roof secure was left to the determination of the skilled managers. No objection or exception having been taken by the pursuer at the trial, it was not open to him now to object to the defenders putting forward the legal defence of common employment.[2]

At advising,—

LORD M'LAREN.—The question in this case is whether the verdict for the pursuer should be set aside as contrary to evidence. The action is founded on the common law liability of employers of labour to make such provision for the safety of the men in their employment as is reasonable and necessary. The pursuer is a miner in the employment of the Dalmeny Oil Company. For some days before the accident which resulted in injury to the pursuer the defenders' workmen were engaged in removing part of a large pillar which had been left in working out the mine by stoop and room. This was done as part of the construction of a new underground passage which was being driven through the mine. It is not disputed that this was a necessary operation, but the removal of an old pillar is a work calling for special care and attention, because it cannot be done without weakening the support of the roof, and, apart from that general consideration, the area of the exposed part of the roof is increased to the extent to which the pillar is taken away. About eight days before the accident in question, a large quantity of shale fell from the roof at this place. The witness, John Bett, says that the men were employed in clearing it, and that there were from 400 to 500 hutchfuls of stuff that came down and were taken away. He adds, "The fall that my son was injured by was at the same place, just above the plates. It broke right down. It was the same, but not so big a fall as the previous one; there was not such a mass of stuff."

The pursuer was knocked down by the second fall, and had his collar-bone fractured. He also sustained severe injuries on the head, from the effects of which he had not, at the time of the trial, fully recovered. According to the evidence of Sir Henry Littlejohn, he suffered from giddiness, and would most probably be weak for about a year.

It was not maintained that the damages awarded were excessive, if damages are due. But it was contended, on behalf of the defenders, that

[1] L. R. [1898], 2 Q. B. 402.
[2] M'Clelland v. Rodger & Co., Feb. 9, 1842, 4 D. 646.

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there was no personal fault on their part, and that they are not responsible for the fault, if any, of their manager or their oversman. On the evidence I have no doubt that there was faulty management; I mean that the fall would not have taken place if the roof of the mine had been properly supported while the operation of cutting away the pillars was in progress. Granting that the neglect to support the roof was in the beginning a mere error of judgment, the defenders were sufficiently warned by the extensive fall that took place eight days before the accident that the roof could not be relied on, and their neglect to do anything to support the roof after this warning, amounts, in my opinion, to inexcusable negligence. The weight of the engineering evidence is to this effect, if such evidence were needed; but I think this is a case where the facts point plainly to negligence; because by the Coal Mines Regulation Act, 1887 (sec. 49, rule 21), the mine-owner is charged with the duty of making the roof safe, and it cannot be said that this duty has been discharged when after the roof had begun to give way nothing whatever was done to support it.

It follows then that the verdict ought not to be disturbed unless the defenders are in a position to say that this is a case falling within the rule as to common employment. Now, the principle of that rule is that it is an implied term of the contract of service that the workman takes the risk of such misfortunes as may result from the negligence of persons who are engaged in the organisation of labour of which he is a member, and that the master is only responsible for the performance of such duties as he can reasonably be supposed to undertake in person—such as the provision of a competent staff of men, adequate material, a proper system, and effective supervision. But in the case under consideration, the duty of supporting the roof is a statutory duty, and stands on a different plane from those duties which a master undertakes as implied conditions of the contract of service. The duty is not merely to provide a competent underground manager, and to supply him with material for supporting the roof of the mine where necessary. The statutory duty of the mineowner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager.

I should have come to this conclusion independently of authority, but on a question of such importance, we should wish, if possible, to be guided by authority, and it is satisfactory to know that this is the view of the employer's responsibility that was taken by the Court of Appeal in England in the case of *Groves* v. *Lord Wimborne*.[1] The statutory duty there in question was that of providing fencing for dangerous machinery, and it was held that the defence of common employment was not applicable where injury was caused to a servant by the breach of that duty. Lord Justice A. L. Smith, in his opinion, first considers whether the statute can be founded on for any other purpose than that of rendering the employer liable to a penalty, and he comes to the conclusion that, as the statutory provision was passed, not in the interest of the public at large, but for the benefit of workers employed in particular industries, and as the penalty was not to be

[1] [1898], 2 Q. B. 402.

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applied for their benefit, it could not be intended that the provision which imposes a fine as punishment should take away the *prima facie* right of the workman to be compensated for injury occasioned by that neglect. On this point, the learned Judge quotes with approval the decision of this Court in *Kelly* v. *Glebe Sugar Company*.[1]

His Lordship then examines the authorities on the defence of common employment. He says, "In the present case, which is an action founded on the statute, there is no resort to negligence on the part of a fellow-servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of his statutory duty on to the shoulders of another person." The other Judges expressed themselves to the same effect.

With regard to the *dictum* of Lord Chelmsford in *Wilson* v. *Merry & Cuninghame*,[2] I agree with Lord Justice Smith that the judgment of the House of Lords only decided that the law as to the effect of common employment, where the fellow-servant was in a position of superintendence, was the same in Scotland as in England, and that Lord Chelmsford's opinion, on the question of statutory duty, not being necessary to the judgment of the House of Lords, is open to reconsideration.

On the whole matter, I am of opinion that the rule which we granted should now be discharged.

LORD ADAM and LORD KINNEAR concurred.

The LORD PRESIDENT was absent.

THE COURT discharged the rule.

D. HILL MURRAY, S.S.C.—W. & J. BURNESS, W.S.—Agents.

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Alexander Turnbull & Co., Limited, v. Cruickshank & Fairweather.

ALEXANDER TURNBULL & COMPANY, LIMITED, Pursuers (Respondents). —*M'Lennan, K.C.*—*Macmillan.*

CRUICKSHANK & FAIRWEATHER, Defenders (Reclaimers).—*Clyde, K.C.* —*Sandeman.*

*Agent and Principal—Negligence—Patent—Damages for loss of patent —Defence of invalidity of patent.*—In an action of damages against patent agents, the pursuer averred that the defenders had charge of two patents held by him, and that they had allowed them to lapse by failing to give him notice that certain payments were necessary to keep them in force.

The defenders pleaded that there was no loss, as the patents were invalid by reason of anticipation by prior patents specified. *Held* (*aff.* judgment of Lord Low) that the defence was irrelevant.

*Davidson* v. *Mackenzie*, 19 D. 226, and *Stiven* v. *Watson*, 1 R. 412, *commented on.*

1ST DIVISION. Lord Low.

THIS was an action at the instance of Alexander Turnbull & Company, Limited, Saint Mungo Works, Glasgow, assignees to British patents numbered 3447 and 3994 of the year 1893, against Cruikshank & Fairweather, chartered patent agents, Glasgow, concluding for certain sums of damages for loss sustained through the lapse of the patents.

[1] 20 R. 833.

[2] 6 Macph. (H. L.) 92.

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Patent No. 3447 of 1893 was for improvements in steam and low-water safety valves. Patent No. 3994 of the same year was for improvements in stop and other valves.

The pursuers averred that after these patents had been assigned to them, the charge of the patents was entrusted to the defenders; that a distinct branch of the charge of the patents was the duty of intimating from time to time to the pursuers when renewal fees, necessary to keep the patents in force, became payable by the pursuers to the Patent Office, so as to enable the pursuers to make payment of said fees in due time and thus prevent the patents from lapsing; and that for giving such intimation, and for correspondence following thereon, the defenders received a fee of £1, 1s. per annum for each patent. The pursuers further averred that in 1901 the defenders, in breach of the duty undertaken by them, failed to send to the pursuers any notice with reference to the renewal fees payable on said two patents, with the result that the period within which said patents might respectively have been kept in force by payment of the fees, expired without knowledge of the omission reaching the pursuers, and the benefit of the said two patents had consequently been entirely lost to the pursuers, under the provisions of section 17 of the Patents, &c. Act, 1883, and thereby they had sustained heavy loss.

The defenders denied that they were employed to perform the duty of intimating from time to time the dates when renewal fees fell due, or that they undertook the duty of giving such notices in the case of the pursuers' patents. They admitted that after 1900 they gave no notice regarding the renewal fees on said patents, and that the said patents had lapsed, but denied the pursuers' averments as to the loss thereby suffered.

The defenders averred (Ans. 6) that the patent No. 3994 of 1893 was of no value, being invalid. It related to improvements in stop valves for steam-engines, and the devices shewn in the specification relative to the said patent were well known prior to the date of the patent. They set forth in detail patent specifications, prior in date to the pursuers' patent, in which they alleged practically identical devices were contained. The defenders further averred that the patent No. 3447 of 1893 was also invalid, being a mere variation, involving no ingenuity, of a well known form of safety valve, and that the same or similar arrangements of safety valves had been published prior to the date of the pursuers' said patent in a number of British patents, which were set out in detail.

The pursuers in answer averred,—"The pursuers' monopoly, and the validity of their patents, were never previously challenged. The lapsed patents were perfectly valid, and are challenged for the first time in the defences."

The pursuers pleaded, *inter alia*;—(2) The defences are irrelevant.

The defenders pleaded, *inter alia*;—(4) The said letters-patent being invalid, the pursuers have sustained no loss through their lapse. (5) In any view, the sum sued for is excessive.

On 3d April 1905 the Lord Ordinary (Low) pronounced an interlocutor in these terms:—"Finds that the statements of the defenders in their answer to article 6 of the condescendence, that the patents number 3447 of 1893, and number 3994 of 1893 are invalid, are irrelevant, and ought not to be remitted to probation: Therefore to that extent sustains the second plea in law for the pursuers; repels the fourth plea in law for the defenders, and before further answer

allows the parties a proof of their respective averments in the closed record, and to each a conjunct probation," &c.*

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* "OPINION.—The pursuers carry on engineering works in Glasgow, and they are in right of certain patents. The defenders are patent-agents, and acted as agents for the pursuers in regard to patents which the latter held. The pursuers aver that it was part of the duty of the defenders to give notice to them from time to time when renewal fees necessary to keep patents in force became payable to the Patent Office, so that they might make payment of the fees in due time and prevent the patents from lapsing. That duty, the pursuers aver, the defenders failed to perform, in respect that in 1901 they omitted to give notice to the pursuers that fees for two of their patents had become due, in consequence of which the fees were not paid and the patents lapsed. In this action the pursuers claim damages from the defenders for the loss which they have sustained through the lapsing of the patents.

"In their defences the defenders allege that the two patents were invalid for want of novelty, and the question which was argued in the Procedure-roll was whether that is a relevant defence.

"There are two pleas in law, either of which that defence might be regarded as supporting. The one is that the 'letters-patent being invalid, the pursuers have sustained no loss through their lapse,' and the other that 'the sum sued for is excessive.'

"It was practically conceded that the defenders could not be allowed to prove the alleged invalidity of the patents merely for the purpose of reducing the damages, because it would be impossible to estimate the chances of the validity of the patents, if they had not lapsed, ever being challenged. The defenders, however, argued that if they could establish that the patents were invalid, the result would be to shew that the pursuers had not sustained any loss of which the law could take cognisance, through the patents being allowed to lapse, because no one could lawfully make profit out of a patent for an invention which was not entitled to protection.

"I am of opinion that that argument cannot be sustained. It is true that, although letters-patent are not granted as a matter of course, they are always granted at the risk of the patentee, and are liable to be set aside if the requirements of the law have not been complied with. But my understanding of the law is that when letters-patent have been duly sealed and registered, the patentee is entitled to use the patent unless and until it is found to be invalid in an appropriate action. Now, so far as I know, there are only two ways in which the validity of a patent can be challenged. In the first place, the challenge may be made by way of defence to an action of infringement. But in that case, even if the patent is found to be invalid, it is not reduced, but it is still open to the patentee, if the circumstances permit, to cure the defect which has been found to invalidate the patent by amending the specification. The other mode of challenge is by way of reduction of the letters-patent. Unless, however, the pursuer in such an action alleges that the patent was obtained by fraud, or that he was the true inventor, or that he had manufactured or sold the patented article before the date of the patent, he can only sue with the concurrence, on just cause shewn, of the Lord Advocate.

"The way, therefore, in which the defenders in this case seek to have the letters-patent found to be invalid is a novelty. They are in substance seeking to have the letters-patent reduced by way of exception, and without the concurrence of the Lord Advocate. I do not think that that is competent.

"But however that may be, I do not think that the result of the defenders' establishing that the patent was invalid on such grounds as they allege would be that this action would fall to be thrown out. If it had been

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The defenders reclaimed, and argued;—The averments as to the invalidity of the patents were relevant, as shewing that the pursuers had suffered no loss in consequence of the lapse of the patents. The objections to the validity of the patent were pleadable by the defenders as by any member of the public. A patent right was always open to challenge.[1] An agent defending himself against a claim of damages for an omission was entitled to plead all defences open to him, and it was no bar to say that no one else would have stated similar pleas.[2] It was sought to make the defenders liable for the value of patents alleged to have been lost by their default, and in these circumstances it was right and necessary that the defenders should be permitted to lead evidence as to the value of the patents, which was the measure of the amount of damages. They were entitled to scrutinise whether the patents were good or bad in order to ascertain what the loss of the pursuers had been. If the patents were shewn to be bad, then there had been no loss to the pursuers, and therefore no damages were due. Apart from the invalidity of the patents, their value as pieces of property must be ascertained. In order to this, there must be construction of the specifications; inquiry must be made as to what the patents covered; and the construction of the specifications necessarily opened up the whole question of the value of the patents. In *Davidson* v. *Mackenzie*[3] and *Stiven* v. *Watson*[4] the question was not as to the value of pieces of property—for a step in diligence, like an inhibition, was not a piece of property. But these patents were incorporeal rights—pieces of property—the inherent value and qualities of which could be ascertained.

Argued for the respondents;—The defence based on the invalidity of the patents was irrelevant, whether put forward to exclude the action or in mitigation of the damages. The patents, at the time of the defenders' breach of duty, were good patents, for nobody had challenged them. Even assuming that there were defects in the patents, the patents remained valid and served their purpose until somebody successfully challenged them,[5] and it was entirely hypothetical whether anyone would have challenged them. The defence in question could

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averred that the pursuers had obtained or used the letters-patent fraudulently, the case might have been different. But nothing of that sort is suggested. All that is said is that if a number of prior specifications are examined, it will be found that the invention did not possess that novelty which entitled it to protection. Assuming that to be true, I cannot assent to the conclusion for which the defenders contend, that during all the years in which the pursuers have used the patents they must be regarded as having acted dishonestly. Although the Crown does not guarantee the validity of letters-patent, the very object of granting them is that they may be used, and the patentee is, in my judgment, entitled to use them unless and until they are found to be invalid in one or other of the ways recognised by the statutes.

"I am therefore of opinion the defence, in so far as it is rested upon the alleged invalidity of the patents, is not relevant."

[1] Webster v. De Tastet, 1797, 7 T. R. 157.

[2] Story on Agency, section 222; Davidson v. Mackenzie, Dec. 20, 1856, 19 D. 226, *per* Lord Deas, at p. 254, 29 Scot. Jur. 113.

[3] 19 D. 226.

[4] Jan. 27, 1874, 1 R. 412.

[5] Halsey v. Brotherhood, 1880, L. R., 15 Ch. Div. 514, 1881, L. R., 19 Ch. Div. 386.

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exclude the action only if it was shewn that, standing the patents, no gain could have accrued to the pursuers therefrom. It was part of the duty of the defenders, as patent-agents for the pursuers, to protect the validity of the patents against challenge, and the defence stated was contrary to the fiduciary duty of the defenders. Further, the defenders had no title under the statute to impugn the patents.[1] The principle applicable was that a person who had failed to perform a duty could not qualify his own act and escape liability for his non-performance by shewing that loss might possibly have resulted even if he had performed his duty; he must shew that loss would have been certain.[2] Clearly in this case there was, even on the assumption that the patents were open to challenge, no certainty of loss to the pursuers if the defenders had done their duty. In estimating the amount of damages the patents must receive a fair construction on the footing that they were valid, as in fact they were valid at the time of the defenders' default—for no one had challenged their validity.

At advising,—

LORD PRESIDENT.—This reclaiming note raises some puzzling questions, easier to propound than to answer. The action is at the instance of a limited company which held letters-patent for an invention, against a firm of patent-agents, for damages on the ground of negligence. The allegation is that the defenders, having undertaken to do certain things for hire, and amongst others, to keep the pursuers from time to time informed of the dates on which certain payments which, under the regulations of the Patent Office, are necessary in order to keep a patent in force, fell to be made, nevertheless neglected to do so, with the result that the patent lapsed and is no longer of any avail.

There are, of course, denials as to damage that has thereby ensued, and parties are agreed that on this point inquiry is necessary. But a matter of interest has arisen on a special averment of the defenders contained in the answer to article 6 of the condescendence. Their averment is as follows:—They deny the statement that the pursuers have suffered loss and damage, and then proceed to table a large number of specifications prior in date to the pursuers' patent, with the object of shewing that the pursuers' patent was of no value, as it was invalid by anticipation. The meaning which they attach to this is *prima facie* disclosed by their fourth plea in law, which is,—"The said letters-patent being invalid, the pursuers have sustained no loss through their lapse." The Lord Ordinary in dealing with that plea pronounced the interlocutor now under review, which is as follows:—"Finds that the statements of the defenders in their answer to article 6 of the condescendence, that the patents . . . are invalid, are irrelevant, and ought not to be remitted to probation: Therefore to that

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[1] Patents Designs and Trade-Marks Act, 1883 (46 and 47 Vict. cap. 57), sec. 26 (4).

[2] Davis v. Garrett, 1830, 6 Bing. 716, *per* Tindal, C. J.; Lilley v. Doubleday, 1881, L. R., 7 Q. B. D. 510; Bell's Comm. (7th ed.), I. p. 531; Davidson v. Mackenzie, Dec. 20, 1856, 19 D. 226, 29 Scot. Jur. 113; Stiven v. Watson, Jan. 27, 1874, 1 R. 412.

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extent sustains the second plea in law for the pursuers; repels the fourth plea in law for the defenders, and before further answer allows the parties a proof." We have to determine whether that interlocutor is right.

It is clear from the state of the pleadings, and from certain statements in the Lord Ordinary's note, that the discussion before his Lordship was confined to one, and that the extreme point, that proof should be allowed to shew that the patent was bad, and that, in consequence, no damages at all were due. But before your Lordships the discussion has taken an ampler form, to which I shall revert presently, but the first point was not given up. The first question for us is whether the Lord Ordinary was right in pronouncing the interlocutor he has done upon the plea urged in what I call the extreme sense. I am of opinion that he was. The subject is not free from difficulty, but it has already been under the consideration of the Court. Two authorities were quoted to us, which, in my opinion, are indistinguishable from the present case. I refer to the cases of *Davidson* v. *Mackenzie*[1] and *Stiven* v. *Watson*.[2] *Davidson's*[1] was a case in which a person, who had had an inhibition executed, by means of which he sought to secure a preference over a debtor's estate, brought an action against the Keeper of the Register of Inhibitions, who, by neglecting to record it, had prevented the inhibition from receiving any effect at all. I think your Lordships will see that this is extraordinarily analogous to the present case on the point I am now dealing with. The action of the Keeper destroyed the life, or, more accurately, prevented the birth, of the inhibition, just as here the action of the defenders destroyed the life of the patent. Accordingly, in so far as the action of the defenders here cut short the life of the patent, it seems to me that there is a perfect analogy between that and *Davidson's* case.[1] The defence proponed by the defender in *Davidson's* case[1] was, that even if he had duly recorded the inhibition it would have been of no value, because he was prepared to shew that the inhibition was bad before he got it to record. Here the defenders propose to shew the patent was bad, and therefore worthless. I am aware that in the case of *Davidson*[1] there was an inquiry, owing to the view taken by the Lord Ordinary, and that therefore there was a double ground of judgment. However, the opinions of the Lord President and Lords Curriehill and Ivory clearly shew that they held that this was not a relevant defence in the mouth of the Keeper of the Register. I think that the bottom of the judgment was this, that after all the inhibition might have served its purpose, even although the defects were there, because it was impossible to say whether they would have been pleaded or not. I am fortified in thinking that the true ground of judgment, because it is clearly brought out in the case of *Stiven*.[2] This was a case where a person had a right to have certain yarn delivered to him, and being afraid that the yarn might not be delivered to him, he was to get from the persons who were bound to deliver it a certain quantity of tow. It was necessary that the tow should be held in security by a third person, to whom it was delivered. This person neglected to intimate the delivery-order, which had the effect that the property did not pass. The result was that when the bankruptcy ensued the

[1] 19 D. 226. [2] 1 R. 412.

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security was lost. The reply of the third person to an action of damages was,—"You cannot get damages from me, because even if I had duly completed the efficacy of the delivery-order by giving intimation to the warehouse, it would have been no use, since your security in my hands would have been reducible under the Bankruptcy Acts." The *ratio decidendi* is shortly put by Lord Neaves,—"The intention was that Watson should become the agent or mandatory of Stiven. That relation once constituted, a duty arose, and Watson was liable in damages if he failed to perform it, which it is clear that he did. We are now asked on that footing to hold that the agent or servant might turn round and say,—'It would have done you no good if I had performed my duty.' I should have great difficulty in sustaining that defence. It is not a plea to be favoured, and I doubt whether it is relevant, unless, at least, it is demonstrated that the performance of the duty could under no circumstances have been of use to the person for whose benefit it was undertaken." The Lord Justice-Clerk says,—"A somewhat novel plea is urged to the effect that even if the defender had intimated the order, Stiven would have been none the better, as he could not have made use of the security, because it was granted within sixty days of bankruptcy, and might therefore have been set aside by the trustee on Annan's estate. I have no doubt it was a security, and perhaps it might have been challenged with success. But the defender to make his plea plausible must be able to say that it would have been reduced. But how can we tell? The effect of the possession of this tow by the creditor might have been the delivery of the overdue yarns, in which case the other creditors would have had nothing to say." I think these two authorities really settle the matter upon the first point, and therefore, upon the case argued to the Lord Ordinary, I have come to the conclusion, while admitting that it is a difficult case, still without hesitation, that the Lord Ordinary is right.

But when the case came here the argument assumed a wider range. Mr Sandeman saw he might well urge what he wanted in the sense of what I may call mitigation of damages. His argument was this:—"What you have not got through my default is a patent, and I am liable for the necessary results of that. But the value of a good patent and a bad patent is different; and, therefore, just as if you had lost a horse, I should be entitled to prove that he was a bad horse to mitigate the damages, so here I am entitled to prove whether it is a good or a bad patent." This sounds plausible and was well put by Mr Sandeman; but if pressed it is found, I think, to be really the same point over again, because the material point is not the validity or invalidity of the patent, but the chance of someone attacking it. It is not a true analogy with the horse. The difference lies in the nature of the inquiries to shew the value of the horse and the patent. It is clear from the cases I have quoted you could not have excused yourself for the loss of the horse by saying:—"If I had delivered the horse it would have done you no good, because there was a flood in the stable that would have drowned the horse next day." That is the same class of objection as is made here. Accordingly, I think, you really have the discussion, though in somewhat astute form, of the old plea over again.

But Mr Clyde started another argument even more puzzling. He said he wanted to prove the validity or invalidity of the patent for another

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reason. His argument was this: "*Esto* I cannot in the proper sense of the word go into the invalidity of your patent. But you are going to sue me for damages. How are you going to fix the value of your patent? You cannot fix it as you do the value of wheat by taking the market value at the time. You can only fix it by finding out what you would have made from it if you had had it. You will begin your inquiry by saying:—'If I had had my patent I should have sold so many valves under it. Not having my patent I cannot sell so many, because other people are now making them. Before they would have been struck at under my patent, and I would have made the valves myself or else obtained a royalty.' Clearly the beginning of the inquiry is to shew what the patent will cover. But," says Mr Clyde, "how am I to find out what the patent will cover unless I am entitled to go into the question of prior specifications, and prove the state of prior knowledge, in order to shew what is the true meaning and construction of the patent." That is ingenious and plausible, but I think there is a way in which it may be solved. In the first place, it might be solved narrowly by saying that there is nothing in the Lord Ordinary's interlocutor which prevents Mr Clyde doing what he wishes to do, because the interlocutor is merely that the averments that the patents are invalid are irrelevant and should not be remitted to probation. That would be one way out of the difficulty, but I think it would be a very unfair way to the Lord Ordinary after there has been so much discussion. In the next place, it is quite obvious that the construction of the patents must in one sense be an open question at the proof. Suppose that Mr Macmillan in leading his proof was simply to put in his clients' books and show the turn-over, it is obvious that Mr Clyde would say:—"I want to see the items, because, for all I know, you may be putting in sales not of valves, but of pistons or anything else, and clearly you cannot recover upon these." To come to a less extreme case, if the patent is one for a particular form of valve, say for a needle valve, it is obvious that damages could not be recovered for diminution in the sales of mushroom valves. So in that sense the construction of the patents must be open to proof.

But the construction of the patents must be merely the construction of documents. I am aware it is often said you must construe a patent in what may be called a wider or narrower sense, according to what you may find in prior specifications, or in books, or in view of things that have been formerly used or sold. I do not think that is truly a rule of construction, but that it represents the exigencies of counsel in a case where a patent is being tested. I hold that though the construction is open, the Lord Ordinary and counsel must make the best of it on the documents as they are. I am quite aware this will entail entering into a difficult subject of inquiry. But there are many difficulties in the case arising out of questions of a problematical character—for instance, whether there was a good chance of the invention being superseded by something else. All that is relevant, and I am only pointing out that an inquiry must always be difficult when its domain is in the region not of what is or what was, but of what might have been. But this is the defenders' fault. If they had performed their duty, and had kept the patent alive, we should have had none of these troublesome inquiries to make.

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I think the determination of the case should be that we should adhere to the Lord Ordinary's interlocutor, and it would be quite improper in an interlocutor to say anything else. But I think he will consider these further remarks if they seem just to him; and although on the question of construction he will at the proof be entire master of the case, he will give effect to them when the inquiry is taken.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT adhered.

MARTIN & M'GLASHAN, S.S.C.—R. H. MILLER & Co., S.S.C.—Agents.

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Blyth's Trustees v. Milne.

EDWARD LAWRENCE IRELAND BLYTH AND OTHERS (E. L. I. Blyth's Trustees), First Parties.—*Blackburn.*
MRS EDITH LOUISA BLYTH OR MILNE AND ANOTHER, Second Parties.—*Clyde, K.C.—Macmillan.*
MISS OLIVE GWENDOLINE MILNE AND OTHERS, Third Parties.—*Blackburn.*

*Fee and Liferent—Company—Bonus paid out of reserve fund—Simultaneous issue of new capital equal in amount to the bonus.*—When a testator directs or permits part of his estate to remain as shares or stocks in a company which has the power either to distribute its profits as dividends or convert them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested through the testator in the shares, and consequently what is paid by the company as dividend goes to the liferenter, and what is paid by the company to the shareholders as capital or appropriated as an increase to the capital stock of the concern ensures to the benefit of all who are interested in the capital.

The directors of a limited company, who had power to divide as dividend part of its reserve fund (accumulated from undivided profits), resolved to divide a portion of its reserve fund among the shareholders in the shape of a bonus of 50 per cent on the amount paid up, and at the same time to increase the capital of the company by issuing, concurrently with the payment of the bonus, preference shares of an amount equal in value to the bonus. A circular was sent to each shareholder intimating the sum to which he was entitled as bonus and the number of preference shares he was entitled to, and enclosing an application form for the new shares. Subsequently warrants for the bonus dividend were sent to the shareholders payable on the day on which payment of the new shares was due.

The trustees of a deceased shareholder, who were directed by the trust-deed to hold certain shares in the company for one person in liferent and for others in fee, took up their quota of the new shares, and applied the bonus in payment thereof.

In a question between the liferenter and fiars of the original shares, *held* that the operation was a payment of dividend, and not a conversion of profits into capital, and that the liferenter was entitled to have the bonus dividend paid to her.

1ST DIVISION.

EDWARD LAWRENCE IRELAND BLYTH, C.E., who died on 22d November 1902, left a trust-disposition and settlement, dated 24th September 1902, whereby he directed his trustees to set apart out of the residue of his estate certain shares, including certain shares in the North British Rubber Company, Limited, and to hold these

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shares and pay the free income of them for the liferent use allenarly of his daughter, Mrs Edith Louisa Blyth or Milne, and pay the free income thereof to her as an alimentary provision, and to hold the capital of the shares for behoof of her daughter, Olive Gwendoline Milne, in a certain event, and in another event for behoof of his residuary legatees.

The articles of association of the North British Rubber Company, Limited, provided as follows:—(Art. 112) "The directors may, before paying or recommending any dividend, set aside out of the profits of the Company (but subject to the sanction of the Company in general meeting) such sum as they shall think proper as a reserve or sinking fund for equalisation of dividends and contingencies, and the directors shall have power to apply the said sum, at their discretion, to all or any of the said purposes, or to such other purposes as they may deem necessary." (Art. 113) "The directors may invest the sum so set apart as a reserve or sinking fund in such securities and investments as they may see fit, and may vary such securities and investments and dispose of all or any part thereof for the benefit of the Company. They may from time to time divide such reserve fund among the ordinary shareholders rateably according to the amount paid up on their shares."

A special case was presented by the trustees acting under the testator's settlement, first parties; Mrs Edith Louisa Blyth or Milne and her husband, Charles Milne, for his interest, second parties; and Olive Gwendoline Milne and others, residuary legatees under the settlement, third parties.

The case set forth:—"4. On 6th February 1904 the directors of the North British Rubber Company issued a circular letter to the shareholders in the Company* intimating their intention of distri-

* The circular letter was in these terms:—"Your directors find that there is at the credit of reserve fund an amount sufficient to permit them to distribute amongst the ordinary shareholders, in terms of the powers contained in the articles of association, a bonus of 50 per cent to each shareholder on the amount of the shares held by him. They therefore propose that such bonus should be distributed, but as the Company's business has in recent years greatly increased, and as further plant will have to be laid down," &c., "it will be necessary to raise further capital. The directors propose that the capital of the Company should be increased by the creation of 20,000 second preference shares of £12, 10s. each, and that debenture stock for £400,000 should be sanctioned. It is, however, necessary at present to issue only one-half of each class, viz., 10,000 of the second preference shares, and £200,000 of the debenture stock.

"The capital represented by the intended present issue of second preference shares will be £125,000, and equals the total of the bonus of 50 per cent on the ordinary capital. The bonus payable to each shareholder will therefore enable him to meet the price of the preference shares to be offered to him. It is proposed to ask the shareholders to apply for their *pro rata* proportion of these second preference shares simultaneously with the payment of the bonus.

"These shares will be of £12, 10s. each. . . . They will be issued with £12, 10s. each, or the full amount thereof, payable concurrently with the payment of the bonus, and will therefore be at once fully paid if the shareholders accept the same and apply the amount of the bonus in payment for the shares. . . . The proposed issue would allow of four second preference shares of £12, 10s. each being allotted in respect of every 'A' ordinary share, and one such second preference share of £12, 10s. for every

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buting among the shareholders a bonus of 50 per cent out of the reserve fund of the Company, and at the same time of increasing the capital of the Company by issuing second preference shares of an amount equal in value to the bonus to be distributed among the shareholders. A special resolution * was passed by the Company on 2d March 1904 approving of this proposal, and on 6th April 1904 the directors issued another circular letter † intimating that they intended to distribute the bonus among the shareholders, but that any shareholder who might apply for an allotment of the new shares in lieu of the bonus would be entitled to a number of shares equivalent in value to the bonus to which he was entitled. The first parties filled up and returned to the Company on 11th April 1904 an application for new shares, and on 13th May 1904 received a notice of dividend, with warrant annexed, for a bonus of £550 appli-

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'B' ordinary share. Your directors propose, if the resolutions are passed, that the bonus dividend and the call of £12, 10s. for each new second preference share be made payable on the 15th day of May 1904, the members registered in the Company's books on the 1st day of May 1904 being treated as those entitled to such dividend and to the allotment of new shares. Every holder of ordinary shares in the Company on the 1st day of May 1904 would consequently receive four new second preference shares of £12, 10s. each in respect of every 'A' ordinary share he then holds, and also one new second preference share of £12, 10s. for each 'B' ordinary share he then holds. . . ."

* The special resolution was, *inter alia*, as follows:—"That the capital of the company be increased by the creation of 20,000 shares of £12, 10s. each, to be called second preference shares. . . .

"That the board shall issue said second preference shares at such time or times, to such persons, and on such terms and conditions, as the board may think expedient."

† Circular letter, dated 6th April 1904:—"The creation of 20,000 preference shares of £12, 10s. each has now been sanctioned.

"The directors have resolved to distribute the bonus of 50 per cent from the reserve fund to the ordinary shareholders of the Company, as intimated in the circular of the 6th of February last.

"In respect of your present holding of.....'A' ordinary shares, and.....'B' ordinary shares in the Company, you are entitled to a bonus of £....., and a warrant for this will be posted to you on the 13th May next.

"The directors are prepared to accept applications for the 10,000 second preference shares now being issued, and you are entitled to an allotment of .....shares.

"Be good enough to fill up, sign, and return the application form enclosed herewith.

"Payment for the second preference shares will be due on the 15th May 1904, when the warrants for the bonus dividend will also be payable.

"The application form must be returned to us completed by 2d May next. Any shareholder failing to do so by that date will be held to have forfeited his right to any allotment of the second preference shares."

With this circular letter was enclosed a "Form of Application for Second Preference Shares" addressed to the directors of the Company in these terms:—"In reply to your circular of 6th April 1904, I beg to apply for .....of the Second Preference Shares of your Company, and I request you to allot me that number of shares, and I hereby agree to accept the same, and to pay the price of £12, 10s. per share on the 15th day of May 1904," &c.

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cable to the shares held by them for the said Mrs Edith Louisa Blyth or Milne, one of the second parties, in liferent, and an allotment letter containing a request to pay a sum of £550 to the Company on 15th May 1904 in respect of shares allotted. This payment was duly made by the first parties, and shares were allotted to them accordingly."

The case further stated:—"6. During the life of the testator a reserve fund had been accumulated out of the profits of the Company amounting to £154,320, but between the date of his death and the date of the issue of the above letter no addition had been made thereto. In order to pay the bonus of 50 per cent the directors required to appropriate a sum of £125,000 out of the reserve fund."

The questions of law for the opinion of the Court were:—"1. Was the said Mrs Edith Louisa Blyth or Milne entitled to the bonus dividend declared and paid by the North British Rubber Company on the shares held by the first parties for her in liferent? and 2. Is she now entitled to have the new shares of said Company, which were purchased with the said bonus dividend, transferred to her absolutely?"

The first and third parties maintained that the Company by issuing the new shares appropriated its profits to capital, or that, at all events, the said bonus was to be regarded, in a question between the second and third parties, as part of the capital of the testator's estate, being payable out of profits accumulated in his lifetime. The second parties maintained that the said new shares were purchased by the first parties with cash paid to them by the Company out of profits accumulated by the Company, and actually distributed to the shareholders in cash, and that the liferentrix was entitled to have the bonus dividend paid over to her, or otherwise to have the new shares which were purchased with the bonus dividend transferred to her absolutely.

Argued for the second parties;—As between the liferentrix and the fiars the bonus fell to be treated as revenue. The bonus was paid out of the reserve fund, which consisted of accumulated profits, and which the directors, by the articles of association, had power to divide from time to time among the shareholders. The trustees, as shareholders, got cash from the Company, and with that cash purchased the new shares. The principles of law governing the question were set forth in *Bouch* v. *Sproule*,[1] but the present case was more analogous to the cases where it had been held that there was no conversion.[2] *Cunliff's Trustees* v. *Cunliff*[3] was distinguished from the present case in respect that there the new shares were allotted directly to the shareholders. It was true that in *Gunnis' Trustees* v. *Gunnis*[4] it was held that the bonus was to be treated as capital, although the shareholders had the option of taking the bonus in new shares or of taking cash; but there was a difference in the form by which the operation in that case was carried through; and, in any event, the decision in that case did not rule the present. The trustees should not have the power, by exercising the option of taking the new shares, to benefit the fiars at the expense of the liferentrix.

Argued for the first and third parties;—The Company had validly, in exercise of its powers, converted the accumulated profits, which formed the reserve fund, into capital, and such exercise of its powers

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[1] 1887, L. R., 12 App. Cas. 385.
[2] Malam v. Hitchens, L. R. [1894], 3 Ch. 578.
[3] Nov. 30, 1900, 3 F. 202.
[4] Nov. 17, 1903, 6 F. 104.

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was binding on all persons interested in the shares.[1] The Company had here in substance and fact appropriated the reserve fund as an increase to its capital, the new capital being represented by the new issue of shares paid for out of the reserve fund, and that appropriation by the Company was decisive as between the liferentrix and the fiars. The matter depended on the actings of the Company,[2] and the real nature and effect of the Company's actings in this case was to capitalise the reserve fund. The reserve fund had been, in fact, used in the business as working capital, and was being so used at the time of these transactions. [The Court pointed out that this was not stated in the special case.] Regard must be had to the substance of the transaction rather than to the mere form, and the substance of the transaction was to make into capital the sum previously appearing in the Company's books as reserve fund, and which had been used as capital. In the form in which the operation was carried through, the present case was indistinguishable from *Gunnis' Trustees* v. *Gunnis*.[3] In that case, as here, the shareholders were given the option of taking the new shares or taking payment of the bonus in cash, but the Court, looking to the reality of the transaction, and to the circumstance that the Company had used the fund out of which the bonus was paid as working capital, held the bonus to be capital. The Company and everyone else knew perfectly that no shareholder would prefer the option of taking cash rather than the new shares, and no shareholder did so in fact. The whole sum constituting the reserve fund had been accumulated out of the profits of the Company prior to the death of the testator.

At advising,—

LORD PRESIDENT.—This is a special case in which your Lordships are asked to determine whether the second or third parties are entitled to a certain sum of money amounting to £550, which arises out of certain operations connected with the North British Rubber Company. The question depends on the terms of the settlement of the late Mr Blyth, and the first parties to the case are his trustees. Mr Blyth's settlement need only be recited to a very limited extent in order to make clear the question which is now before the Court. He made what I may call a special trust of certain shares which were in his possession, and those shares included certain shares in the North British Rubber Company. He directed that the trustees should hold these shares, and pay the free income of them as an alimentary provision to his daughter, Mrs Milne, the second party, and that the capital of the shares should be held in certain proportions for certain other purposes, the third parties being the residuary legatees under the truster's settlement. Now, in 1904, February 6, that is to say after Mr Blyth's death, and when the trustees were vested in the shares, the North British Rubber Company issued a circular letter to their shareholders, and that circular letter forms part of the case. The circular letter begins by a statement that the directors of the North British Rubber Company "find that there is at the credit of the reserve fund an amount sufficient to permit

[1] Bouch v. Sproule, 1887, L. R., 12 App. Cas. 385.

[2] *Per* Lord M'Laren in Cunliff's Trustees v. Cunliff, Nov. 30, 1900, 3 F. 202, at 209.

[3] 6 F. 104.

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them to distribute amongst the ordinary shareholders in terms of the powers contained in the articles of association, a bonus of 50 per cent to each shareholder on account of the shares held by him." There is no question raised upon the directors' powers in doing so, and I do not think it well could have been raised, because in articles 112 and 113 of the articles of association of the Company, which are also held part of the case, and therefore subject to your Lordships' consideration, there is provision for the establishment of a reserve fund, and there is provision that the directors may from time to time divide such sum among the ordinary shareholders rateably. I think it is quite clear, therefore, that while these directors were entitled to accumulate a reserve fund as they did out of undivided profits, they were not bound to keep it in that state, but they might, if they liked, divide it among the ordinary shareholders, in other words, divide the profits which, up to this moment, they had kept undivided. Now, reverting to the circular letter, the circular letter goes on to say that although they propose to divide this bonus, it is quite clear, in the present state of the Company, that increased capital will be required, and accordingly they make the proposal to the shareholders to increase the capital of the Company by the creation of 20,000 second preference shares of £12, 10s. each, and the creation of debenture stock of £400,000. They indicate at the same time that they do not propose to issue all that capital, but only a half of each class. They then point out that the capital proposed to be issued in preference shares will exactly equal in amount the sum which they propose to distribute by way of bonus, and that accordingly as they intend to offer this capital to the shareholders before offering it to anyone else, each shareholder will find himself by the receipt of his bonus in the position of being able to take up this capital if he so pleases. Of course these proposals as to new capital could not be carried out without special resolutions, and special resolutions were duly promulgated and passed. The final letter following upon this, which is also in the appendix to the case, is a letter of 6th April 1904, and this letter which is addressed to each shareholder individually, is in these terms—(His Lordship read the letter of 6th April 1904, quoted *supra*, p. 801 note).

The option of this trust to acquire the preference shares was exercised by the trustees, who filled up the application for allotment, and accordingly got an allotment of shares, for which the sum of £550 was due. They, of course, got a warrant or cheque for £550. The two transactions squared each other, and they took the shares. The second party to the case says she is entitled to the £550, being the bonus dividend declared, whereas the third parties to the case contend that that is not so, because this was truly merely a distribution of capital, and that being so the second party has no right to receive part of the capital of this estate. Now, there have been several such questions in cases like this, and we have had a very satisfactory statement of authority from the bar and a discussion upon the same. I do not think it at all necessary to go into the whole series of cases, because at this time of day I do not think there is any doubt as to the doctrine of law that is to be applied to such cases. I think everybody has been content, including the tribunal of highest resort—the House of Lords —everybody has been content with the passage in the judgment of Lord

Justice Fry given originally in the case of *Bouch* v. *Sproule*[1] which went to the House of Lords. The passage of Lord Justice Fry, which is quoted with approbation by Lord Herschell, is at page 397 in *Bouch* v. *Sproule*,[1] and is in these terms :—"When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either to distribute its profits as dividend or convert them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital or appropriated as an increase to the capital stock of the concern enures to the benefit of all who are interested in the capital." The only point really lies in the application of that doctrine of law to the facts of each particular case. I think it is apparent that necessarily each case must stand upon its own facts, and that, although it is very right and proper to cite other cases in order to pick out the circumstances which the Judges determining these cases may have thought led to the preponderance being on one side or the other, still in one sense no one case is an authority for another. I say that because there was an attempt to say that this case was ruled by the case of *Gunnis' Trustees*.[2] I do not think any case can really be ruled by the facts of another case, although there may be such similarity as may involve the same train of reasoning in the second case as in the first. I believe that is precisely the way Lord Herschell puts it in that very case of *Bouch* v. *Sproule*,[1] which, being a House of Lords case, must be the leading case in that branch of the law. After that passage I have read, Lord Herschell, having commented upon the earlier cases, puts the question thus on page 398 :—"I come now to the question whether the company did in the present case distribute the accumulated profits as dividend, or convert them into capital. And here I find myself constrained to differ from the conclusion at which the Court of Appeal arrived. I think we must look both at the substance and form of the transaction. It is to be observed in the first place that the amount of that portion of the new capital created which was to be paid up was exactly equal to the amount of the profits to be distributed. And it was obviously contemplated, and was I think certain, that no money would in fact pass from the company to the shareholders, but that the entire sum would remain in their hands as paid up capital." I think that is a statement of an issue of fact, which will always arise in each case, and on which the whole matter must be determined. Now, he makes another observation which I think very pertinent. He says,—"We must look both at the substance and form of the transaction," and I think that is so because it is just one of that class of cases where it may very often be that the form really determines the substance. It is quite clear, of course, that there is such a thing as substance behind an independent form. No company could really return its capital to its shareholders merely by calling it dividend. But, on the other hand, if there is a sum of money, as there was here, which it was quite *intra vires*

[1] 1887, L. R., 12 App. Cases, 385.
[2] 6 F. 104.

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of the company to use as dividend, or to use for the purpose of creating new capital, then it may very well be that the form will determine what is the true substance of the transaction, which might be either the one or the other. Accordingly, I do not think it particularly material to very narrowly scrutinise, or still less to criticise, results that may have been come to in other cases, to find whether one would have exactly agreed with them or not. But the point is to find what has happened in this case. Now, I confess that in this case I have come to the conclusion that here the Company truly did make payment of a dividend. In the first place, they say so, and in the next place, there is this great testing point in this case, that not only did they have the money, but they gave the money in a way in which you had to go through no process whatever in order to get the cash by the ordinary way in which modern payments are made—namely, by going to a banker and getting a sum of money in exchange for an absolutely negotiable document, because nobody gives money in cash and bags of gold nowadays. I think it is there where you have a contrast with what was done in the case of *Bouch* v. *Sproule*.[1] In the case of *Bouch* v. *Sproule*[1] it might have been that a shareholder would have said, "I do not want new shares," but unless he had actually cut off his nose to spite his face, the only way in which he could have got the value of his shares would have been to have taken the shares and then have sold them in the market, where they would have had a recognised value. I do not go upon that particularly, but I go upon the fact as determined by the learned Judges that what was really done in *Bouch* v. *Sproule*[1] was the creation of new capital, and not the payment of dividend at all. Now, when I look at what was done here, I am driven to the conclusion that what was done was the giving of a dividend, because in the circular letter of 6th April not only are you told that a warrant will be posted to you on 13th May, but you are invited to apply for shares. If you do not apply for shares all that will happen to you will be that you will have forfeited any right to get shares. Accordingly upon the question, which is a pure question of fact, and upon the documents submitted to us, I have come clearly to be of opinion that this Company did as matter of fact pay a dividend in cash, as it was entitled to do, and that being so, upon the doctrine laid down by Lord Justice Fry, I think the second party is entitled to prevail.

Lord Adam.—I perfectly agree with what your Lordship has said upon the law of this case, and I also agree that the case depends upon what view you take of the facts and of what the Company actually did and wished to do in the matter. Now, the question arises very simply. It arises on the will of the late Mr Blyth, who directed his trustees to hold these shares of the North British Rubber Company for a certain party in liferent and for the third parties in fee. It appears that the sum of £550 was paid by the Rubber Company to the trustees under the will, and the question, and the only question, raised in this case is, Is it to be treated as dividend?—if so, there is no question of the second party's right to it,—or Is it to be treated as having been a payment of capital? in which case there is equally no

[1] 1887, L. R., 12 App. Cas. 385.

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doubt that the third party should prevail. It is obvious that this Company had been very successful, and they desired to increase their capital to a large extent; the mode in which they proposed to carry that out is very clearly set forth in the case. As your Lordship has said, the proposals of the directors of the Company are clearly set out in the circular letter of 6th February 1904. They begin that letter by saying that there is at the credit of the reserve fund an amount sufficient to permit them to distribute among the ordinary shareholders a bonus of 50 per cent. They then say that it is proposed to increase the capital, and they give the reason why. They state how that is to be done. They propose that the capital of the Company should be increased by the creation of 20,000 second preference shares of £12, 10s. each, and by £400,000 of debenture stock; and then they say, it is however necessary at present to issue only one half of each class. Now the question arises about this issue of 10,000 preference shares. It is said that the capital represented by the intended present issue of second preference shares will be £125,000, and equals the total of the bonus of 50 per cent on the ordinary capital. They then say,—"The bonus payable to each shareholder will therefore enable him to meet the price of the preference shares to be offered to him. It is proposed to ask the shareholders to apply for their *pro rata* proportion of these second preference shares simultaneously with the payment of the bonus." There is no doubt therefore as to the Company desiring to increase their capital, and as to the mode in which they proposed to carry that out. In carrying it out they passed the requisite resolutions setting out the conditions on which such shares should be issued. That was not the creation of fully paid-up shares, which was a mode in which they might have increased their capital if they had thought that the best way. But that was not the way they took. The way they took was this. They had the undisputed right to pay a dividend out of the reserve fund, and they took £125,000 for that purpose, and so having increased their capital by the creation of £125,000 of shares they sent out a circular letter informing the shareholders of this, and say that the directors had resolved to distribute a bonus as mentioned, and that the warrant would be posted on 13th May next. That is the history so far of this matter relating to the bonus. In the notice with the dividend warrant sent out on 13th May it is stated that the dividend was declared on 30th March, this following on the passing of the requisite resolutions declaring a dividend of 50 per cent on the share capital. Now, *ex facie* of that proceeding that appears to me to be a declaration—a perfectly valid declaration of a dividend of 50 per cent per share. There is no question of their power to do so, because, as your Lordship pointed out, they have special power to pay a dividend out of the reserve fund if they so pleased. That was not a bogus arrangement, because it is perfectly clear that having declared a bonus payable on 13th May 1904 they sent the amount of the bonus due to each shareholder of the Company who was entitled to it. They sent to each of them and made actual payment of the bonus to each of the shareholders. It humbly appears to me that unless there is something to render that proceeding invalid, or to shew that that proceeding should not be carried out, that that is a declaration of a dividend. Now, what is said is that that is not so. It is said that the directors intended to

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increase their capital. There is no doubt that is so. I have no doubt, by making payment of the bonus and payment of the allotted shares simultaneous, that they hoped and expected that the shareholders would consent and agree to take up the allotted shares. But the question occurs to me, where is there anything illegal in that, where is there anything to render it invalid? The shareholders were perfectly free to do as they liked in that matter; they had the matter in their own hands. They might have gone to the bank next day and got the money in exchange for the dividend warrant. There was no obligation upon them to take the shares. It is perfectly true that they got notice in the circular letter of 6th April that the directors proposed to increase the capital, and they enclosed an application form, and they told them that the application must be returned by 2d May next. That was before the dividend was actually paid. What were the consequences if they refused to take up the application? Not that they were not to get the dividend, but that they would be held to have forfeited any right to an allotment. There is nothing in that that I can see to render the thing invalid. I agree with your Lordship that each case must turn upon its own facts, and looking to the actual facts in this case, and to what the directors did, I see no reason to suppose that this was not a valid declaration of dividend. The directors might have increased their capital by the issue of fully paid-up shares, but for good reasons of their own they did not take that course. Possibly they thought that a number of shareholders might think they had shares enough. However that may be, I see nothing in the course they took to make the declaration of the dividend not a valid one. For these reasons I agree with your Lordship, and I think the questions should be answered accordingly.

LORD KINNEAR.—I have had some difficulty in this case, because I think if we could look at all the probabilities there might be a great deal of force in Mr Blackburn's argument that the substance of this transaction was intended to be, and was, to convert the undivided profits into paid-up capital upon newly created shares. But then, we are not only not at liberty to speculate upon the probabilities, which is always a hazardous process, and I think we are precluded by the form of process adopted by the parties even from drawing inferences of fact from the facts stated by the parties themselves, because this question is before us in the form of a special case, and by statute that is competent only when the parties interested in the question of law are agreed upon the facts and dispute only upon the law. And accordingly we are in the habit of taking, and I think we are bound to take, the statement of facts upon which parties are agreed, not only as an exact and accurate statement, but as an exhaustive statement of all the facts which by the contract of parties are to be deemed to be relevant, and are to be taken into account in the consideration of the question of law. Now, upon the question of law which arises in the case, I think the principle must be taken as finally decided in the words which your Lordship in the chair quoted from Lord Justice Fry, because the learned Judge's statement of principle has been cited and approved by the House of Lords in the case of *Bouch* v. *Sproule*.[1] And it comes to this, that when a testator directs

[1] 1887, L. R., 12 App. Cas. 385.

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that part of his estate shall remain as shares or stocks in a company, which has power either to distribute its profits as dividend or to convert them into capital, and the company validly exercises this power, such exercise of power by the company is binding upon all persons interested in it, and consequently what is paid as dividend by the company goes to the liferenter, and what is appropriated as increased capital goes to the persons interested in the capital. That is the doctrine of law upon which the question put to us must be decided. The only further question of law which might be raised upon that statement, and was raised by Mr Blackburn, was whether that doctrine could apply to profits accumulated during the lifetime of the testator, and therefore accumulated before the liferent interest created by his will had begun. But then I think that difficulty is met by Lord Watson in the case of *Bouch* v. *Sproule*.[1] He says that the rule must obtain whether the profits with which the company is dealing belong to the current year or have been previously reserved for the purposes of the company's business. The question therefore between the parties appears to me to resolve, the moment the law has been ascertained, as I think it is, by this authoritative statement, into a mere question of fact. Whether the accumulated profits in question have been paid as dividend, or whether they have been converted into paid-up capital upon newly created shares—upon that question of fact I have come to agree with your Lordships, for the reasons which have been already stated, and which I do not think it necessary to repeat. I only observe what appears to me to be conclusive on the one side, and that is that the Company did pay in money, or in what is equivalent to money, the £550 now in question as dividend upon existing shares. They issued to the shareholders a dividend warrant in perfectly clear and explicit terms, which is equivalent to a cheque, which could have been taken to the bank, and upon which the money must have been recovered. All that is equivalent to paying a dividend in money. It appears to me, therefore, that it is established by the agreement of parties as to the facts that the Company did in fact pay this sum of £550 as dividend. Now, the argument upon the other side came to this, that notwithstanding that payment it must be held that in substance the transaction was the conversion of the profits into capital upon two main grounds. In the first place, Mr Blackburn said these accumulated profits were *de facto* part of the floating capital of the Company, because they were used as part of the capital from the time when the profits were first reserved for the purposes of the Company's business. Secondly, he said that it was known to the Company, and was apparently found in fact, that no shareholder would refuse his shares and prefer to take the money as dividend, and in point of fact probably no shareholder did. Now, these are considerations of fact which might or might not have weight if we were balancing equally well proved facts against one another, but the observation I make upon them is that they are not to be found in the special case. They are statements of fact only, and I decline to draw from what is stated any inference to the effect that the undivided profits were used as part of the floating capital of the Company. That may or may not be, but it is a matter of fact, which, if either of the

[1] 1887, L. R., 12 App. Cas. 385.

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parties intended to found upon it, it was necessary to put to the other party and obtain his agreement to its being stated. Therefore I think we must exclude from consideration all argument based upon inferences of fact which are not to be found in the special case itself. We know nothing except what is set forth in explicit terms by the parties themselves. From what is so set forth I can gather nothing except that this £550 in dispute was paid as dividend, and therefore it belongs to the party having interest in the dividend accruing to the shareholders, and not to the party interested in the capital stock of the Company.

LORD M'LAREN was absent.

THE COURT answered the first question of law in the affirmative and the second in the negative.

MACANDREW, WRIGHT, & MURRAY, W.S.—GRAHAM, JOHNSTON, & FLEMING, W.S.—Agents.

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JOHN BISSETT MORRISON AND OTHERS (Morrison's Trustees), First Parties.—*C. H. Brown.*
MRS SARAH GAW OR MORRISON, Second Party.—*Valentine.*
MISS ANNIE M'GREGOR MORRISON AND OTHERS, Third Parties.—*C. H. Brown.*

*Succession—Testament—Revocation—Special Destination of Heritage—Subsequent General Disposition.*—In 1898 and 1902 A purchased with moneys belonging to himself certain heritable properties, taking the titles which were registered, "to and in favour of the said A and B, wife of and residing with the said A, and to the survivor of them, and to their heirs and assignees whomsoever."

A died in July 1904 leaving a trust-disposition and settlement, dated April 1904, by which he conveyed to trustees his whole estate, heritable and moveable, including all means and estate over which he had power of disposal by will or otherwise. The purposes were to pay the liferent of the whole residue to his widow, burdened with an obligation to maintain and educate the children, and the fee to the children on the liferenter's death. Power was given to the trustees (1) to encroach upon capital if the income was insufficient for the maintenance of the widow and children, and (2) to sell and burden heritage.

At his death the testator had personal estate of the value of £3337. The heritable properties above mentioned were valued at £4900. The testator had no other heritable property. He was survived by a widow and by eight children, two in pupilarity and four in minority.

*Held* that the settlement, read in the light of the circumstances, shewed the testator's intention to evacuate special destinations of the heritable properties, and that the settlement had this effect.

2D DIVISION. ROBERT MORRISON, paperhangings manufacturer, Glasgow, died on 22d July 1904, leaving a trust-disposition and settlement, and survived by his wife, Mrs Sarah Elizabeth Gaw or Morrison, and by eight children of the marriage, of whom four were in minority and two in pupilarity.

Mr Morrison had, in 1898 and 1902, purchased three heritable properties, taking the destinations in favour of himself and his wife as shewn below,* and in January 1905 a special case was presented

* The heritable estate at the date of Mr Morrison's death consisted of (1) a villa in Cambuslang, purchased from William Clouston Johnston,

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for determination of the question whether these special destinations had been evacuated by Mr Morrison's trust-disposition and settlement, which was dated 14th April 1904.

By the trust-disposition, Mr Morrison, "for the settlement of the succession to my means and estate," disponed and made over to trustees for the purposes after mentioned, "All and Sundry the whole means and estate, heritable and moveable, real and personal, of every kind and description and wheresoever situate, that shall belong to me at the time of my death, including therein all means and estate over which I have power of disposal by will or otherwise; together with the writs and vouchers of the same."

The purposes were (Firstly) payment of debts, &c.; "(Secondly) I direct my trustees to hold and apply the residue of my means and estate for behoof of my wife in liferent, for her liferent use only, during all the days and years of her life, burdened with the suitable maintenance, education, and upbringing of such of my children as may at my death be unable to maintain themselves; and I provide that in the event of my trustees being of opinion at any time that the income of my estate is insufficient for the comfortable maintenance of my said wife and that of any of my children who may be unable to support themselves, they shall have power from time to time to encroach upon and pay to her for that purpose part of the capital of my estate, and that to such extent as they deem proper; (Thirdly) On the death of my said wife, or on my own death should she predecease me, I direct my trustees to hold and apply, pay and convey, the residue of my means and estate equally to and among my whole children, payable and to be conveyed to them as they respectively attain twenty-one years of age after the death of their mother," with a conditional institution of issue, and a clause of survivorship for the event of any child dying before the period of payment.

The trust-disposition further provided: "And to enable my trustees to carry out the purposes of this settlement, and of any codicils thereto, I confer upon them all requisite powers, and particularly

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solicitor in Glasgow, and his wife, conform to disposition granted by them, dated 16th, and, with warrant of registration thereon on behalf of Mr Morrison and his wife, recorded in the Register of Sasines 17th May 1898, whereby they, in consideration of £200 paid to them by Mr Morrison, and of his freeing and relieving them of £650, being the balance of a bond and disposition in security affecting the property, sold and disponed the said villa "to and in favour of the said Robert Morrison and Sarah Gaw or Morrison, wife of and residing with the said Robert Morrison, and to the survivor of them, and to their heirs and assignees whomsoever"; (2) a tenement of dwelling-houses in Dennistoun, Glasgow, the title to which consisted of a feu-contract, dated 15th and 17th, and, with warrant of registration thereon on behalf of Mr Morrison and his wife, and the survivor of them, recorded in the Register of Sasines 24th January 1902, entered into between the trustees of the deceased Alexander Dennistoun of Golfhill, of the first part, and Mr Morrison and his wife, of the second part, by which Dennistoun's trustees sold, alienated, and in feu-farm disponed the said subjects "to and in favour of the said Robert Morrison and Mrs Sarah Elizabeth Gaw or Morrison, and the survivor of them, and his or her heirs and their, his, or her assignees whomsoever"; and (3) tenement of dwelling-houses in Langside, Glasgow, the title to which consisted of a feu-contract, dated June 1902, in terms, *mutatis mutandis*, similar to the immediately preceding title.

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(but without prejudice to the said generality) power, without incurring any personal liability, to retain unrealised and unaltered for such period as they may see fit, any investments, securities, or property that may be held by me at the date of my death, or any part thereof; and also to borrow money on the security of my heritable estate, and to grant bonds and dispositions in security or other necessary deeds for the sums so borrowed; and also to sell my heritable estate in such lots, at such prices, and with such warrandice as they may think proper; and also (and in addition to the powers of investment conferred upon trustees by statute) from time to time" to lend out or invest the trust funds on certain specified classes of security.

The case set forth the following facts:—Mr Morrison left personal estate valued at £3337, 8s. 2d., exclusive of policies of insurance on his life payable to his widow of the value of £674, 12s. 6d. The three heritable properties above mentioned were valued in all at £5550, burdened with a bond and disposition in security for £650 over one of them, the Cambuslang property, leaving the net value of £4900. Mr Morrison had no other heritable property. In the case of each of the three properties the price or cost of building was paid by Mr Morrison out of his own funds. The bond and disposition in security for £650 was held by his wife, and the loan was given from her own funds.

The first parties to the case were the trustees under Mr Morrison's trust-disposition and settlement; the second party was Mrs Morrison the widow; and the third parties were the children of the marriage, with the tutors or curators of such of them as were in pupilarity or minority.

The second party maintained that she, being the survivor of the spouses, under the several special destinations in the titles, was now absolute proprietrix of the three heritable properties to the exclusion of the first and third parties. Alternatively, she maintained that the heritable properties were vested in fee, jointly and in equal shares, in her late husband and herself, and that if the trust-disposition and settlement applied to these properties, it conveyed only that one-half *pro indiviso* share thereof in which the truster was vested, and that the second party was therefore vested in the fee of the properties to the extent of the other one-half *pro indiviso*.

The first and third parties maintained that the conveyances of the heritable properties, so far as conceived in favour of the second party were revocable by the truster as donations *inter virum et uxorem;* that these special destinations were evacuated by the conveyance contained in the trust-disposition and settlement, and particularly by the conveyance of "all means and estate over which I have power of disposal by will or otherwise"; and that the said heritable properties fell to be wholly administered by the first parties as part of the trust-estate.

The questions of law were;—"(1) Is the second party, in virtue of the special destinations in the titles to the heritage, (*a*) proprietrix of the whole of these several properties; or (*b*) proprietrix of one-half thereof? or (2) does the said trust-disposition and settlement evacuate the special destinations in the titles and convey (*a*) the whole of said several properties, or (*b*) one-half thereof, to the first parties to be administered by them as part of the trust-estate?"

Argued for the first and the third parties;—The destinations in the titles of these three heritable properties were revocable by Mr

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Morrison as being donations *inter virum et uxorem*. The only donation *stante matrimonio* by a husband to his wife which was irrevocable was one which made a reasonable provision for her, in the whole circumstances, to take effect only on her survivance of her husband.[1] Here it could not be said that an absolute conveyance of the husband's whole heritage to his wife was no more than a reasonable provision. Being therefore *sua natura* revocable, had these special destinations been revoked? Where the special destination was taken by the testator himself, it might be that the presumption was against revocation or evacuation, but in considering whether the special destination had been evacuated, the Court was entitled to look not merely at the deeds, but at the whole circumstances.[2] Here the settlement conveyed to the trustees all the means and estate, heritable and moveable, which should belong to the testator at the time of his death, "including therein all means and estate over which I have power of disposal," which seemed very apt language to carry these specially destined properties. Then the power conferred on the trustees to encroach on capital, and the powers of selling and burdening the heritage, and generally the whole provisions of the settlement, were almost meaningless if the widow took the whole heritage as her own absolute property and only the moveables were carried into the trust. In the whole circumstances the special destinations had been evacuated.

Argued for the second party;—The second party admitted that it was within her husband's power to evacuate or revoke these special destinations, as being donations *inter virum et uxorem*. The question was, Had he done so? Where the special destination was taken by the testator himself as here, and was not a subsisting destination under which he himself had succeeded, there was a strong presumption against evacuation by a subsequent settlement in general terms; the principle was that the special destination being in effect a testamentary deed by the testator was not to be held as revoked by the subsequent settlement unless it was (1) either revoked *per expressum*, or (2) the two deeds were incompatible, in which case the settlement as the later deed prevailed. It was a question how far extrinsic evidence was admissible to overcome this presumption against evacuation. Certainly the Court were entitled to look at the facts in view of which the testator presumably made his settlement, but it rather appeared that direct extrinsic evidence of intention was inadmissible.[3]

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[1] Rust v. Smith, Jan. 14, 1865, 3 Macph. 378, 37 Scot. Jur. 182; Dunlop v. Johnston, March 24, 1865, 3 Macph. 758, April 2, 1867, 5 Macph. (H. L.) 22, 39 Scot. Jur. 382; Thomas v. City of Glasgow Bank, Jan. 31, 1879, 6 R. 607; Fraser, Husband and Wife, vol. ii., pp. 926 and 947.

[2] Campbell v. Campbell, July 8, 1880, 7 R. (H. L.) 100; Gray v. Gray's Trustees, May 24, 1878, 5 R. 820; Walker's Executor v. Walker, June 19, 1878, 5 R. 965; Walker v. Galbraith, Oct. 21, 1895, 23 R. 347; Brydon's *Curator Bonis* v. Brydon's Trustees, March 8, 1898, 25 R. 708; Minto's Trustees v. Minto, Nov. 9, 1898, 1 F. 62.

[3] Thoms v. Thoms, March 30, 1868, 6 Macph. 704, 40 Scot. Jur. 364; Glendonwyn v. Gordon, May 19, 1873, 11 Macph. (H. L.) 33, 45 Scot. Jur. 183; Webster's Trustees v. Webster, Nov. 8, 1876, 4 R. 101; Thomson's Trustees v. Thomson, July 9, 1879, 6 R. 1227; Farquharson v. Farquharson, July 19, 1883, 10 R. 1253; Lang's Trustees v. Lang, July 14, 1885, 12 R. 1265; Connell's Trustees v. Connell's Trustees, July 16, 1886, 13 R. 1175; Paterson's Judicial Factor v. Paterson's Trustees, Feb. 4, 1897, 24 R. 499; Currie v. M'Lennan, March 3, 1899, 1 F. 684.

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In the present case, however, it was sufficient that the deeds, read in the light of all the circumstances disclosed in the special case, did not infer an intention to evacuate. The second party's contention involved that she got the whole heritage and a liferent of the moveables, leaving only the fee of the moveables at her death to the children. That might seem rather an unequal division, but to proceed on that ground was not to proceed on evidence, but on the bare conjecture that the testator could not have intended such an unequal division. The general conveyance of all heritable property to the trustees was a condition of the question arising, not a solution of it. There was no doubt added the words "including therein all means and estate over which I have power of disposal by will or otherwise," but similar words occurred in the case of *Currie*,[1] where the special destination was held not to be evacuated, a proof of circumstances being refused. The clauses in the settlement giving the trustees power of dealing with heritage were inserted to provide for contingencies, *e.g.*, the contingency of Mrs Morrison predeceasing her husband, or of the acquisition by him of other heritage with a general destination in the titles. In any view, there could not be evacuation as regarded one-half of these three properties, for under the recorded titles the second party was vested in a one *pro indiviso* half of each, and to that one-half the settlement did not apply.[2]

At advising,—

LORD STORMONTH-DARLING.—The success of the second party's contention would mean that the testator, having a wife and eight children and an estate to dispose of among them, with £4900 in heritage and £3337 in personalty, so dealt with it as to give his widow a right of fee in the whole heritage (as well as in £674 of insurances on his life), besides a liferent of the whole personalty, under burden of maintaining and educating such of the children as might at his death be unable to maintain themselves, thereby leaving to the eight children only the fee of the moveable estate at the widow's death. Such a division among widow and children is not perhaps a very likely one for a testator to make. But the widow has in her favour a certain presumption of law that a general settlement by a testator will not evacuate any special destination which he himself has previously made. And the question here is whether the provisions of Mr Morrison's general settlement, read in the light of the surrounding circumstances, are sufficient to overcome that presumption. In my opinion they are, for the following reasons:—(1) The conveyance to trustees is of Mr Morrison's whole estate, heritable and moveable, including therein all means and estate over which he had power of disposal by will or otherwise—a description which seems to apply to the three house properties which in 1898 and 1902 had been bought with his own money, but the titles to which he had taken to himself and his wife and the survivor, and to their heirs and assignees whomsoever. There was no other property to which the description could apply, and these destinations were undoubtedly revocable as being *quoad* one-half of the fee donations *inter virum et uxorem* and *quoad ultra* destinations of the

[1] 1 F. 684.

[2] Connell's Trustees v. Connell's Trustees, 13 R. 1175; Thomson's Trustees v. Thomson, 6 R. 1227; Walker v. Galbraith, 23 R. 347.

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truster's property admittedly testamentary. (2) The total liferent given to his widow after paying debts and expenses, although not absolutely inconsistent with a fee to her of the heritage, is much more consistent with an intention to limit her to a liferent of his whole estate, both heritable and moveable. This view is, I think, strengthened by the power given to the trustees to encroach upon capital in the event of their being of opinion at any time that the income was insufficient for the comfortable maintenance of the widow and that of the children, who might be unable to support themselves, for encroachment could hardly be required if the widow besides having the liferent of the moveable estate was also intended to have the fee of the heritable estate. (3) Express power is also given to the trustees to deal with heritage, both by selling and burdening, and there would be no heritage either to sell or burden if it all went to the widow.

I do not think that, in point of practical result, any distinction can be drawn between the whole and the half of the properties specially destined. Either the widow, as the survivor of the spouses, is entitled to the whole, or the destinations in the titles are completely evacuated. I am in favour of answering the questions in the case to the latter effect.

The LORD JUSTICE-CLERK, LORD KYLLACHY, and LORD KINCAIRNEY concurred.

THE COURT pronounced this interlocutor:—"Answer the first question of law therein stated in the negative: Answer the first alternative of the second question therein stated in the affirmative: Find and declare accordingly, and decern."

SMITH & WATT, W.S.—HENRY SMITH, W.S.—Agents.

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Smith's Trustees v. Smith's Trustees.

JAMES BOYD AND ANOTHER (John Smith's Trustees), First Parties.—*W. Thomson.*
JOHN EDMISTON AND ANOTHER (Andrew Smith Senior's Trustees), Second Parties.—*Younger—Cowan.*
JOHN EDMISTON AND ANOTHER (Andrew Smith Junior's Trustees), Third Parties.—*C. N. Johnston, K.C.—Macdiarmid.*
COCHRAN BARR CROSS, Fourth Party.—*M'Lennan—J. W. Forbes.*
ANDREW SMITH *Tertius*, Fifth Party.—*Macmillan.*

*Succession — Construction of Testamentary Writings — Destination—Substitution or Conditional Institution—Date at which heirs to be sought.*—By a marriage-contract certain heritable subjects belonging to the wife were disponed in fee "to the children of said intended marriage equally among them, share and share alike, whom failing to the heirs and assignees of the wife." The wife died survived by one child, who died in pupilarity.

*Held* that the last clause of the destination was a substitution and not a conditional institution merely; and that the heirs of the wife were to be sought as at the date of the child's death.

*Kirkwood v. Keeling*, 4 D. 878, *followed.*

*Succession — Construction of Testamentary Writings — Destination—"Survivors or survivor" held to mean "others or other."*—In a *mortis causa* disposition and settlement the granter disponed certain heritable subjects to A, his youngest son, "and the heirs whomsoever of his body, whom failing to the heirs of the bodies of" B, C, D, and E, his other children, one-fourth to each, "and in case of the death of any of the said B, C, D, and E without issue, or that the children of any of them should fail, then to the

No. 145. heirs of the bodies of the survivors or survivor of the said B, C, D, and E, and their heirs, successors, and assignees whomsoever."

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*Held* that the words "survivors or survivor" fell to be read as "others or other."

1st Division.

THIS was a special case brought for the determination of questions arising with regard to certain heritable subjects formerly belonging to the late John Smith, portioner, Bridgeton, Glasgow, who died on 10th November 1847, leaving a disposition and deed of settlement, dated 3d September 1847, which disposed of the subjects in question.

The facts of the case and the contentions of the parties appear from the opinion of the Lord President.

The parties to the special case were (1) the testamentary trustees of John Smith, a son of the testator; (2) the testamentary trustees of Andrew Smith senior, a son of the testator; (3) the testamentary trustees of Andrew Smith junior, the eldest son of Andrew Smith senior; (4) Cochran Barr Cross, the son of Jean Smith or Cross, a daughter of the testator; and (5) Andrew Smith *tertius*, eldest son of Andrew Smith junior.

The present and past state of the family, and the connection between the parties and the testator, are shewn in the genealogical tree subjoined in note *infra*.*

The Court did not answer the questions of law stated in the case, and for the purposes of this report it is not necessary to refer to them further.

The questions of law argued by the parties were (1) whether a destination over of heritage in a marriage-contract to the heirs of the wife failing children of the marriage was merely a conditional institution or a substitution, and if a substitution whether the heirs of the wife were to be sought as at the death of the wife, or as at the date of the failure of children of the marriage; (2) whether the words "survivors or survivor" in a destination over of heritage to the heirs of the bodies of the survivors or survivor of certain of the testator's children were to be read as "others or other," and if so to be read whether the heirs of the body of the others or other were to be sought as at the death of each or as at the death of the last survivor; (3) whether in a destination of heritage to two of the testator's children

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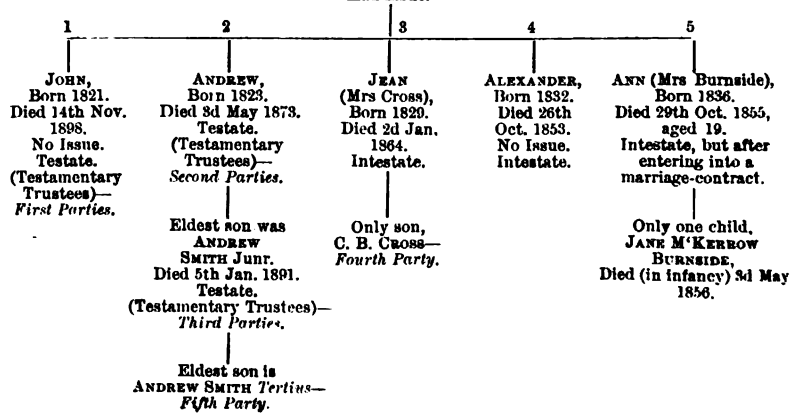
* JOHN SMITH (the Testator)
(Died 10th November 1847).
(His Wife died 17th December 1872).
Had Issue.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JOHN, Born 1821. Died 14th Nov. 1898. No Issue. Testate. (Testamentary Trustees)— First Parties.
ANDREW, Born 1823. Died 3d May 1873. Testate. (Testamentary Trustees)— Second Parties.
JEAN (Mrs Cross), Born 1829. Died 2d Jan. 1864. Intestate.
ALEXANDER, Born 1832. Died 26th Oct. 1853. No Issue. Intestate.
ANN (Mrs Burnside), Born 1836. Died 29th Oct. 1855, aged 19. Intestate, but after entering into a marriage-contract.
Eldest son was ANDREW SMITH Junr. Died 5th Jan. 1891. Testate. (Testamentary Trustees)— Third Parties.
Only son, C. B. CROSS— Fourth Party.
Only one child, JANE M'KERROW BURNSIDE, Died (in infancy) 3d May 1856.
Eldest son is ANDREW SMITH Tertius— Fifth Party.

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*nominatim* equally "and their foresaids," the words "their foresaids" imported the whole of a long destination, including substitutions, contained in a previous clause disponing other subjects.

The authorities undernoted were cited at the hearing.*

At advising,—

LORD PRESIDENT.—The present case arises out of the testamentary arrangements of the late Mr John Smith. The points raised are not either of very great difficulty or importance at law, but the whole case is involved in no inconsiderable complexity, arising from the fact that there are four different subjects in dispute which are contended for by five different persons, and their various contentions are represented to your Lordships by no fewer than fifteen questions.

Under these circumstances I think it will conduce to lucidity if I take the subjects in dispute one by one. The subjects in dispute are all various parts of a heritage which was left by Mr Smith under a scheme of very elaborate destinations contained in his settlement.

The present and past state of the family, which it is necessary to understand in order to apply the provisions of the settlement, is most conveniently made out by referring to the genealogical tree, which is made part of the case.

Subjects IV.—The destination of this subject is in these terms:—"In the fourth place, I do hereby give, grant, assign, dispone, convey, and make over from me, my heirs and successors, to and in favour of Ann Smith, my youngest daughter, and the heirs whomsoever of her body, whom failing to the heirs of the bodies respectively of the said John Smith, Andrew Smith, Jean Smith, and Alexander Smith, my other children, in the proportion of one-fourth to the heirs of each, and in case of the death of any of the said John Smith, Andrew Smith, Jean Smith, and Alexander Smith without issue, or that the children of any of them should fail, then to the heirs of the bodies of the survivors or survivor of the said John, Andrew, Jean, and Alexander Smiths, and their heirs, successors, and assignees whomsoever, heritably and irredeemably, All and Whole" Subjects IV.

Under this destination Ann, who survived her father, took these subjects, which she conveyed by a marriage-contract entered into between her and John Burnside, who became her husband. In the case as stated by

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* (1) (*a*) Conditional institution or substitution—Watson v. Giffen, Jan. 23, 1884, 11 R. 444, and *per* L. P. Inglis, at p. 450, foot; Brown's Trustees v. Smith, March 17, 1900, 2 F. 817; (*b*) date at which heirs of wife to be sought—Gregory's Trustees v. Alison, April 8, 1889, 16 R. (H. L.) 10, *per* Lord Watson, at p. 14.

(2) (*a*) Whether "survivors or survivor" equivalent to "others or other"—Ramsay's Trustees v. Ramsay, Dec. 21, 1876, 4 R. 243; Forrest's Trustees v. Rae, Dec. 20, 1884, 12 R. 389, *per* Lord Shand, at p. 393; Paterson's Trustees v. Braud, Dec. 9, 1893, 21 R. 253; Hairsten's Judicial Factor v. Duncan, July 14, 1891, 18 R. 1158; Ward v. Lang, July 13, 1893, 20 R. 949; (*b*) when heirs of the others to be sought—Gregory's Trustees v. Alison, 16 R. (H. L.) 10, *per* Lord Watson, at p. 14; Mortimer v. Slater, (1877), 7 Ch. D. 322, *per* Thesiger, L. J., at p. 329; Danvers v. Earl of Clarendon, (1681), 1 Vernon, 35; Jarman on Wills (5th ed.), vol. ii., p. 932.

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some of the parties it was contended that the marriage-contract was not valid in respect that it had not been entered into with consent of her curators-nominate, she being at the time a minor, but as the curators never acted, this plea was not insisted upon before your Lordships. The said marriage-contract forms part of the case. It dealt with the property specially conveyed to Ann, mentioned as subjects No. IV., which it disponed to "and in favour of the children of the said intended marriage equally among them, share and share alike, whom failing, to the heirs and assignees of me the said Ann Smith in fee."

Ann Smith or Burnside died survived by one child, Jane Burnside, who accordingly took under this destination.

Jane Burnside died in infancy and necessarily intestate, her heir-at-law being her father, John Burnside, who is still alive. John Burnside, as heir of his daughter, and in respect of the interest he had through the marriage-contract in properties left by his father-in-law, disponed to his two brothers-in-law John and Andrew Smith and his sister-in-law Jean Smith. The first question that arises, therefore, with regard to these subjects depends upon the meaning and import of the destination in the marriage-contract. If the destination over in favour of the heirs and assignees of Ann Smith on failure of the children of the marriage is only a conditional institution, or if being a substitution the heirs and assignees of Ann Smith are to be sought as at the date of the death of Ann Smith, then in either of these two cases the property passed to Burnside and was carried by his disposition, the parties presently in right under that disposition being the testamentary trustees of John, the first parties, the testamentary trustees of Andrew *primus*, the second parties, and Mr Cross, the fourth party, who is the heir of his deceased mother, Mrs Cross, who died intestate. If, on the other hand, the clause in question being a substitution, the heirs of Ann are to be sought at the date of the failure of the children of the marriage, that is to say, at the date of Jane Burnside's death, then the heir of Ann at that date was her elder brother Andrew *primus*—Alexander being already dead—but he having never served, and not having survived the passing of the Conveyancing Act of 1874, the heir has come to be Andrew Smith junior, who survived the Act of 1874, and in whose rights are his testamentary trustees, the third parties. Upon this question I am in favour of the latter view, being of opinion that the case is ruled by a case not cited before us, *Kirkwood* v. *Keeling*.[1] See also Lord M'Laren's book, sec. 1388.

Subjects V.—The clause dealing with these subjects is in these terms:—"In the fifth place, I do hereby give, grant, assign, dispone, convey, and make over from me, my heirs and successors, to and in favour of Alexander Smith, my youngest son, and the heirs whomsoever of his body, whom failing, to the heirs of the bodies respectively of the said John Smith, Andrew Smith, Jean Smith, and Ann Smith, my other children, in the proportion of one-fourth to the heirs of each, and in case of the death of any of the said John Smith, Andrew Smith, Jean Smith, and Ann Smith without issue, or that the children of any of them should fail, then to the heirs of the bodies of the survivors or survivor of the said John, Andrew,

[1] March 5, 1842, 4 D. p. 878, 14 Scot. Jur. 327.

Jean, and Ann Smiths, and their heirs, successors, and assignees whomsoever, heritably and irredeemably, All and Whole" Subjects V.

Alexander died in 1853, childless and intestate, and accordingly, the portion of the destination came into effect which devolves the share on the heirs of the body respectively of his brothers and sisters. At that time his brothers and sisters were alive, so that matters were in suspense till it came to be seen who answered the description of the heirs of the body of the various brothers and sisters. As regards two of them there is no question. Jean died in 1864, and after her death of course the fourth party became the heir of her body. He therefore obviously takes one-fourth, which, for purposes which will become evident, I will call three-twelfths of Alexander's share. Andrew died in 1873 survived by Andrew Smith junior, who in the same way thereupon took the share, and as he survived 1874 his testamentary trustees, the third parties, are now in right of his original three-twelfths. Ann died in 1855 survived by one child, Jane Burnside. She served as heir of provision to her uncle, Alexander, and thereby became vested in her share, but as she died in infancy she was unable to evacuate the destination, and accordingly her share passed on to the heirs of the body of the others. In substituting the word "others" for "survivors," I am not throwing any doubt on the general principle that survivors must *prima facie* receive its natural meaning. But in the present case I think it must mean "others,"—a result which has already been arrived at in cases like that of *Ramsay's Trustees*,[1]—because in all the cases in which "survivor" received its natural meaning, there is always somebody who either as survivor takes or indicates the person who at that moment can take (*e.g.* issue of the survivor). But to say that a property is to go to the heirs of the body of the survivor at the time of the opening of the succession is obviously a contradiction in terms. One-twelfth therefore of Jane Burnside's three-twelfths goes in the same way as before to the third party, and one to the fourth party, while the third is hung up for the eventual determination of who are the heirs of the body of John. John died in 1898 without issue, and therefore with no heirs of the body. Following the same process of reasoning as before, his original three-twelfths *plus* one-twelfth, being the part of Jane Burnside, is divided into two-twelfths each to the third and fourth parties, the result being *in toto* that the third and fourth parties divide the subject equally between them.

Subjects VI.—The destination regulating these subjects is as follows:—"In the sixth place, I do hereby give, grant, assign, dispone, convey, and make over from me, my heirs and successors, to and in favour of the said Ann Smith and Alexander Smith, equally between them, or share and share alike, and their foresaids, heritably and irredeemably, All and Whole," Subjects VI.

The question here is as to the meaning of "their foresaids," whether that applies to heirs of the body, or whether it imports the longer destination introduced by the words "whom failing," in the description of Subjects IV. and V. respectively. Ordinarily speaking I would be of the opinion that "their foresaids" was limited to that class of heirs connected with the

[1] 4 R. 243.

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original disponee by the word "and," and not to the longer catalogue introduced by the words "whom failing," but I am driven to the conclusion that this testator did not so use it, because he uses the words "their foresaids" in obviously the larger sense in the obligation to infeft and in the procuratory of resignation. That being so, Ann's share follows the fate of Subjects IV., and Alexander's share follows the fate of Subjects V.

I propose therefore to your Lordships that we should say that in the opinion and judgment of the Court the subjects fall to be divided as follows:—

Subjects IV.—To the third parties.

Subjects V.—One-half to the third parties, and one-half to the fourth party.

Subjects VI.—Three-fourths to the third parties, and one-fourth to the fourth party:

and that it is unnecessary to answer the fifteen questions as put.

LORD ADAM.—I concur.

LORD KINNEAR.—I have had an opportunity of reading the opinion which has been delivered by the Lord President, and I concur in it.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"Find and declare that in the opinion and judgment of the Court the Subjects IV., V., VI., . . . mentioned in the case belong to the parties as follows:—Subjects IV. wholly to the third parties; Subjects V.—One-half to the third parties, and one-half to the fourth party; Subjects VI.—Three-fourths to the third parties, and one-fourth to the fourth party; . . . and find it unnecessary to answer the fifteen questions as put, and decern."

STEEDMAN, RAMAGE, & BRUCE, W.S.—J. & J. ROSS, W.S.—R. AINSLIE BROWN, S.S.C.—CUMMING & DUFF, S.S.C.—R. BARCLAY ALISON, W.S.—Agents.

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WILLIAM PRINGLE, Pursuer (Respondent).—*Younger, K.C.*—*Umpherston.*

CARRON COMPANY, Defenders (Appellants).—*Mackenzie, K.C.*—*Chree.*

THE DUKE OF DEVONSHIRE AND OTHERS (Trustees of the Twelfth Duke of Hamilton), Compearing Defenders (Sisted in the Inner-House).—*Campbell, K.C.*—*Macphail.*

*Mines and Minerals—Right to support—Feu-disposition reserving the minerals—Clause of Exemption from claims for surface damage—Construction—"Persons deriving right from" superior—Right derived from author of superior—Trust.*—The testamentary trustees of the twelfth Duke of Hamilton granted a feu-disposition of a plot of building ground, reserving the minerals, and stipulating that no claim for surface damage should lie against the trustees "or persons deriving right from them." The minerals belonged to and were worked by a company under deeds granted by the twelfth Duke and by the eleventh Duke.

*Held* that the company "derived right from" the trustees within the meaning of the feu-disposition, and consequently were not liable to the feuar for surface damages.

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2D DIVISION. Sheriff of Stirling, Dumbarton, and Clackmannan.

IN May 1904 William Pringle, the proprietor of a plot of ground, with a dwelling-house thereon, in the parish of Grangemouth, Stirlingshire, brought an action in the Sheriff Court at Falkirk against Carron Company, for decree for £110 as damages to his house and ground caused by the defenders' working of the coal underneath.

The defenders, who did not deny that their workings had caused damage to the pursuer's ground and buildings, pleaded;—(1) No title to sue. (2) The defenders having been entitled under their titles and the minute of agreement founded on to work their coal so as to withdraw support from the surface of the pursuer's ground and buildings, without incurring any liability for damage, are entitled to absolvitor. (3) The pursuer being, under his titles, excluded from claiming damage due to subsidence caused by defenders' mineral workings, the defenders are entitled to absolvitor.

The deeds on which these pleas were founded were three, viz.:—

(1) A contract of excambion, dated 18th and 23d December 1854, and registered in the Register of Entails, 29th June, and in the Books of Council and Session, 17th August, 1857. By this deed the eleventh Duke of Hamilton disponed to Carron Company the coal under certain lands belonging to His Grace, including the coal under the lands afterwards (in 1898) feued to the pursuer, "with all right, title, and interest, present and future, of the said Duke of Hamilton and Brandon, in the said coals, . . . hereby disponed by him, and all right competent to the said Duke with reference to the working of the said coals"; and the defenders Carron Company on their part alienated and in excambion disponed to the Duke, in terms, *mutatis mutandis*, identical, the coal under certain lands belonging to the Company.

(2) A minute of agreement, dated November 1889, and not registered in any way, by which the twelfth Duke of Hamilton, first party, and the defenders Carron Company, second parties, consented that the coal in their respective properties, which had been conveyed to the other party by the contract of excambion, should be worked "by the longwall system, or any other process of complete excavation conducted in a regular and workmanlike manner, notwithstanding that such method of working may have the effect of lowering the surface of said lands." The parties agreed in respect of this consent to pay to each other a lordship on the coal respectively worked by them. The minute of agreement further provided:—"(Fifth) The royalties above provided to be paid to the first and second parties respectively shall be in full of and include all claims competent to them for damage that may be caused to the surface of their said respective lands by their respective mineral workings, including any claims competent to them in respect of the lowering of the surface or dislocation of any of the mineral strata by the extraction of the coal, but excluding" damage to existing dwelling-houses, &c., "and so long as the said royalties shall be punctually paid when due the parties shall free and relieve each other of their respective claims therefor, and for damage to the drains or crops on their respective lands which may be from time to time caused by said coal workings."

(3) The pursuer's title was a feu-disposition by the testamentary trustees of the twelfth Duke of Hamilton in favour of the pursuer, dated 6th December 1898, and recorded 18th January 1899. By this feu-disposition the testamentary trustees of the twelfth Duke feued out to the pursuer the plot of ground in question, "but except-

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ing and reserving always to the said trustees, and their successors in the ground hereby disponed, all ironstone, coal, fireclay, marble, shale, and limestone, and all mines, metals, minerals, and stone of every description which may be found in and under the ground hereby disponed, with power to the said trustees and their foresaids, and their tacksmen, or others in their name, to work, win, and carry away the said minerals and other substances hereby reserved, and to do everything necessary for working, winning, and carrying away the same, except that they shall not be entitled to sink pits in the ground hereby disponed; and in the event of any loss or damage being caused to the ground hereby disponed, or to the buildings erected or to be erected thereon, or to the water with which the same may be supplied, or to the drainage thereof, or in any other manner of way, by or through the past or future workings of the said ironstone, coal, fireclay, marble, shale, and limestone, or other metals, minerals, or stone, under or near the ground hereby disponed, no claim for damage or recompense shall on such account lie or be competent to my said disponee or his foresaids against the said trustees or their foresaids, or their tacksmen, or other persons deriving right from them." At the date of the feu-disposition the plot of ground was not built upon, but the pursuer afterwards, in terms of the obligations of the feu-disposition, erected the dwelling-house in question.

On 29th July 1904 the Sheriff-substitute (Russell Bell) repelled the first, second, and third pleas in law for the defenders, and allowed to the parties a proof as to the amount of damage caused by the workings of the defenders to the pursuer's subjects. Thereafter a remit to an architect to ascertain the amount of damage was made of consent (all other questions being reserved), and subsequently decree for the amount so ascertained was pronounced in favour of the pursuer.

The defenders Carron Company appealed.

On 23d December 1904 the trustees of the twelfth Duke of Hamilton lodged a minute in which they stated that the defenders Carron Company had intimated to the minuters that they claimed to be relieved (in virtue of the agreement of 1889) by the minuters of whatever sums the pursuer might be found entitled to in the present action. The minuters accordingly prayed to be sisted as compearing defenders in the action. On 20th January 1905 an interlocutor was pronounced sisting the minuters as compearing defenders, and they adopted the defences of the defenders Carron Company.

Argued for the defenders;—The pursuer was not entitled to surface damages from the defenders. The pursuer did not acquire a right to surface support, because in 1854 the eleventh Duke had conveyed the right to bring down the surface to Carron Company. By the contract of excambion of 1854 the eleventh Duke conveyed to the Company not only the coal, "but all right competent to the said Duke with reference to the working of the said coal"; and as the Duke, prior to that conveyance, undoubtedly had right himself to work the coal so as to bring down the surface, he must be held to have conveyed that right to the Company by the contract of excambion. In any view, the pursuer's own title—the feu-disposition of 1898—excluded his present claim. That feu-disposition expressly declared that the pursuer should have no claim to damages from injury to the surface against the trustees or persons "deriving right from them." The present claim was practically a claim against the trustees, because the Company had a right of relief against the trustees; in any view

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the Company were persons "deriving right" from the trustees, since under the agreement of 1889 the Company derived right from the twelfth Duke, whom the trustees represented. The effect of the agreement of 1889 was to create a servitude in favour of the Company.[1] If the trustees were even now to grant a letter of authority to the Company empowering the Company to bring down the surface that would be sufficient to exclude this claim, looking to the terms of the pursuer's title.

Argued for the pursuer;—The contract of excambion of 1854 did not give the Company right to bring down the surface. "All right competent to the said Duke with reference to the working of the said coal" merely gave the Company such rights as the Duke would have had had he been the owner of the coal but not of the surface. The right of surface support was one of the natural rights of property in land, and any derogation from it must appear in the surface owner's own title.[2] There was no such derogation in the pursuer's title in so far as the Company were concerned, for the Company did not "derive right" from the trustees, but from the eleventh Duke under the excambion of 1854. Further, the agreement of 1889 was between the Company and the twelfth Duke. Under neither deed did the Company derive right from the trustees. If it had been intended to include rights acquired under these earlier deeds it would have been easy to say so. "Right" did not mean mere licence to work. It meant a proper right to minerals by disposition or lease.

LORD JUSTICE-CLERK.—The provisions of the feu-disposition to the pursuer in 1898, by which he obtained no right to minerals, include a clause to the effect that if damage is caused to the surface or to buildings on the subject by mineral workings, whether these be old workings or future workings, there should be no claim competent to the pursuer or those coming into his right against the granters or their successors, "or their tacksmen or other persons deriving right from them."

Carron Company obtained by excambion a certain seam of minerals in the lands of which the feu of the pursuer forms a part. The excambion took place between them and the eleventh Duke of Hamilton. Subsequent to this there was a minute of agreement between the Company and the twelfth Duke, which however was not put upon the record. By that agreement each party got the right of working their minerals so as to take out the whole mineral, any question of damages being met by an agreed-upon royalty on the output. Carron Company under this agreement have claimed relief against any claim the pursuer may have, and the trustees of the twelfth Duke have been sisted to defend the action.

Taking the clause above quoted by itself, and construing it according to ordinary rules of interpretation, it appears distinctly enough to be a surrendering of any claim on the part of the pursuer to damages resulting from the working of the minerals, the working of which could do injury to his

[1] North British Railway Co. v. Parkyard Co., Limited, June 20, 1898, 25 R. (H. L.) 47.

[2] White v. Dixon, March 19, 1883, 10 R. (H. L.) 45; Bank of Scotland v. Stewart, June 19, 1891, 18 R. 957; Anderson v. M'Cracken Brothers, March 16, 1900, 2 F. 780; Backhouse v. Bonomi, June 28, 1861, 9 H. L. Cases (Clark), 503.

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feu, or the erections he might put upon it, and that whether such working was done by his authors or by others who might derive right from them, in whatever form the right to work the minerals might be given.

That being so, the true question in the case is, whether Carron Company in excavating the coal were doing so under a right from the trustees of the Duke. The position was this, that the agreement by which power was obtained to work out the entire minerals was dated in 1889. It may be that, as is averred, the pursuer did not know of the agreement. But this does not, as it appears to me, affect the question under consideration. For he had surrendered any claim he might have had to the effect of shutting him out from recovering damages against the granters or their successors, or their tacksmen or others deriving right from them, apart from all question when or why those having the right should bring down the surface, provided always it was done in the legitimate working of the coal according to recognised practice.

I do not go into the matter in detail, as I have had an opportunity of perusing the opinion of Lord Stormonth-Darling, in which I concur. I would move that the interlocutor under review be recalled, that the third plea in law for the defenders be sustained, and that they be assoilzied from the conclusions of the action.

LORD KYLLACHY.—In this case I am not able to agree with the judgment of the Sheriff. I am not sure that I quite understand his particular view. But in any case that view was not, as I think, ultimately maintained to us.

The questions really involved are, I think, two—(1) Whether the pursuer, who acquired in 1898 from the compearing defenders, the testamentary trustees of the twelfth Duke of Hamilton, a feu of a certain piece of ground exclusive of minerals, is excluded from claiming support to his surface by the previous recorded titles of the subjacent minerals; (2) whether, if not, the pursuer has, by the terms of his own title—that is to say, his feu-disposition of 1898—renounced as against his superiors the compearing defenders, and by consequence as against the other defenders (Carron Company), who are working the subjacent minerals under the authority of the compearing defenders, whatever right of support he might have otherwise had.

The first question turns upon the terms of a certain clause in the conveyance of minerals made in the year 1854 in favour of the defenders Carron Company by the eleventh Duke of Hamilton, who then owned both surface and minerals in and around the pursuer's feu. That conveyance is contained in the contract of excambion printed in the appendix, and by it there is conveyed to Carron Company, *inter alia*, certain coal under what is now the pursuer's feu, "with all right, title, and interest, present and future, of the said Duke of Hamilton and Brandon in the said coals hereby disponed by him, and all right competent to the said Duke with reference to the working of the said coals." On this conveyance infeftment followed, and it is not disputed that if upon the just construction of the clause just quoted there was a surrender in favour of Carron Company of the Duke's right of support, that surrender is conclusive against the present action, which is an action of damages against Carron Company in respect of injury to the surface by their underground workings. The pursuer, however, con-

strues the clause differently, and contends that, as the decisions on this subject stand, the Duke, although assigning to Carron Company "all rights competent to him with reference to the working of the minerals," must be held to have done so only to the effect of transferring to the Company such rights as he would have had as owner of the minerals if the two estates of surface and minerals had been already separated.

It appears to me to be, apart from authority, somewhat difficult to limit in the way suggested, and to make practically superfluous the clause referred to, and upon the cases cited I am not satisfied that the difficulty is removed. I do not, however, propose to decide the question thus raised, or to express any decided opinion about it. For it appears to me that assuming the point in favour of the pursuer, the present case may be decided, and I think without much difficulty, upon the second point—the point, namely, as to the effect of the pursuer's own title of 1898.

By that title—I mean the feu-disposition obtained in 1898 by the pursuer from the compearing defenders—the subjacent minerals were as usual excepted from the conveyance, and it was further provided that the pursuer should have no claim in respect of injury to the surface by the working of the subjacent minerals "against the said trustees (the compearing defenders) or their foresaids, or their tacksmen, or other persons deriving right from them."

The question is whether the defenders, Carron Company—who it is admitted have by their longwall workings caused the injury complained of, and have done so by virtue of the agreement made in 1889 between them and the compearing defenders' author the twelfth Duke of Hamilton—have the benefit of the above stipulation in the pursuer's title as being, in the sense of that stipulation, persons working in the compearing defenders' right.

There could, I think, have been no doubt on that subject if the 1889 agreement had been made by the compearing defenders themselves instead of being made by their author, the last Duke. In other words, I am unable to doubt that if in 1889 the compearing defenders, being still owners of the surface, had (by way of supplement to, or explanation of, the conveyance of minerals made in the contract of excambion in 1854) granted to Carron Company the right so to work as to bring down the surface, the said Company, thus working in the compearing defenders' right, would have had, as against the pursuer, all the benefits of the clause of immunity contained in the pursuer's title. I say so, because I think it is clear that the clause in question does not require that the right to work, which is to carry with it the immunity, should be necessarily a right conferred in the future, or be a right conferred by a recorded title, or be a right attached to a disposition or tack of minerals, or, in short, be a right conceived in any particular form or granted in any particular way. All that is, as it seems to me, required is that Carron Company, or other persons claiming to work with the benefit of the immunity, shall be in fact persons working with the authority of the compearing defenders.

But that being so, does it make any difference that the deed of 1889 was granted not by the compearing defenders—the testamentary trustees of the twelfth Duke—but by the twelfth Duke himself? I am unable to think so. The trustees represent their author. In all questions with third parties they are identified with him. They are bound by his acts and deeds, and

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the authority which was originally given by him, is now, as a continuing authority, in a quite proper sense an authority derived from them. The case in fact is, so far as I can see, just the same as if the twelfth Duke, having granted the deed of 1889, had lived to grant the pursuer's feu in 1898 and had also lived to compear, as his trustees have done, in the present action. It seems to me hardly disputable that if he had done so the pursuer's case must have been at an end.

On the whole matter, therefore, I am of opinion that the Sheriff's judgment should be recalled, and that decree of absolvitor should be pronounced in favour of Carron Company.

LORD KINCAIRNEY.—The pursuer Pringle is feuar of a house in the parish of Grangemouth, to which his title is a feu-disposition by the trustees of the late Duke of Hamilton, dated 6th December 1898 and registered 18th January 1899. The minerals under the feu are expressly excepted from the disposition, and I understand that the pursuer makes no claim to them. But he has raised this action of damages in the Sheriff Court at Falkirk for injury to his house and to the surface by the workings of the defenders Carron Company. Carron Company admit having worked the minerals under the pursuer's house, and having injured the house in doing so, but they claim that under their titles from the Duke of Hamilton they had right to work the minerals without paying for damage for the subsidence of the surface.

The title of Carron Company is an excambion between the Company and the Duke of Hamilton, dated 18th and 23d December 1854, on which apparently no infeftment passed. The minerals thereby disponed to Carron Company consist of the main coal and the Coxrod coal beneath, *inter alia*, what is now the pursuer's house.

An agreement between Carron Company and the succeeding Duke of Hamilton, author of the trustees, who granted the pursuer's feu-contract, is of more consequence. That is a somewhat complicated deed, dated in November 1889, and apparently, so far as it bears on the questions raised, it comes to this, that it confers power on Carron Company to work the minerals in question by longwall although the surface should be thereby let down, and provides that the Duke should relieve the Company of all claims for damage to the surface by such working. This was a personal contract on which there was and could be no infeftment. The late Duke of Hamilton died at a date not mentioned in the pleadings, and his trustees are the granters of the disposition in favour of the pursuer Pringle. The position at the date of the Duke's death was this, that it was agreed that Carron Company should incur no liability to the owner of the surface, that is, to the Duke, on account of damage to the surface by their workings.

The feu-disposition to the pursuer was granted in 1898. It expressly excepts all the minerals from the grant, and reserves them to the granters.

This feu-disposition to the pursuer contains an elaborate and somewhat difficult clause on which the case appears to a large extent to depend, and which requires somewhat careful attention. That clause, besides excepting the minerals from the disposition and reserving them to the granters and their successors, with power to work them, provides that in the event

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of injury being caused to the ground disponed or to the buildings erected or to be erected thereon, "or in any other manner of way, by and through the past or future workings of the said ironstone, coal, fireclay, marble, shale, and limestone, or other metals, minerals, or stone, under or near the ground hereby disponed, no claim for damage or recompense shall on such account lie or be competent to my said disponee (*i.e.*, the pursuer) or his foresaids, against the said trustees or their foresaids, or their tacksmen, or other persons deriving right from them."

This clause does not provide that the pursuer shall have no claim for damages on account of surface injury, but only that he shall have no such claim against (1) the trustees, or (2) their foresaids (that is, the successors of the trustees), or (3) their tacksmen, or (4) other persons deriving right from them. In a question with anyone else than those enumerated the pursuer's right to protection of the surface remains, and therefore it would remain in this question with Carron Company unless Carron Company is included in this final clause. The clause protects the Duke's trustees and other persons deriving right from them not expressly including Carron Company, and the questions seem to be these two—(1) does the protection of the trustees from claims for damages involve the protection of Carron Company because the liability of Carron Company would involve a claim of relief against the trustees; and (2) can Carron Company be held to be covered by the words "other persons deriving right from them," that is, from the trustees? I am of opinion that these questions should be answered in the affirmative. It appears unreasonable to hold that the Duke of Hamilton should give up all claim for surface damages against Carron Company, and that the Duke's trustees should straightway (in manifest derogation of that deed) put a feuar in the position of claiming such damages. That could hardly have been intended, and it seems to me that the words "other persons deriving right from them," *i.e.*, from the Duke's trustees, may be read as including persons (such as Carron Company) deriving right not immediately from the Duke's trustees but from the Duke, whose trustees they are. I am therefore of opinion that the claim of the pursuer for such damages fails, and that the appeal should be sustained and the defenders assoilzied.

LORD STORMONTH-DARLING.—When the pursuer obtained his feu-disposition of the surface from the trustees of the twelfth Duke of Hamilton in 1898 he got no right to the subjacent minerals. These were expressly excepted and reserved, and it did not matter, so far as this clause was concerned, whether the minerals were at the time the property of the trustees or had been (as in fact they had been) conveyed to Carron Company by excambion in 1854, for in either case the pursuer got no right to them. Further, it was provided by the feu-disposition of 1898 that in the event of loss or damage being caused to the surface or buildings thereon through the past or future working of the minerals under or near the ground thereby disponed, no claim for damage or recompense should on such account lie or be competent to the pursuer or his heirs and assignees against the trustees or their successors, or their tacksmen, or other persons deriving right from them. It is on this clause that I think the present question turns.

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The mineral workings which have resulted in damage to the pursuer's buildings have been carried on by Carron Company in virtue of the excambion of 1854, which was a recorded contract between them and the eleventh Duke of Hamilton supplemented by an unrecorded minute of agreement between Carron Company and the twelfth Duke, whereby it was arranged that mutual claims of damages should be settled by each party obtaining the privilege of working their respective minerals by the longwall system or other process of complete excavation on payment to the other party of certain royalties. Under this agreement Carron Company have claimed to be relieved by the trustees of the twelfth Duke of any sums to which the pursuer may be found entitled in this action, and the trustees, admitting their obligation of relief, have been sisted as compearing defenders.

The pursuer's case is that he has not surrendered his claim of damages for subsidence except as against the trustees or other persons deriving right from them, and that Carron Company derived their right to take the coal the excavation of which has caused the subsidence from the eleventh Duke under the excambion, or if the agreement of 1889 was necessary to complete their right, it was a transaction between them and the twelfth Duke of which he had no notice, and which was not referred to in his feu-disposition. All that he had the means of knowing, he says, when he acquired his feu, was that his disponers had parted with the subjacent minerals, and therefore he might readily and safely agree to give up any claim of damages for mineral workings against them or those in their right.

I suppose it may be admitted that this question, which is not without difficulty, might have been obviated by a little more precision of language in the feu-disposition. But I am of opinion that the clause in that deed, as it stands, is sufficient to exclude the pursuer's claim. It seems to me that we are not concerned with the considerations which may have led the pursuer to consent to the insertion of this clause in his feu-right. The fact remains that it was inserted and has to be construed. The pursuer thereby agreed to give up any claim of damages for mineral workings, past or future, against the trustees or anybody deriving right from them. The right did not require to be constituted by sale; it might be by lease or by licence in writing. Now, have Carron Company derived right from the trustees? I think they have, in a substantial sense, because at the date of the feu-disposition, assuming the trustees could have prevented complete excavation by Carron Company, they were prevented from asserting that right by the fact that their author, the twelfth Duke, had made the agreement of 1889. The fact (which must be assumed in the pursuer's favour), that he did not know of that agreement, is not material, because the surrender of his claim of damages was not made conditional on the trustees themselves acquiring the right to bring down his surface or conferring the right upon others at any particular time or in any particular way or for any particular reason. There might have been a subsequent purchase of the minerals by the trustees, or a subsequent tack or licence to or by them, and still the pursuer would have had no redress. Does it matter that the right or permission given by the trustees to Carron Company, instead of being a voluntary act, is given because their author, the twelfth Duke, came under an obligation by which they are bound? In short, I think that the pursuer's

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claim fails if Carron Company can be said to be deriving right from the trustees in any substantial sense, and that in construing a contract (which is what we are doing here) it is too literal and technical to say that Carron Company derive their right not from the trustees but from their author. The unreality of the plea appears plainly enough when it is remembered that the claim if successful would have to be borne by the trustees and not by Carron Company.

I am therefore for recalling the interlocutors appealed against, sustaining the third plea in law for the defenders, and assoilzieing them, with expenses.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the interlocutors appealed against: Sustain the third plea in law for the defenders Carron Company; assoilzie them from the conclusions of the action, and decern: Find" as to expenses.

HENRY SMITH, W.S.—JOHN C. BRODIE & SONS, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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THE PARISH COUNCIL OF RUTHERGLEN, Appellants.—*Sol.-Gen. Salvesen—D. P. Fleming.*
MAGISTRATES OF RUTHERGLEN, Respondents.—*Campbell, K.C.—Morton.*

*Burgh—Street—Improving Line of Street—Ultra Vires—Resolution of Commissioners allowing Buildings to be set forward so as to close up existing Public Street—Competency—Effect of General Improvement Scheme—Burgh Police (Scotland) Act*, 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 157.—The 157th section of the Burgh Police (Scotland) Act, 1892, enacts, with regard to the powers of Burgh Commissioners, that "the Commissioners may allow, upon such terms as they think fit, any building within the burgh to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated." *Held* that it was competent for Burgh Commissioners to allow a building to be set forward with the effect of closing one end of a public lane, the alteration being part of an improvement scheme which provided another entrance for the lane.

1ST DIVISION. Sheriff of Lanarkshire.

THE TOWN COUNCIL OF RUTHERGLEN, on 11th July 1904, passed a resolution,* fixing an improved line for Main Street (shewn in the plan on page 831 as a dotted line), and allowing certain buildings, the property of the corporation, to be set forward to that line. The Parish Council of Rutherglen, who were the proprietors of the buildings adjoining those to be set forward, appealed against this resolution to the Sheriff-

* The resolution was in these terms:—"That for improving the line of Main Street, the building line of the buildings situated on the north side thereof, between King Street Lane and the property belonging to the Rutherglen Educational Trust, be a line commencing at a point in Main Street, being the westmost point of the existing building line of the property belonging to the said trust, and thence continuing in a straight line westwards to a point 18 feet or thereby northwards from the existing building line in Main Street of the property belonging to the corporation, and presently occupied as a public-house by Robert Anderson, all as the said new building line is delineated and coloured red and blue on the plan after referred to, and that the buildings situated as aforesaid be allowed to be set forward or set backward, as the case may be, to the said new building line shewn on said plan, all in terms of sections 157 and 158 of The Burgh Police (Scotland) Act, 1892." Section 157 is quoted in the rubric.

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substitute (Scott Moncrieff), who dismissed the appeal, and confirmed the resolution. On the Parish Council appealing to the Sheriff (Guthrie) he adhered, with certain slight variations, to the Sheriff-substitute's interlocutor. The Parish Council then appealed by way of stated case to the Court of Session, and a case was stated by the Sheriff.

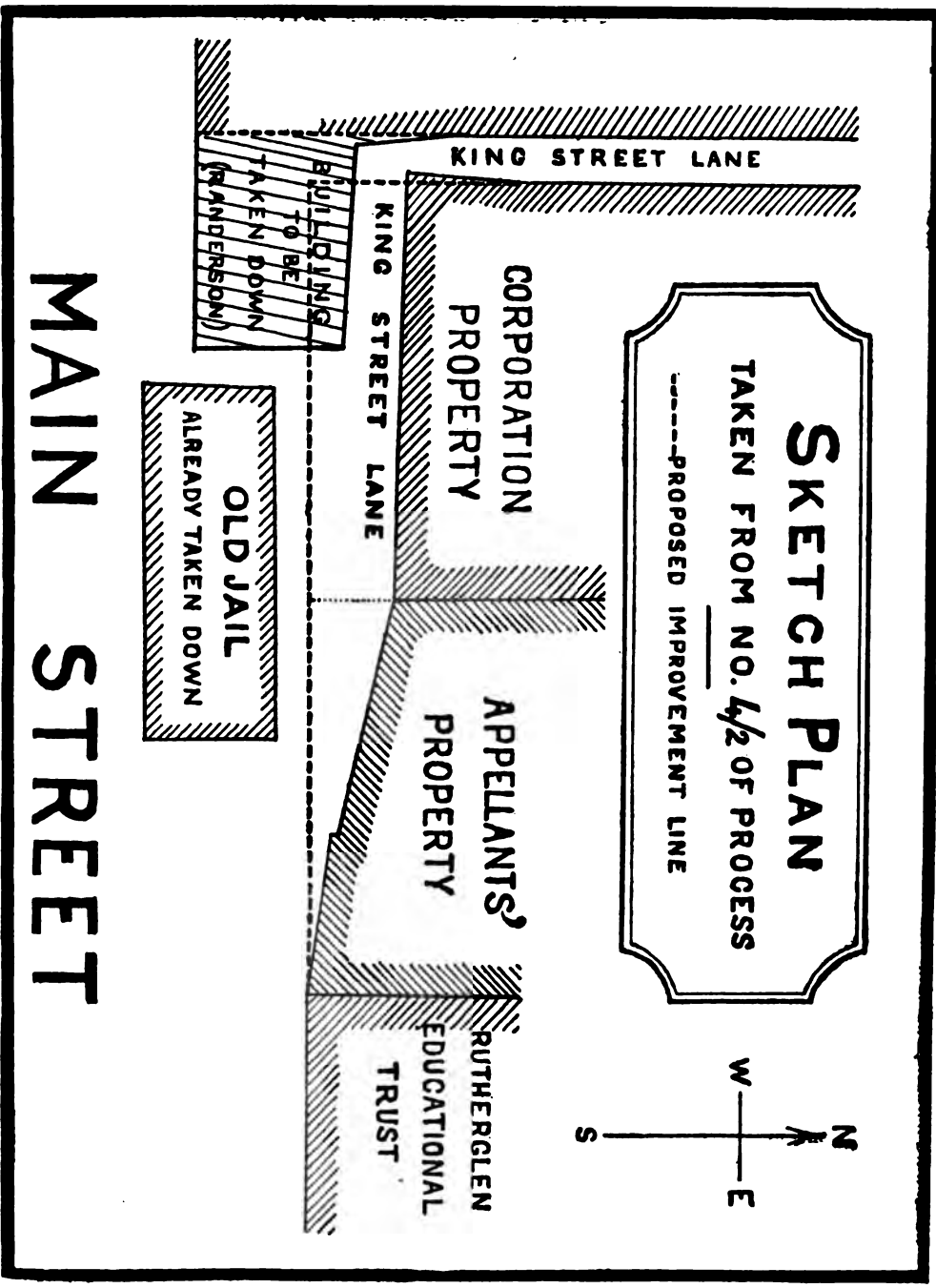
The following facts were set forth as proved or admitted:—"(2) That the intention of the respondents is to bring forward the building line southwards, and themselves to erect, immediately to the west of and adjoining the appellants' premises, a block of buildings, which will extend about 15 feet to the south of the line of the Parish Council Offices at their western gable. (3) That the position of the buildings and the lines of streets are shewn upon the plans Nos. 4/2* and 21 of process, which I have signed as part of this case: and that while King Street Lane is a public street, a part of the portion of it running east and west has, by the demolition of the old jail or town-house, become practically part of Main Street. (4) That if the building line is brought forward southwards as proposed, the *solum* of King Street Lane, as shewn on the said plans, so far as it runs east to west, will be built over, but that the respondents intend, by removing certain adjacent property, to open up a new entrance to the said lane from Main Street, which will have the effect of rendering that lane straight."

The question of law was,—"Whether it was competent, under The Burgh Police (Scotland) Act, 1892, section 157, for the Town Council to pass the resolution referred to?"

Argued for the appellants;—Section 157 gave powers of altering property without compensation, and must be strictly interpreted. The resolution here appealed against was incompetent, because (1) it involved building over and obliterating a public street. Such a result was clearly outwith the provisions of section 157, which only contemplated setting forward a building to bring it into conformity with the adjacent buildings and so improve the line of the street. The suggestion that it was proposed to open another entrance to King Street Lane was irrelevant. It could not make a resolution that went beyond the powers of the statute competent, and, further, it was not embodied in the resolution, and there was no guarantee that it would be carried out. (2) It was not an improvement such as was contemplated by the Act. What was proposed here was not to improve the line of a street but to substitute one street for another. The buildings affected by the new line were buildings fronting King Street Lane. It was not proposed to improve King Street Lane, but to destroy this portion of it altogether, by building over part of it and throwing another part into Main Street. Power for such an extensive alteration could only be obtained by means of a Provisional Order. (3) The Commissioners had acted *ultra vires* in laying down a new line for a street. All that the statute permitted was improving a street by bringing buildings into conformity with an existing line. Though eventually by this resolution the line might be improved, the immediate result would be to make it more irregular, and the immediate result in view of the presently existing line of buildings was all that could be considered.[1] (4) This alteration involved material

* See page 831.

[1] Schulze v. Magistrates of Galashiels, May 14, 1895, 21 R. 682, and 22 R. (H. L.) 70.


SKETCH PLAN
TAKEN FROM NO. 4½ OF PROCESS
PROPOSED IMPROVEMENT LINE
N
W
E
S
KING STREET LANE
KING STREET LANE
BUILDING TO BE TAKEN DOWN (ANDERSON)
CORPORATION PROPERTY
APPELLANTS' PROPERTY
RUTHERGLEN EDUCATIONAL TRUST
OLD JAIL
ALREADY TAKEN DOWN
MAIN STREET

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damage to the appellants' property, and so, whether an improvement or not, was not competent.[1] The street would be removed at one place 15 feet from their building; the projection of the new building would deprive them of light and air; and their convenient access to King Street Lane would be cut off. The purpose of the respondents here was obviously to obtain an increased area on which to erect a large new public building, and to do so without paying compensation, by making use of section 157, which did not provide for compensation, and which was never intended to be used for such a purpose. For such a purpose they should have obtained a Provisional Order, under which the appellants would have got full compensation.

Argued for the respondents;—(1) The setting forward of buildings so as to encroach upon the *solum* of a public street had been decided to be competent.[1] In considering the building over of King Street Lane the improvement scheme must be regarded as a whole,[1] and, as the Sheriff had stated, it was intended to open a new and better entrance to King Street Lane by removing other buildings.[2] The appellants' interests in seeing that this was done were entirely safeguarded by the Dean of Guild Court, whose sanction would have to be obtained before the alterations provided for in the resolution could be carried into effect. (2) There was nothing in the statute to indicate that the opening of a new entrance to an existing lane and the throwing of a portion of the lane into a wide public street, where such alterations improved the lines of the lane and the street, were to be excluded from the improvements contemplated by sec. 157. (3) The laying down of an improved line for Main Street did not render the resolution incompetent. All the resolution really did was to permit certain buildings to be set forward, in terms of sec. 157. The reference to the improved line was merely an indication to the appellants that, if they so desired, they too would be permitted to set forward their buildings to that line. (4) This appeal was only on a question of law. All questions of improvement and amenity were already decided by the Sheriff, whose decision on these points was final.[3]

At advising,—

LORD ADAM.—The question which we have to answer in this case is whether it was competent under the Burgh Police (Scotland) Act, 1892, sec. 157, for the respondents to pass the resolution set forth in the stated case.

That resolution is in the following terms:—(His Lordship read the resolution).

By section 339 of the Burgh Police (Scotland) Act, 1892, an appeal is allowed to any person whose property may be affected, or who thinks himself aggrieved by any resolution of the Commissioners made or done under any of the provisions of the Act, either to the Sheriff or Court of Session, who should make such order thereon either confirming, quashing, varying, or reducing the order, resolution, or act appealed against as the Sheriff

[1] Michie's Trustees v. Grant and Others, Nov. 8, 1872, 11 Macph. 51, 45 Scot. Jur. 39.

[2] Ferguson v. Fall, March 9, 1776, M. 13,181.

[3] Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 339; Burgh Police (Scotland) Act, 1903 (3 Ed. VII. cap. 33), sec. 104, subsec. 2 (*s*).

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or Court should think fit, and it is provided that the judgment of the Sheriff-substitute should be subject to review by the Sheriff, and, subject to this appeal, should be final. This section, however, of the Act was amended by the 104th section of the Burgh Police (Scotland) Act, 1903, which provided that any party dissatisfied with the judgment of the Sheriff, as erroneous in point of law, might appeal thereagainst to the Court of Session in terms and subject to the provisions of the Summary Prosecutions Appeals (Scotland) Act, 1875.

The appellants in this case appealed first to the Sheriff-substitute, who refused the appeal, and confirmed the resolution of the respondents. They then appealed to the Sheriff, who adhered to the judgment of the Sheriff-substitute with a variation, and they have now appealed to us on the question of law stated in the case. We have not therefore to consider whether the resolution is well founded on its merits—whether, for example, it would constitute a public improvement or would unduly interfere with the amenity or value of the appellant's property or otherwise—all such questions having been finally disposed of by the Sheriff. The only question we have to consider is whether the resolution in question was competent under the 157th section of the Burgh Police Act of 1892.

That section is in these terms:—"The Commissioners may allow, on such terms as they think fit, any building within the burgh to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated."

It is clear, from the phraseology of the section, that it is intended to apply to what no doubt is the common case of a third party, the proprietor of a building, applying to the Commissioners for leave to put forward his building to a particular line, and that, if there is nothing in the circumstances to make it incompetent, they have power to do so. But if they have power to do so in the case of a third party, I do not see how it can be disputed that they have power to allow themselves, as proprietors of buildings, to put forward buildings to a particular line. I think accordingly that the case is to be treated exactly as if it had been the case of a third party to whom leave had been granted to put forward his buildings, and that the question is whether there are, as the appellants maintain, such circumstances in the case as to render it incompetent for the respondents to have granted such leave.

Now, clearly to understand the resolution, and what is proposed to be effected thereby, it is necessary to look at the plan therein referred to.

It appears accordingly that the appellants are the owners of property, having buildings thereon fronting Main Street on the north side of the street, and that the respondents are the owners of the property adjoining these buildings on the west. The respondents' property is bounded on the west by King Street Lane, which runs from north to south till it meets certain property in Main Street, also the property of the respondents, when it turns eastwards and runs along between the respondents' buildings on the north and south, for between 20 and 40 feet, when it passes into Main Street. It thus appears that the buildings which the respondents propose to set forward are at present bounded on the west by King Street Lane, and on the south, for about one-third of their length, also by King Street

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Lane, and for the remaining distance by Main Street. There is also shewn on the plan, a line coloured red and blue, which shews the line to which the respondents propose to put forward their buildings. Now, it is sufficiently clear that if the respondents' buildings were put forward to the new line of the street as proposed, the effect would be that King Street Lane, so far as it runs east and west, would be entirely built over, and King Street Lane, we are told by the Sheriff, is a public street.

It is the fact that the resolution thus allows a public street to be entirely built over, which constitutes the main if not the only objection to its competency. Now, if we were tied down to consider only what appears on the face of the resolution, I think that would be a formidable objection to its competency. But I agree with the Sheriff that we are entitled to consider the whole scheme of improvement of the respondents, of which the putting forward of the buildings mentioned in the resolution only forms a part. But we are told by the Sheriff that it is the intention of the respondents to remove the property belonging to them in Main Street occupied by Robert Anderson, which now forms the southern side of King Street Lane, where it runs east and west, and to open up a new entrance to the said lane by Main Street. If that building were removed, the effect would be that King Street Lane, so far as it runs east and west, would practically cease to exist as a separate lane and become merged in Main Street, and that the whole buildings on the respondents' property would then front Main Street.

That is a state of matters which the respondents have it in their power to produce at any time by simply removing the building in question. Had they done so before passing the resolution I should have thought it quite unobjectionable.

In these circumstances, I am not disposed to find that the resolution in question is incompetent. I think we should pronounce an interlocutor to the effect that, as it is stated by the respondents that it is part of their scheme for the improvement of the line of Main Street that the house in Main Street, presently occupied by Robert Anderson, should be removed, on that footing and condition answer the question in the case in the affirmative.

LORD KINNEAR.—I am of the same opinion. We have nothing to do with any question of expediency or amenity which may have been considered by the Sheriff, but are required to consider only the question of law stated in the case, whether the resolution in question is competent. Now, it is to be observed that the resolution in question is not an operative order of any kind, but is simply an allowance or sanction of certain things being done which may form the foundation of an application to the Dean of Guild Court. What the resolution allows to be done is that, for improving the line of Main Street, the buildings situated on the north may be set forward, and the other buildings described in the resolution set backward, such buildings being set forward or set backward, as the case may be, so as to conform to the new proposed line of the street. Now, the objection to the competency, at least the only formidable objection to the competency, of that resolution was that under colour of improving the building line of Main Street the Corporation proposed to cover over with buildings and so

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shut up another public street in Rutherglen called King Street Lane; and if they proposed to do nothing else but set forward these buildings to the north so as to encroach upon what is now King Street Lane, there is no doubt that the effect would be to shut up that lane, because when the buildings to the north are set forward they are met by the existing buildings to the south. But then it is perfectly clear, as I take it, upon the construction of the resolution with reference to the plan that that is not the scheme of the Corporation at all. Their scheme is that when they put forward their buildings to the north they should take down and remove the existing buildings to the south, so as to furnish a sufficient line of street fronting the new line of buildings. I think all parties interested are sufficiently safeguarded against any departure from that scheme of building, because, as I have said, the resolution will only enable an application to be presented to the Dean of Guild Court, in which all just and necessary conditions of building may be imposed. That objection, therefore, seems to me to fall to the ground. But then it was said that, even although the roadway is left as a sufficient access, the street called King Street Lane will still be obliterated, because the new line of roadway will not be King Street Lane but Main Street. I think that is a mere question of words and names that has no practical force or significance at all. I think that while we are confined for the determining facts to the statement of the case, we may legitimately look at the Sheriff's judgment for the ground of his decision in law, and I agree with the way in which he has dealt with this particular point, because he says:—"The critical contention that the statute does not authorise the setting forward of a building over the whole of a street, which was once, and may still perhaps be strictly called, King Street Lane, is, in my opinion, too technical. We must look at things as they are, and, doing so, we find that the real question relates to the improvement of the line of Main Street at the point where the properties of the parties meet." That being the real question, and the objection to the encroachment upon one part of the street being met by the condition that the buildings to the south are to be removed, I see no objection to the competency of the resolution. I may add that I quite agree in Lord Adam's view that it is well to make it quite clear what the condition upon which the Court answers the question in the affirmative really is by inserting in the interlocutor the words which he proposes.

It was stated that LORD M'LAREN, who was present at the hearing, but absent at advising, concurred.

The LORD PRESIDENT was absent at the hearing, and did not deliver an opinion.

THE COURT pronounced this interlocutor:—"Find and declare that as it is stated by the respondents that it is part of their scheme for the improvement of the line of Main Street, Rutherglen, that the house in Main Street presently occupied by Robert Anderson be removed, on that footing and condition answer the question in the case in the affirmative, and decern," &c.

H. B. & F. J. DEWAR, W.S.—J. & A. HASTIE, Solicitors—Agents.

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Hope v. Derwent Rolling Mills Co., Limited.

MRS HENRIETTA ALICE ASHBY OR HOPE, Pursuer (Respondent).—*Fleming, K.C.—Pitman.*

DERWENT ROLLING MILLS COMPANY, LIMITED, AND ANOTHER, Defenders (Reclaimers).—*Wilson, K.C.—Moncrieff.*

*Jurisdiction—Arrestment jurisdictionis fundandæ causa—Amendments made in the course of the action.*—Arrestments *jurisdictionis fundandæ causa* found jurisdiction not only in the action as originally laid, but as competently amended.

*Process—Amendment—Competency—Summons laid on Bill of Exchange—Alternative conclusion and averment of circumstances in which bill was granted added by amendment.—Held* that it was competent to amend a summons concluding for payment of the sum due under a bill of exchange by inserting an alternative conclusion for payment of the sum for which the bill was granted, and adding to the condescendence a statement of the circumstances in which the bill was granted.

*Loan—Proof—Writ sufficient to prove Loan.—Held* that, the passing of money from A to B having been proved by means of a cheque, post entries in pencil in B's ledger and an entry by B in a statement of account between himself and A were sufficient to establish that the money passed from A to B under a contract of loan.

1ST DIVISION. Ld. Kyllachy.

MRS HENRIETTA ALICE ASHBY OR HOPE, with consent and concurrence of her husband, Mr John Alfred Hope, brought an action against the Derwent Rolling Mills Company, Limited, Workington, against whom arrestments had been used *ad fundandam jurisdictionem*. The action concluded for payment to the pursuer of "the sum of £500 sterling, being the amount contained in a bill of exchange, dated 19th February 1902, drawn by the female pursuer upon and accepted by the defenders, and payable on demand with interest . . . *Or otherwise the defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of* £500 *sterling, with interest.* . . ."* The record was closed on 13th January 1903.

On 5th June 1903 the Lord Ordinary ordered intimation of the action to be made to Mr William B. Peat, who had been appointed by the English Courts receiver on the defendant company's estates, in order that he might sist himself as a defender, if so advised. On 4th July 1903 Peat was sisted as a defender.

In her condescendence the pursuer founded on the bill specified in the summons. She admitted that the acceptance was written by the secretary of the Company, and averred that the bill was still due and resting owing.

In answer it was explained that the acceptance of the bill in name of the defendant Company was written by the secretary of the Company, and was not authorised by the board of directors; that the said acceptance in name of the Company was, by the articles of association of the Company, *ultra vires* of the secretary; and that the defenders were not thereby bound.

With regard to the circumstances in which the bill was granted the pursuer averred that in the beginning of February 1902 the defendant Company contracted to purchase from Le Bas & Company, London, a cargo of steel bars, and being short of funds, and unable to

* The words printed in italics were an amendment allowed by the Lord Ordinary on 12th December 1902.

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uplift the bills of lading for the said cargo, requested an advance from Mrs Hope for this purpose, and that Mrs Hope on 5th February agreed to advance the sum necessary to enable the Company to uplift the bills of lading. The pursuer further averred:—"Mrs Hope on the same day granted a cheque in favour of the Company for £2000 for this purpose. On 15th February the bills of lading were uplifted. The amount required for this purpose was £2196, 17s. 3d." Of this sum £196, 17s. 3d. was advanced by the Company's bankers. "It was a condition of said *transaction that the warrants representing the said cargo should be held subject to Mrs Hope's orders, and released by her from time to time to such extent as should be required by the Company, and that the Company should pay to Mrs Hope the value of each lot of bars so released. When Mrs Hope was asked to release a second lot of bars, the bill sued on was handed to her by the Company on account of the value of said lot, and the first lot released by her.*" * It was further stated that Mrs Hope had received certain sums in repayment of this loan, but the balance, with interest, remained due.

The defenders admitted that on 15th February Mrs Hope agreed to purchase and take over the bars on her own account. They stated,—"On said date the bills of lading were uplifted by her, and she paid the price, viz., £2196, 17s. 3d., by cheque in favour of Le Bas & Company." † They explained that the payments made by the Company to Mrs Hope were made on account of the price of bars received by the Company from Mrs Hope.

The defenders further averred that the letters of arrestment to found jurisdiction had been executed only with reference to the sum alleged to be contained in and due under the bill of exchange, being the debt originally sued on. "The said letters are not competent to found jurisdiction with reference to the alleged loan of £500 said to be due apart from the bill, or set forth in the amendment added to the summons after the execution of the said letters of arrestment."

The pursuer pleaded, *inter alia*;—(1) The sum sued for being due and resting owing to the female pursuer under the bill of exchange libelled, decree should be pronounced as concluded for, with expenses. (2) The pursuer having advanced to the defenders the sums above set forth, *or, in any event, having disbursed the same on behalf of the Company and at their request,** and the defenders being due and resting owing to her in respect *thereof** a sum exceeding the sums sued for, the pursuer is entitled to decree as concluded for. (5) The defences are irrelevant.

The defenders pleaded, *inter alia*;—(1) No jurisdiction *quoad* the alleged debt referred to in the alternative conclusion of the summons, added by way of amendment after execution of the letters of arrestment to found jurisdiction. (2) The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons. (6) The averments of loan can only be proved by writ or oath of the defenders.

A proof was led. The material facts disclosed at the proof are sufficiently set forth in the opinions of the Lord Ordinary and the Lord President.

The pursuer founded on the following documents:—(1) The bill.

* The words printed in italics were an amendment allowed by the Lord Ordinary on 16th December 1904 after his Lordship had pronounced his opinion.

† At the bar it was admitted that the amount of this cheque was £2000.

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(2) An entry—"Feb. 15, 1902. By cash received for bars, £2196, 17s. 3d."—contained in a statement of the account in the books of the defenders between the pursuer, Mrs Hope, and the defenders. An excerpt from this account was lodged in process (No. 82 of process), and by joint minute of the parties it was admitted that, *inter alia*, No. 82 of process was a true copy of the original document. (3) The following entries in pencil in the defenders' cash-book:—On the Dr. side—"Feb. 15. Mrs Hope, £2196, 17s. 3d."; on the Cr. side—"Feb. 15. To Le Bas & Co., £2196, 17s. 3d."

On 16th December 1904 the Lord Ordinary (Kyllachy) granted decree against the defenders, the Derwent Rolling Mills Company, Limited, for the sum of £500, with interest thereon, as concluded for.*

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* "OPINION.— . . . What I have to decide is whether or not on the whole matter the defenders have any good defence to the pursuer's claim. I am of opinion in the negative, and I am disposed to think that when the case is understood no other result is possible.

"The facts—the relevant facts—are very simple, and are, I think, shortly these: The defenders' Company had in the beginning of 1902 bought for the purposes of their works a cargo of iron bars to be paid for on ship's arrival, and exchange in due course of dock warrants for bill of lading. When the iron arrived, the Company were unable to pay the price, which turned out to be £2196. The iron was required, and if not got the Company's rolling mills must have been stopped. In these circumstances the pursuer, who is the wife of the managing director and principal shareholder of the Company, was applied to for an advance out of her separate estate of £2000 to enable the Company to take up the warrants. She ultimately agreed, on being secured to the satisfaction of her solicitors, who were, as it happened, also the solicitors of the Company's bankers. The result was an arrangement whereby by means of the £2000 which she provided, and £196 provided by the bank, the pursuer took up the warrants, doing so in her own name, but on the footing that she should release or deliver them to the Company in lots as required, upon payment for each lot of a proportion of the disbursed price. She agreed also, in consideration of the Company's bankers advancing the said £196, that they should hold the warrants to her order and on her behalf, but primarily in security to themselves (1) of the £196, and (2) of a previous advance of about £350 made by them to the Company on the pursuer's guarantee. In the outcome of the transaction the pursuer received only about £670 to account of her £2000. For the rest, unfortunately for herself, she released the warrants, or allowed their delivery to the Company, upon receipt only of the Company's cheques, and not of cash. Of these cheques, she has not yet got, and I am afraid is not likely to get, payment. She got, however, upon the release of the first two lots of warrants (about 100 tons) a bill for £500 payable on demand and signed by the Company's secretary. For the amount of this bill she some time ago brought the present action, the bill being produced and founded upon. But the facts being as I have said, the summons was at an early stage amended, I think sufficiently, to cover any claim within the amount sued for which upon the actual facts arose to the pursuer against the Company.

"Such being the position—the facts being what I have said, and being really not in dispute—it should, one would have thought, have been difficult to find materials for litigation. The pursuer being undoubtedly creditor of the Company for an amount largely exceeding the sum sued for, it would not have occurred to one as useful to inquire critically to what precise legal category the transaction should be referred. For the pursuer sued simply as an ordinary creditor of the Company; and doing so, it could make no difference as to her right to decree that she had founded jurisdiction by arrestments, and had also used arrestments upon the dependence.

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The defenders reclaimed, and argued;—The original action was laid solely on the bill of exchange, and that bill, having been accepted in name of the Company by the secretary, was not binding on the Company. The letters of arrestment to found jurisdiction, having been executed only with reference to the sum due under the bill, were incompetent to found jurisdiction in respect to the loan of £500 alleged to be due apart from the bill, repayment of which was sued for in the alternative conclusion of the summons. Arrestments *jurisdictionis fundandæ causa* founded jurisdiction only in the action as originally laid, and did not warrant decree in terms of a conclusion which was added to the summons after the letters of arrestment had been executed. The addition of the new conclusion fundamentally altered the ground of action. Jurisdiction founded by arrestment itself rested on a fiction, and was strictly limited in its effects.[1] Being contrary to the principle *actor sequitur forum rei*, it should not be

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The defenders' Company, however, having got into difficulties, defences were lodged, and a receiver having been subsequently appointed, that official was sisted as a defender, and has thought it necessary to litigate—doing so, it appears, in the view that, as acting for creditors, it was his duty—as perhaps it was—to state all pleas, however technical, which might suffice to throw out the action, and so to destroy the arrestments. And the pleas which he has in this view maintained are, in substance, I think, these—(1) That the action, so far as rested on the bill, is bad, because the bill is not signed by two directors in terms of the articles of the Company; (2) that, so far as the action is founded on loan, the loan is not proved *scripto* as required by the law of Scotland; and (3) that the true legal category under which the pursuer's claim comes is not loan, but either mandate or sale and delivery, neither of which grounds of action are, it is said, properly pleaded upon record.

"Now, I am bound to say that for myself I see no substantial objection to the pursuer's action, even as laid on the bill. It may be true that the bill was not signed, as required by the articles of the Company, by the secretary and two directors. But it is, I think, sufficiently proved that it was got by the pursuer in exchange for warrants of about equivalent value which she released to the Company at the time; and it seems to me that, if the Company desires to repudiate that transaction as *ultra vires* of their official, they can only do so by returning to the pursuer her warrants, which is not proposed, and is indeed now impossible.

"Apart, therefore, altogether from the amendment made on the summons when the action came into Court and the additions to the condescendence thereafter made on adjustment (an amendment and additions entirely regular), I am not, as at present advised, prepared to say anything against the propriety of the action, even as originally laid. And I am the less prepared to do so, because our rule of process (which in an action like this I suppose still requires the mention in the summons of any liquid document of debt on which the pursuer may propose to found) does not, as I understand it, preclude the pursuer from resting her case ultimately, not upon the document of debt itself, but upon the contract, whatever it is, which lies behind the document.

"Again, I see no particular difficulty—taking the record as it now stands—in maintaining the action, if that is desired, as an action laid upon loan. There may be a question whether in strictness the real contract between the

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[1] Voet, Comm. on Pandects, II., 4, 22; Scruton v. Gray, Dec. 1, 1772, M. 4822; Young v. Arnold, 1683, M. 4833; Ashton v. Mackrill, June 17, 1773, M. 4835; Cameron v. Chapman, March 9, 1838, 16 S. 907; Bertrams v. Barry & Bruce, March 6, 1821, F. C.

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carried further than was expressly warranted by authority and precedent.[1] The nexus laid on the foreigner's moveables was loosed as soon as he gave caution *judicio sisti*.[2] The forms of arrestment to found jurisdiction shewed the limited nature of the jurisdiction so founded.[3] Such arrestment did not subject a foreigner to the jurisdiction of the Court in any action other than the particular action with reference to which it was used, and did not extend to a new action subsequently raised by the same pursuer in reference to the same matter.[4] The amendments allowed by the Lord Ordinary were incompetent, in respect that they introduced a new ground of action and raised a different question between the parties from that raised in the original action.[5] The pencil jottings in the defender's books were not writ of the nature required to instruct loan.[6]

Argued for the pursuer and respondent;—The effect of arrestment *jurisdictionis fundandæ causa* was to fix the foreigner's moveables so as to make them equivalent to heritage for the purpose of jurisdiction, and accordingly to establish jurisdiction over the foreigner until decree in the action was given.[7] The *punctum temporis* to be looked to in determining whether a foreigner had been made subject

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parties was not rather the contract of mandate—the pursuer interposing and taking up the warrants on behalf of the Company and at their request, and being entitled, by way of indemnity for what she disbursed, to a sum considerably exceeding the sum sued for. But the transaction may nevertheless, I think, quite fairly be described as a loan; and as such it is, I cannot doubt, quite sufficiently proved *scripto*. It is so, *inter alia*, (1) by the pursuer's cheque, No. 29 of process, which was indorsed by her husband on behalf of the Company, and was, as so indorsed, delivered to her, and transmitted by her to the Company's bankers to be used by them (as it was used) for the Company's purposes; and (2) by entries in the Company's books, which, although made in pencil, and made, as the secretary explains, at posting, are yet perfectly true entries, and constitute by our law the Company's writ.

"Supposing, however, all this to be otherwise—supposing that the contract between the parties was really one of mandate, or supposing even (what I think is absurd) that the pursuer bought the iron on her own account and sold it to the Company from time to time by ordinary sale—supposing either of these things, what does it matter? It involves at most certain amendments on the condescendence and on the pursuer's pleas—amendments which are not only competent, but which it is the duty of the Court to make if it be necessary for determining the real question between the parties. And if the pursuer desires it, I shall have no difficulty in allowing or making any amendment necessary. What the effect of those amendments or of the original amendment of the summons may be on the pursuer's arrestments I am not called on to decide. . . ."

[1] Parnell v. Walter, July 3, 1889, 16 R. 917, at p. 924.

[2] Erskine, Inst. i. ii., 19.

[3] Jurid. Styles, 1st ed. 1794, Vol. II. 439, 2d ed. 1828, Vol. III. 553, 3d ed. 1888, Vol. IV. 305.

[4] Anderson v. Harboe, Dec. 12, 1871, 10 Macph. 217, 44 Scot. Jur. 133; Goodwin & Hogarth v. Purfield, Dec. 8, 1871, 10 Macph. 214, 44 Scot. Jur. 128.

[5] Gibson's Trustees v. Fraser, July 10, 1877, 4 R. 1001; Bank of Scotland v. W. & G. Fergusson, Nov. 24, 1898, 1 F. 96; Malcolm v. Campbell, Dec. 9, 1891, 19 R. 278; Hannay v. Muir, Dec. 16, 1898, 1 F. 306; Russell, Hope, & Co. v. Pillans, Dec. 7, 1895, 23 R. 256.

[6] Wink v. Spiers, March 23, 1868, 6 Macph. 657, 40 Scot. Jur. 340.

[7] Cameron v. Chapman, March 9, 1838, 16 S. 907.

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to the jurisdiction of the Court was when appearance was entered in the action, or when the party found caution *judicio sisti*.[1] The fact that the action was subsequentiy altered or amplified by amendments was of no consequence in the matter of jurisdiction, provided the amendments were competent. Accordingly, the question whether the arrestments were valid to found jurisdiction turned entirely on the question whether the amendments were competent. The amendments were perfectly competent under the Court of Session Act, 1868, sec. 29.[2] There was no change in the nature of the action by reason of the amendments, for an action on a bill was merely an action for money due—the bill being the evidence of the debt.[3] In these circumstances the summons might be competently amended, equally with the condescendence, under sec. 29 of the Act of 1868.[4] The cheque proved that the money was paid, and the entries in the books of the defenders, taken with the cheque, were sufficient writ to instruct the loan.

LORD PRESIDENT.—This is a reclaiming note against an interlocutor of Lord Kyllachy's, in which he has decerned against the defenders for the sum of £500 sterling, and the peculiarity of the case is that the defenders, who are now really represented by a receiver who has been appointed on the defenders' concern, do not contend that £500 is not due to this pursuer, but maintain that £500 ought not to be decerned for in this action. The reason for that contention is obvious enough. The summons has got, in usual form, a conclusion for arrestment on the dependence of the action, and we are informed that arrestment on the dependence has been executed, and that funds have been arrested, and accordingly if decree is given in the present summons the preference secured by this arrestment will become available to the pursuer; whereas if decree is not given under the present summons, but the debt is constituted under some other summons, or by the acknowledgment of the defenders, the pursuer will only rank *pari passu* with other creditors in a question with the present defender, who, as I have already said, is the receiver of the Company's property.

Now, that is a very technical defence. I am not for one instant suggesting that it is not a point that may not fairly have been taken by the receiver, who is a Court official, and whose views of his own duty I should be slow to condemn.

But of course a technical defence of that sort must be treated critically, and accordingly I propose to examine critically whether the particular defences proponed by this defender are good or not. The antecedent set of circumstances—for I of set purpose use a popular rather than legal expression—which gave rise to the whole matter, are clear enough. The

[1] North v. Stewart, July 14, 1890, 17 R. (H. L.) 60, *per* Lord Watson, at p. 63; Carlberg, &c., v. Borjesson, &c., Nov. 21, 1877, 5 R. 188, *per* Lord President Inglis, at p. 192.

[2] Rose v. Johnston, Feb. 2, 1878, 5 R. 600; Keith v. Outram & Co., June 27, 1877, 4 R. 958; Rottenburg v. Duncan, Oct. 23, 1896, 24 R. 35; Bank of Scotland v. W. & G. Fergusson, Nov. 24, 1898, 1 F. 96.

[3] Duncan's Trustees v. Shand, July 19, 1872, 10 Macph. 984, 44 Scot. Jur. 566.

[4] Shotts Iron Co. v. Turnbull, Salvesen, & Co., Jan. 11, 1870, 8 Macph. 383, 42 Scot. Jur. 177.

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Derwent Rolling Mills Company was pinched for money. At that time the husband of the pursuer was the managing director of the Company. The Company had entered into a contract for delivery of certain steel bars, and they were in straits to find the wherewithal to pay for them. The manufacturers naturally were not going to part with their property unless they got cash or something equivalent to it, and, in the straits that the Company were in, this managing director bethought him of the pecuniary resources of his wife, who was possessed of a separate estate. Accordingly he made a proposal to his wife, that she should make available a sum of £2000, which she had at that time to invest. Your Lordships will notice that I am using words of an uncoloured description purposely to designate all these transactions. The lady, upon the advice and persuasion of her husband, was willing to make this £2000 available. There were meetings at the offices of the Company, with certain solicitors, and eventually the lady consented to provide this £2000. The way in which she did it was this:—She paid that sum into the bank account which she kept in her own name. At the same time she passed a cheque upon that bank account for the sum of £2000, which she made payable to the defenders' Company. There was a slight complication about £196, which I do not think makes any difference, but which I merely mention in order to shew that I have not overlooked it. The total bill for these steel bars was not £2000 but £2196, and there arose a question as to how, with £2000, they were to meet £2196. The bank interposed there, and said they would be willing to pay the £196 if the proper securities were furnished for their relief.

There is a certain controversy as to what precisely happened upon the £2000 cheque, and the controversy, I think, arises plainly enough because in truth the documents which we have got are, so to speak, contradictory of each other. If you look at the cheque you find that the cheque is what any cheque would be, that is to say, an order of the person in right of the money directed to the bank—the persons who held the money—to pay to a certain person or his order. You thereupon find an indorsation of that cheque by the payee of the cheque, and you find a notandum by the bank that the cheque has been paid. So far, of course, that is the ordinary proceeding you would find on every cheque. But when you go to the lady's bank account you do not find the transaction recorded in the ordinary way in which a transaction, such as I have detailed, would be recorded. In an ordinary statement of a bank account with the lady you would have expected to find an entry on one side or the other (which side depending on the way the account is kept), which would represent the bank taking credit in a question with the lady for having paid out £2000 of her funds to somebody else on the lady's order. You do not find that in this lady's account. The only figure of £2000 which you do find in the lady's account—which in this case was kept as that of the lady in account with the bank—is a credit entry of £2000, being the proceeds of certain bills. You do not find a payment to her order by the cheque mentioned of £2000, but you find it disguised, so to speak, under £2196 paid not to the lady or the lady's order but to Le Bas & Company, the persons who had supplied the steel bars. That £2196 represents in cash the £2000 supplied by the lady, and the £196 which the bank were willing to advance on the

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lady's security. The effect of the money being paid to Le Bas & Company was that Le Bas & Company consented to deliver the bars. Delivering the bars meant giving up the bills of lading, which were in their turn replaced by dock warrants. The dock warrants practically represented the goods. These dock warrants were held by the lady, she being allowed from time to time to release each particular parcel of bars against the payment of cash to her by the defenders' Company.

Certain payments were made in cash, but after a certain time had gone forward cash became again a little scarce, and accordingly the lady consented to release some parcels of bars, not on getting cash but on getting a bill. She got a bill for £500. Then matters went, so far as the defenders' Company were concerned, from bad to worse. The receiver was appointed, and, the lady not having got the money, this action concluding for £500 was served, and arrestments were used to found jurisdiction in your Lordships' Court.

Now, the provisions of the Court of Session Act make it necessary as a matter of pleading that, where there is a liquid document of debt, it should be stated in the summons, and accordingly the summons, as originally conceived, concluded for £500, and went on to say that that was the sum contained in a bill which was specified by names and date. By this time the receiver was in the saddle, and he put in defences in which he said—the bill is a bad bill because it is not accepted in the way in which under the articles of this particular Company a bill must be accepted in order to make it binding. That averment was true in fact, and accordingly the pursuer, being met by that averment and seeing the materiality of it, made a motion to the Lord Ordinary, under section 29 of the Court of Session Act, 1868, for leave to amend the summons, and she amended the summons by putting in an alternative conclusion for £500, and by adding to the condescendence a statement of the circumstances under which the bill was granted. Now, I do not know that an alternative conclusion need have been put in. I think the same result might have been arrived at—if she really saw that the bill was useless as a bill—by striking out the words "being the amount contained," &c. But the result of putting in the alternative was to leave both the forms of contract, under the bill—the document of debt—and under the antecedent arrangement. The amendment having been made, the defender, the receiver, put in his pleadings an averment that the pursuer's new averment, being tantamount to an averment of loan, could be proved only *habili modo*, *i.e.*, *scripto aut juramento*, and in that state of the pleadings the parties went to proof.

The general import of what had already happened I have already stated. The Lord Ordinary held that as a matter of fact the loan had been proved by the proof; but he added at the end of his note a statement that it did not seem to him to matter whether the loan had been proved or not, because there was no doubt that there was an obligation, in one sense or the other, to repay or make good—that is to say, that the lady's money had been enjoyed by the company, and that, even if "loan" was not exactly the correct category under which the obligation would be classed, she would still be entitled to make a correction of the summons, so as to disclose the real character of the transaction. Accordingly an amendment, obviously

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*ob majorem cautelam*, was made at the latest stage after the Lord Ordinary had pronounced his opinion, and that amendment now stands on record.

Now, that being the state of the pleadings, the case seems to me to depend on a really very small and very narrow point. We had a very satisfactory argument by Mr Moncrieff, for there is little direct authority as to the origin and effect of arrestment *ad fundandam jurisdictionem*. There is no doubt that it is a branch of our law which may be described as artificial in its origin. The original idea of such an arrestment was to arrest property of the defender in the territory to be made good for the purpose of the action, and in olden times there is no doubt an arrestment of that sort did form a nexus on the property, and the nexus was not lost till the action was completed. In course of time all that came to be very much modified. In the first place, caution *judicatum solvi* ceased, and even the caution *judicio sisti* disappeared as a nexus on property. It was then held as a fiction that once you had founded jurisdiction by arrestment the jurisdiction was established. For a long time now it is trite practice to say that, though you may have arrested an amount of property by arrestment *jurisdictionis fundandæ causa*, still, when you raise your action in virtue of the jurisdiction thus created, you must arrest again on the dependence if you want to make a real nexus on the property. All that is by this time very familiar law, but the old idea of arrestment *jurisdictionis fundandæ causa* is a very good criterion of what action may be rested on arrestment which has been put on *jurisdictionis fundandæ causa*. It must be in other words the same action. But when I say it must be "the same action," that means an action with all the potentialities of an action, and therefore as long as arrestment *jurisdictionis fundandæ causa* is followed by the action therein referred to, it does not seem to me either here or there if that action has been in any way, so to speak, amplified, so long as the amplification is within the forms of process. Therefore, the question whether this arrestment is good for the foundation of jurisdiction seems always to come back to the point of whether these amendments were proper amendments. If they were, it is a proper foundation for jurisdiction, and if they were not, it is a bad foundation.

I come now to whether these were proper amendments. They were made under section 29 of the Court of Session Act. I need scarcely remind your Lordships of the terms of that section, whereby you are bound to make all such amendments as are necessary to determine the real question of controversy, "provided always that it shall not be competent, by amendment of the record or issues, under this Act, to subject to the adjudication of the Court any larger sum or any other fund or property than such as are specified in the summons." Now, I take that on the question of the bill. Of course there are bills which represent the bill transaction alone. A familiar illustration of that is a banker discounting a bill. He has nothing to do with the transaction represented by the bill, whether it is a gratuitous transaction or not—all he knows is that the bank pays money on the bill. But on the other hand there are many transactions where a bill is not the substance of the matter, but where there is an antecedent contract and a bill is given as an easy way of making good the prestations under that contract. Under these circumstances I have always thought it trite law that, though you might for convenience sake found on the bill for the purposes

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of your action, yet the real antecedent cause of the action lay behind the bill altogether. I should have thought, too, that one of the very objects of the improvement that was made—if it was an improvement—by the 29th section of the Court of Session Act was just to allow that sort of thing to be done in one action which could not have been done, prior to the date of that statute, without having two actions.

There is the case of *Stirling* v. *Lang*,[1] which I think is a very good illustration of the defects under the old procedure which were meant to be obviated by the new procedure under the Court of Session Act. Accordingly, I am of opinion that the amendment that was allowed by the Lord Ordinary setting forth the circumstances under which the bill was granted and putting in the alternative conclusion is a perfectly proper amendment under the Act of 1868. If that be so, it follows from what I have said that in my view arrestment *jurisdictionis fundandæ causa* is a perfectly proper foundation for that action.

If I am right so far, the only question remaining is whether the pursuer made out her case under the amendment that was made. I am of opinion that she did make out her case. I am not going back on the rule well established that you cannot prove a loan except *scripto vel juramento*. But I think here you have the *scriptum*. You have the cheque. Now, under *Haldane* v. *Speirs*,[2] a cheque will not prove a loan, but it will prove the passing of money. It is said here that the way in which the cheque was dealt with was to reduce the cheque to what one of the witnesses called the position of a piece of waste paper. I think that an absolutely unwarrantable comment. The way in which they chose to put the transaction in the books did not treat the cheque as it would have been in order in that lady's account. But I am bound to say that unless they had the warrant of the cheque, they would have had no warrant for the proceedings at all. The cheque proves the passing of money. *Quo animo* did that money pass? That also under *Haldane* v. *Speirs*[2] must be proved in writing. But I think this must also be held to be proved by writ. In the first place, you find pencil jottings on the ledger account. We were referred by Mr Wilson to *Wink's* case.[3] That is a totally different case. There is no law I know that entries in an account may not be in pencil as well as in ink. Of course you may look on them with suspicion when made with pencil, and under *Wink's* case[3] you may say they are not proper entries. Here no doubt it is a post entry, but it is an entry in the books of the Company, and you have No. 82, which, I think, is raised by the minute of parties here into the position of being an undoubted writ of the defenders' Company. Taking all these documents together, I have no hesitation in saying that I regard this loan as proved. If that is so, there is an end of the action.

Lord Adam and Lord Kinnear concurred.

Lord M'Laren, having heard only part of the argument, gave no opinion.

The Court adhered.

J. & F. Anderson, W.S.—J. B. Douglas & Mitchell, W.S.—Agents.

[1] March 4, 1830, 8 Shaw, 638. [2] March 7, 1872, 10 Macph. 537.
[3] March 23, 1868, 6 Macph. 657.

THE DUKE OF DEVONSHIRE AND OTHERS (Trustees of the late Duke of Hamilton), First Parties.—*Younger, K.C.—Hon. W. Watson.* THE CALEDONIAN RAILWAY COMPANY, Second Parties.—*Guthrie, K.C.—Orr Deas.*

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Duke of Hamilton's Trustees v. Caledonian Railway Co.

*Railway—Minerals under Line—Right of Railway Company to minerals on paying compensation—Railways Clauses Consolidation (Scotland) Act*, 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71.—*Held* that a railway company, which has given notice to a landowner under section 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, requiring him to leave unworked certain minerals lying under or near the railway line, is not entitled, on payment to the landowner of the compensation due to him for leaving the minerals unworked, to demand a conveyance of these minerals.

THE DUKE OF DEVONSHIRE AND OTHERS, trustees acting under the trust-disposition and settlement of the late Duke of Hamilton, were, as such trustees, proprietors of the dukedom of Hamilton, including various lands and estates in the county of Lanark. 1ST DIVISION.

The Caledonian Railway Company, under and in virtue of the Railways Clauses Consolidation (Scotland) Act, 1845, section 71,* on

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* The Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), after section 69, proceeds (*the words here printed in square brackets being printed in the Act as side-notes*) :—

[Working of mines.]—"And with respect to mines lying under or near the railway, be it enacted as follows :—

Sec. 70. [Promoters of the undertaking not to be entitled to minerals.] "The company shall not be entitled to any mines of coal . . . or other minerals under any lands purchased by them, except only such parts thereof as shall be necessary to be dug, or carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby."

Sec. 71. [Mines lying near the railway not to be worked if the company willing to purchase them.] "If the owner . . . of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner . . . shall give to the company notice in writing of his intention so to do thirty days before the commencement of working . . .; and if it appear to the company that the working of such mines, either wholly or partially, is likely to damage the works of the railway, and if the company be desirous that such mines or any parts thereof shall be left unworked, and if they be willing to make compensation for such mines or minerals, or such parts thereof as they desire to be left unworked, they shall give notice to such owner . . . of such their desire, and shall in such notice specify the parts of the mines under the railway or works, or within the distance aforesaid, which they shall desire to be left unworked, and for which they shall be willing to make compensation; and in such case such owner . . . shall not work or get the mines or minerals comprised in such notice; and the company shall make compensation for the same, and for all loss or damage occasioned by the non-working thereof, to the owner. . . ."

Sec. 72. "If . . . the company do not give notice of their desire to have such mines left unworked, and of their willingness to make such compensation as aforesaid, it shall be lawful for such owner . . . to work the said mines or such parts thereof for which the company shall not have

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certain dates between 4th June 1887 and 5th October 1901, gave notice to the trustees requiring them to leave unworked freestone rock, clay, and blaes vested in them as trustees foresaid in certain areas of ground at Bothwell Park Quarry, in the parish of Bothwell and county of Lanark, near the said company's line of railway.

The trustees and the Caledonian Railway Company also agreed that certain sums, amounting in all to £4578, 4s. 4d., should be the amount of compensation to be paid to the trustees for leaving unworked the freestone, clay, and blaes in the several areas.

The Caledonian Railway Company further, in virtue of the said statute, intimated to the trustees in May and September 1901 that they desired certain blocks of coal belonging to the trustees to be left unworked for the support of certain culverts over a stream on the railway line. The trustees and the Caledonian Railway Company agreed that the compensation payable to the pursuers for leaving unworked the said blocks of coal should be £444, 0s. 7d.

A question having arisen between the trustees and the Caledonian Railway Company as to the nature and extent of their respective rights and interests in the said freestone, clay, blaes, and coal, which was to be left unworked in compliance with the notices above mentioned, a special case was presented to which the parties were (1) the Duke of Hamilton's trustees, first parties, and (2) the Caledonian Railway Company, second parties.

The first parties maintained that they were not divested of their right of property in the said minerals by the notices or payment of compensation under and in terms of section 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, and that the second parties on payment of the compensation were not entitled to a conveyance of the said minerals.

The second parties maintained that under sections 70 and 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, and in accordance with the general practice in Scotland since the passing of that Act,* they were, in respect of the compensation agreed to be paid, entitled to have the first parties divested of the property in the said minerals by a conveyance thereof to be granted by the first parties to the second parties in terms of section 80 of the Lands Clauses Consolidation (Scotland) Act, 1845.

The question for the opinion of the Court was:—"Are the second parties entitled to demand from the first parties a conveyance of the minerals above mentioned on payment of the compensation due therefor under section 71 of the Railways Clauses Consolidation (Scotland) Act, 1845?"

It was stated at the bar that the sum of compensation agreed on had been paid by the second parties to the first parties.

Argued for the first parties;—On a true construction of section 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, the effect of the notice and counter notice, followed by the railway company making compensation, was not to make the railway company proprie-

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agreed to pay compensation up to the limits of the mines or minerals for which they shall have agreed to make compensation. . . ."

The provisions of section 74 are set out in the opinion of the Lord President.

* There was no statement in the case as to the general practice in Scotland.

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tors of the minerals, but merely to put the landowner under an obligation not to work the minerals. The opinions expressed in English cases with reference to the corresponding sections 77-81 of the English Act (8 and 9 Vict. c. 20),—which with verbal differences were similar to sections 70-74 of the Scots Act—shewed that in England these statutory provisions were not construed as vesting the railway company with the property in the minerals.[1] What was paid was "compensation" for not working, not a "price" for the minerals, and what was acquired was a right of support, not a right of property.[2]

Argued for the second parties;—The practice in Scotland since 1845 had been for the railway company to obtain a conveyance of the minerals on making payment of compensation under sec. 71 of the Act.[3] The use of the expression "purchased" in sec. 74 of the Act—in which reference was made to "minerals not purchased by the company"—shewed that what was contemplated in sec. 71 was the transfer of the property in the minerals on compensation being paid. In several Scots cases Judges had spoken of the transaction as a "purchase" or "acquisition" of the minerals.[4] The railway company was entitled to give its counter notice at any time before the minerals were worked, and the fasciculus of the sections of the statute dealing with this matter must be read together.[5] The English decisions referred to by the first parties were not on this point, and the *dicta* were *obiter*.

At advising,—

LORD PRESIDENT.—This is a special case in which the point is a very short one. The Caledonian Railway Company with one of their lines go through the property belonging to the other parties to the case,—the trustees of the late Duke of Hamilton. They intimated to the trustees in May and September 1901 that they desired certain minerals under certain portions of their line to be left unworked; and accordingly that was done, and compensation was settled and paid in the ordinary way. The point at issue now between them is whether, that compensation having been admittedly paid, the Railway Company are entitled to obtain from the trustees a conveyance of the materials. This conveyance the trustees, for reasons which I assume to be quite sufficient, do not wish to grant.

The point, therefore, rises shortly upon the provisions of the Railway Clauses Consolidation (Scotland) Act, 1845. The fasciculus of sections

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[1] Smith v. Great Western Railway Co., 1877, L. R., 3 A. C. 165, at p. 189; Errington v. Metropolitan District Railway Co., 1881, L. R., 19 C. D. 559; Great Northern Railway v. Inland Revenue Commissioners, [1901], 1 K. B. 416, at p. 425.

[2] Edinburgh and District Water Trustees v. Clippens Oil Co., Limited, Aug. 5, 1902, 4 F. (H. L.) 40.

[3] Wood's Conveyancing, p. 112.

[4] Nisbet Hamilton v. North British Railway Co., Jan. 15, 1886, 13 R. 454, *per* Lord Adam at p. 461; Caledonian Railway Co. v. Henderson and Others, Nov. 17, 1876, 4 R. 140, *per* Lord President Inglis at p. 147; Glasgow Barrhead and Neilston Railway Co. v. Nitshill Coal Co., Dec. 23, 1848, 11 D. 327, at p. 331, 21 Scot. Jur. 79.

[5] Caledonian Railway Co. v. William Dixon, Limited, Nov. 13, 1879, 7 R. 216, July 12, 1880, 7 R. (H. L.) 116.

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dealing with that matter begins at section 70. Section 70 enacts that the Company are not to be entitled to any mines under land purchased by them unless the same shall have been expressly purchased, and that all such mines shall be deemed to be excepted out of the conveyance of said lands; and then section 71 proceeds, that "if the owner, lessee, or occupier . . . be desirous of working the same, such owner, lessee, or occupier shall give to the Company notice in writing of his intention so to do . . ." And thereupon if the Company thinks the working of the mines is likely to damage the works of the railway, "they shall give notice to such owner . . . that they desire that it be not worked, and in such cases such owner, lessee, or occupier shall not work or get the minerals comprised in such notice, and the Company shall make compensation for the same . . ." Section 82 provides that if the Railway Company is unwilling to pay compensation, then the owner may work the mines; and there are certain other sections dealing with matters which have to do with the same things.

Now, it seems to me that the whole scheme of the Act is to exempt minerals from purchase unless they are specially purchased, that is to say, unless an ordinary notice to take is given, and the provision in the 71st section of compensation for leaving unworked materially differs from a purchase scheme, and particularly in these two criteria,—first, that the notice to take must be of course within the limits of deviation, whereas the notice under the 71st section may be forty yards beyond the limits of deviation. And then the second point of divergence that I see is this, that notice to take cannot be given after the time when the compulsory powers have expired, whereas the scheme of notice and counter notice under section 71 is applicable after the Railway Company commences to work the railway. Now, I think really that consideration ends the question.

Indeed, the only argument I could find that the Railway Company have was the argument based on some words that are used in the 74th section. Now, section 74 is a general section which provides for the Railway Company making compensation to owners of mines for injuries done to them by severance or by the continuous working of the mines being interrupted by the railway, and it is in these terms:—"The Company shall from time to time pay to the owner, lessee, or occupier of any such mines extending so as to be on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner, lessee, or occupier by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such a manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the Company which cannot be obtained by reason of making and maintaining the railway." And it is said the use of the word "purchase" introduced here meant the proper transference which ought to be accompanied by a conveyance. The simple answer I think is that the word "purchase" refers back to the words used in the side-note of sections 71 and 72, where the expression is used that "if the Company is willing to purchase" the "minerals," or "if the Company is unwilling to purchase." But that of course is a mere description of the form used in the section, and sends you back to see what is done in the section itself; and when you come to

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the section itself you do not have a scheme of proper conveyance at all, but this scheme of notice and counter notice. Therefore I venture to think there is no provision here for transference of mines.

I may say I am considerably fortified in this matter by, I will not say the judgments, but the *dicta* of Judges in giving judgment in several English cases. There is the case of *Errington* v. *The Metropolitan District Railway*.[1] The case itself, I may say, merely decided that under a notice to take you must serve a special notice for minerals; but then the whole matter was discussed, and in particular the 78th section of the English Act, which is the equivalent of the 71st section of the Scottish Act, was considered, and Lord Justice Brett there says, "Under the 78th section after the compensation has been paid by the Railway Company, the minerals do not belong to the Railway Company. They continue to be the property of the landowner. The Railway Company cannot touch the minerals." And in the same way, in the case of the *Great Northern Railway Company* v. *The Inland Revenue Commissioners*, affirmed in L. R. [1901], 1 King's Bench, 416, I find that on page 427 Lord Justice Collins, speaking again of this section, says, "No 'property' and 'no estate or interest in any property' was transferred to or vested in a purchaser. All that happened was that the mineowner came under a statutory obligation not to work or get a certain defined portion of coal which continued to be his own property."

Now, these are opinions which of course are not binding on us, but are of very great weight so far as the argument on this use of the word "purchase" is concerned. That was equally plain there, for you will find just the same use of "purchase" in the section of the English Act which is the counterpart of section 74 of the Scottish Act. For these reasons I am of opinion that your Lordships should answer the question in the negative.

LORD ADAM concurred.

LORD M'LAREN.—It is certain that there are no express words in the Scottish Act giving a railway company or a public company, as it may be, a right to demand a conveyance in exchange for payment of compensation for minerals. In this respect the statutory provision stands in marked contrast to the provisions regulating the acquisition of lands, where the acquirer of the lands is entitled to a conveyance, and the form of the conveyance is prescribed by the statute. I cannot help thinking that this was not an undesigned omission, but, on the contrary, that for a reason that I shall immediately indicate it was not intended that a company acquiring a right to have the minerals left unwrought should also be entitled to a conveyance as on a purchase. The key to the interpretation I think is furnished by Lord Selborne's opinion in the case of *Dixon* v. *The Caledonian and Glasgow and South-Western Railway Companies*,[2] where that very eminent and learned Judge says that even if a company pay compensation they have not a right to work the minerals for which they have paid. Following Lord Selborne's opinion, I can come to no other conclusion than that the compensa-

[1] 19 Ch. Div., p. 559. [2] 7 R. (H. L.) 116, at p. 120.

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tion was to be paid merely for support, and that a company which makes a payment is not to be entitled to a conveyance which would entitle the company if it thought proper to sell the minerals. As long as they are not allowed to sell the minerals the company is not likely to claim anything more than is necessary for the support of the line, and that is all that was intended by statute that it should get. There are some other *dicta* on the subject in the Scottish cases, but none of them appear to touch this point. I notice that in the case of *Nisbet Hamilton*,[1] Lord Adam uses the word "purchase," but then he is speaking about the right to acquire mines above formation level which is an incident of the original purchase of the lands, and that cannot be cited as an authority in aid of the contention of the Company in this case. In another case,—I think the case of the *Caledonian Railway Company* v. *Henderson*,[2]—Lord President Inglis speaks of the company acquiring the minerals. I do not know that this expression goes very far, because a company certainly acquires the minerals for a purpose—for the purpose of support, and that really does not touch the question whether the company is entitled to all the rights which a proprietor holding a conveyance would have. And then there is Lord Fullerton's *dictum* in the case of the *Barrhead Railway Company*,[3] which seems to me to be just as inconclusive as all the rest.

In these circumstances, so far as authority is concerned, I agree with your Lordship in the chair in attaching greater weight to the English decision in which the point was raised at all events by clear implication; and I think the same observation may be made with reference to Lord Selborne's opinion in *Dixon's*[4] case, because his Lordship would not have come to the conclusion that the Company was not entitled to work the minerals if he had thought that they were to get a conveyance that would give them all the rights of heritable proprietors. I therefore agree that the first question should be answered in favour of the Duke of Hamilton's trustees.

LORD KINNEAR.—I am very clearly of the same opinion, for the reasons your Lordship has given.

THE COURT answered the question in the negative.

TODS, MURRAY, & JAMIESON, W.S.—HOPE, TODD, & KIRK, W.S.—Agents.

No. 150.
June 28, 1905.
Melrose-Drover, Limited, v. Heddle.

MELROSE-DROVER, LIMITED, AND OTHERS, Applicants (Respondents).—*Munro.*

JAMES HEDDLE, Appellant.—*Party.*

*Bankruptcy—Petition for Discharge—Process—Appeal.*—A bankrupt, whose petition for discharge had been refused by the Sheriff, which refusal was affirmed on appeal, presented a year later another application for discharge. This application having been refused by the Sheriff, the bankrupt lodged an appeal, but for more than two months thereafter did not print or box to the Court the note of appeal and other documents relative thereto. Thereupon the respondents in the appeal presented a note craving the Court

[1] 13 R. 454, at p. 461.
[2] 4 R. 140, at p. 147.
[3] 11 D. 327.
[4] 7 R. (H. L.) 116, at p. 120.

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1ST DIVISION.

to ordain the appellant to print and box the note of appeal and relative documents, and also to find caution for the expenses of the appeal.

The Court *ordained* the appellant to print and box within ten days, under certification that, if he failed to do so, the appeal would be dismissed, but *refused* to order him to find caution.

IN a petition by James Heddle, a bankrupt, for his discharge the Sheriff-substitute of the Lothians (Guy) pronounced, on 12th April 1905, the following interlocutor:—" . . . Finds that it is admitted by the petitioner (1) that he presented a petition for his discharge to this Court on 24th March 1904, averring that no dividend had been paid to his creditors, but that his failure to pay 5s. in the £ had arisen from circumstances for which he could not justly be held responsible; (2) that in that petition the Sheriff-substitute, by interlocutor dated 4th May 1904, . . . found that the petitioner had failed to prove that the failure to pay a dividend of 5s. per £ out of his estate had arisen from circumstances for which he could not be justly held responsible, and therefore refused the petition, and dismissed the same; (3) that the petitioner appealed against said interlocutor to the First Division of the Court of Session; (4) that, by interlocutor dated 21st June 1904, the Lords . . . refused the appeal; and (5) that the petitioner's estates have yielded no dividend, and the creditors have recovered nothing: Therefore finds that in respect of the provisions contained in section 6 of the Bankruptcy and Cessio (Scotland) Act, 1881, the present petition is incompetent: Refuses the petitioner's motion for leave to amend the petition or to sist the same: Refuses the petition, and decerns."

James Heddle appealed to the First Division.

On 28th June 1905 Melrose-Drover, Limited, and others, the respondents in the appeal, presented a note to the Lord President setting forth that the note of appeal lodged by Heddle was dated 20th April 1905; that in order that the rights of parties might be finally settled and the interlocutor appealed against either affirmed or recalled, it was desirable that the necessary papers be printed and boxed to the Court forthwith; and that, in respect the appellant was an undischarged bankrupt, he should be ordained to find caution for the expenses of the appeal. They accordingly prayed the Court to "ordain the appellant, the said James Heddle, to print and box to the Court within ten days the note of appeal, petition, interlocutors, and such productions as he intends to found upon in support of the appeal; and further, to ordain the appellant to find caution for the expenses of the appeal, and that within ten days."

Counsel for the respondents stated that the respondents' agents had written to Heddle, on 2d June and on 12th June, requesting him to print the note of appeal and other necessary documents, but that he had failed to do so, and had taken no steps to prosecute the appeal; that the Act of Sederunt, 10th March 1870, which, in section 3, prescribed the course to be followed by an appellant in the matter of printing and boxing, was not applicable to appeals under the Bankruptcy Acts,[1] and accordingly, in order to have the appeal disposed of, the respondents found it necessary to present the present note.

Heddle stated that he was prepared to box the note of appeal and

[1] Lamont v. Lamont's Trustees, Jan. 29, 1904, 6 F. 336; Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), sec. 170; Bankruptcy and Cessio (Scotland) Act, 1881 (44 and 45 Vict. c. 22), sec. 6 (3).

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other necessary documents, but maintained that in the circumstances printing should be dispensed with, and that the appeal should be allowed to proceed without his finding caution. He referred to the undernoted authorities.[1]

LORD PRESIDENT.—This is a note by the respondents in an appeal taken by Mr Heddle in a petition at his instance for discharge. The process is not before your Lordships, but the note brings the facts sufficiently to your Lordships' cognisance.

It appears that, roughly speaking, more than a year ago Mr Heddle petitioned for his discharge. This discharge was refused, and an appeal was taken by him to this Division of the Court. By interlocutor, dated 21st June 1904, your Lordships adhered to the judgment of the Sheriff-substitute, and confirmed the finding that Mr Heddle was not entitled to his discharge. After a lapse of nearly a year Mr Heddle presented a new application for discharge. That petition was dismissed by the Sheriff-substitute as incompetent. Against that decision Mr Heddle took an appeal, and in that appeal he has not moved up till now.

Such appeals do not fall within the Act of Sederunt relative to the Court of Session Act, 1868, so that this application is made to your Lordships' common law right to direct the procedure in your own Court, in order that the appeal may be in some way disposed of.

The prayer of the note is "to ordain the appellant, the said James Heddle, to print and box to the Court within ten days the note of appeal, petition, interlocutors, and such productions as he intends to found upon in support of the appeal; and further, to ordain the appellant to find caution for the expenses of the appeal, and that within ten days."

Mr Heddle resists the application so far as printing and finding caution are concerned. He is prepared to box.

I am of opinion that, so far as the first point goes, the prayer of the note should be granted. I think a person who presents a petition under the circumstances stated in the note, and having that petition dismissed, and not having moved in the matter for a considerable time, ought to be subject to the usual orders for expediting procedure. I would propose therefore that Mr Heddle should be ordained to print and box within ten days, under certification that if he fails to do so the appeal will be dismissed. I see no reason for dispensing with the ordinary rules of this Court that appeals should be printed.

I am not prepared to grant the prayer of the note *quoad* finding caution. This is a petition by a bankrupt for his own discharge, and that is in a different position from a litigation by him about other matters. I do not think that a bankrupt applying for his discharge should be hampered by being ordered by the Court to find caution.

I am therefore for refusing the second part of the prayer of the note.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—" . . . Ordain

[1] Mackay's Manual, p. 635; Ballinten v. Connon, July 10, 1851, 13 D. 1399; Heggie v. Heggie, June 6, 1855, 17 D. 802, 27 Scot. Jur. 410.

the appellant to print and box to the Court, within ten days from this date, the note of appeal, petition, interlocutors, and such productions as he intends to found upon in support of the appeal, under certification that if the above order is not obtempered the appeal will be dismissed: *Quoad ultra* refuse the prayer of the said note."

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SNODY & ASHER, S.S.C.—PARTY—Agents.

No. 151.
June 28, 1905.
Blyth Scholarship Fund Trustees v. University Court of St Andrews.

WILLIAM YOUNG BLYTH MARTIN AND OTHERS (Blyth Scholarship Fund Trustees), Petitioners.—*Wilton.*
UNIVERSITY COURT OF THE UNIVERSITY OF ST ANDREWS, Respondents.—*Irvine.*

*Charitable and Educational Bequests and Trusts—University—Bursary—Bursary to "one or other of the Colleges of St Andrews"—Subsequent affiliation of another college with the University of St Andrews.*—A Dundee lady, who died in 1880, by her trust-disposition and settlement, dated in 1878, conveyed a fund to trustees "for the purpose of establishing one or more bursaries in either one or other of the colleges of St Andrews," as her trustees might determine. In 1880 the University of St Andrews consisted of two colleges—the United College and St Mary's College. In 1897 the University College of Dundee (instituted in 1881) was affiliated to and became part of the University of St Andrews.

*Held*, on a construction of the settlement, that the bequest was conceived in favour only of the two colleges of St Andrews existing at the date of the testator's death, and that her trustees were not entitled to extend the benefit of the bequest to the University College of Dundee.

*Charitable and Educational Bequests and Trusts—University—Bursary—Female Students.*—A testator, who died in 1880, by her trust-disposition and settlement left a fund to trustees for the establishment of bursaries for "students" in the University of St Andrews. In 1880 the University of St Andrews was open to male students only, but in 1892, under the Universities (Scotland) Act, 1889, it was opened to female students also.

*Held* that under the settlement the trustees had authority to admit female students in St Andrews to the benefits of the trust, there being nothing in the settlement to shew that the testator intended that female students should be excluded.

2D DIVISION.

MRS AGNES CARMICHAEL OR BLYTH, widow of Mr Charles Blyth, engineer, Dundee, residing at Castle Garden, Crail, died on 9th February 1880, leaving a settlement, dated 14th June 1878, by which she conveyed her whole estate to her brother David Carmichael, engineer, Dundee, and appointed him, subject to the legacies and provisions therein made, to be her sole and universal legatory.

The third purpose of the trust-disposition and settlement was in the following terms:—"Thirdly. For the purpose of establishing one or more bursaries in either one or other of the colleges of St Andrews as the trustees after named may determine, I direct the said David Carmichael as soon as conveniently may be after my death to sell" certain heritable property, and to invest the proceeds "in name of himself and William Scott, solicitor, Dundee, and the survivor of them, as trustees or trustee, for the purposes after mentioned, . . . and I appoint the said trustees or trustee, and such other trustee or trustees as may be assumed to continue said trust as after mentioned, to be the patrons or patron of said bursary or bursaries, and that the said David Carmichael and William Scott, or survivor of them, shall

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as soon as conveniently may be after ascertaining the clear capital sum so to be laid out and invested, fix and determine the number of bursaries so to be established; and I further appoint that the said patrons or patron shall so soon as convenient after determining the number of bursaries, and thereafter from time to time as often as a vacancy or vacancies may occur, nominate and present to the said bursaries a student for each qualified in manner after mentioned, which students so nominated and presented shall be entitled to the yearly produce of said sum so invested equally among them, . . . and that for such number of years, not exceeding four years, as the said David Carmichael and William Scott, or the survivor of them, may determine; and in nominating and presenting students as aforesaid, I appoint the said patrons or patron to prefer, in the first place, such as are of the kindred of my said late husband, and failing such, such as are of my own kindred, secondly, such as are of the name of Blyth, thirdly, such as are of the name of Carmichael, and failing students of the above kindred or name then such as shall be found best qualified and most deserving of the same; and for the perpetuation of said bursaries I hereby direct the said David Carmichael and William Scott, or survivor of them, either to assume new trustees into said trust so as there shall always be three trustees in the management of said trust after the death of the survivor of the said David Carmichael and William Scott, and which trust shall be continued in all time coming by the assumption of new trustees, or in the option of the said David Carmichael and William Scott, or survivor of them, they may and are hereby empowered by such deed or writing as may be necessary to appoint, that the said trust shall be perpetuated in all time coming after the death of the survivor of them in the persons of the Principal and Professors of the said college for the time, under such regulations, in addition to those above specified, as the said David Carmichael and William Scott, or survivor of them, may consider judicious. . . . Declaring that the said bursary or bursaries shall in all time be denominated and known by the name of the 'Blyth Scholarship.'"

The property specified in the third purpose was sold, and a sum of £970 was realised and invested in the names of David Carmichael (the survivor of the two trustees named in the third purpose) and three other persons, as the trustees and patrons of the Blyth Scholarship Fund. The income was about £45 a year.

On 12th April 1882 the trustees and patrons by minute resolved as follows:—"1st. To establish two bursaries of equal amount in terms of the trust-deed. 2d. That each bursary be tenable for three years. 3d. That students while holding the bursaries shall attend the United College of St Andrews. 4th. That one of the bursaries be open for competition this year, and the other next year. 5th. That the trustees and patrons reserve to themselves to decide from time to time when applications come before them, how far, having regard to the terms of the trust-deed, and to the qualifications of the applicants, preference is to be given to candidates who may be relatives of the founder, or who may bear the name of Blyth or Carmichael. 6th. It was reserved for further consideration what subjects candidates should be examined upon, and when and where and by whom the examination should be conducted."

At the date of the truster's death the University of St Andrews consisted of two colleges, viz., the United College of St Salvator and

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St Leonard and St Mary's College; but by Ordinance No. 46, dated 3d February 1894, of the Commissioners under the Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), and approved in terms of that Act by Order in Council on 15th January 1897, the University College of Dundee, which had been founded in 1881, was affiliated to and made to form part of the University of St Andrews subject to the conditions in the agreement between the University of St Andrews and the University College of Dundee, set forth in Schedule I. annexed to the Ordinance.

Further, at the date of the truster's death the Scottish Universities were not open to women, but the Universities (Scotland) Act, 1889, sec. 14, gave the University Commissioners power to enable each university to admit women, and in virtue of that power women were for the first time admitted as students of St Andrews University in 1892.

On 18th May 1905 the trustees and patrons of the Blyth Scholarship Fund (David Carmichael named in the settlement being one of their number) presented a petition, in which they prayed the Court "to authorise the petitioners and their successors in office in the administration of the Blyth Scholarship Fund to extend the benefits thereof (first) to students attending the University College of Dundee as well as the United College of St Salvator and St Leonard and the College of St Mary's, being Colleges of the University of St Andrews, as the petitioners and their foresaids may determine from time to time, and (second) to female students attending one or other of the said colleges."

The petitioners stated;—The truster was a native of Dundee, and belonged to a family of engineers, whose business was and had always been in Dundee. Her father and her husband had been engineers in Dundee, and her brother, the petitioner David Carmichael, was also an engineer there. In making regulations for carrying out the objects of the truster's benefaction it was the desire of the trustees and patrons, in accordance with what they believed would have had the full approval of the truster, that students attending classes in science or engineering should participate in the benefits thereof. But at the outset of their administration there was no course of instruction given in these branches at the University of St Andrews. The University College of Dundee being now one of the Colleges of the University of St Andrews, the petitioners are desirous of extending the benefits of the Blyth Scholarship Fund to students of that college, "but as it is doubtful whether it can be regarded as one of the Colleges of the University of St Andrews in the sense of the truster's settlement, the petitioners, for their safety in the administration of the fund, desire to obtain the authority of the Court to their extending the benefits of the fund to students of that college, so that there may be no doubt of their powers. The admission of students of the University College of Dundee to participate in the benefits of the fund would not, as the petitioners believe, be against the intention of the truster, but the reverse, and they submit that it would not be inconsistent with the provisions of her settlement. Upon such authority being given, the petitioners would be enabled to give effect to the views of the original trustees and patrons by selecting, when occasion offered, students attending classes in science and engineering for the benefits of the fund, as the University College of Dundee is well equipped for such instruction."

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The petitioners further submitted that the extension of the benefits of the fund to women was not opposed to the intention of the truster, and was not inconsistent with her settlement.

Answers were lodged by the University Court of the University of St Andrews. The respondents objected to the extension of the benefits of the fund to students of the University College, Dundee, on the grounds (1) that it was inconsistent with the provisions of the trust-disposition and settlement; (2) that a discretionary power having been entrusted by the truster to David Carmichael, the survivor of the trustees named in the trust-disposition and settlement, to determine the College of St Andrews in which the bursaries were to be established, and he, in exercise of that power, having determined that students holding the bursaries should attend the United College of St Andrews, power should not be conferred on the petitioners to alter this determination; and (3) that under the provisions of Ordinance No. 46 of the Scottish University Commissioners and the agreement scheduled thereto, the fund, having been bequeathed to and vested in the United College of St Andrews prior to the date of that ordinance, was appropriated to the use of the United College of St Andrews, and the bursaries having been at the date of the ordinance attached to the United College of St Andrews, should continue to be tenable only by students there.*

With respect to the admission of women students to the benefits of the fund, the respondents set forth in their answers sec. 14, subsec. (1), of the Universities (Scotland) Act, 1889, and secs. 1 and 2 of Ordinance No. 58 of the Scottish Universities Commissioners;† but the

* The respondents specially founded on the following clauses in the agreement set forth in the schedule annexed to Ordinance No. 46:—

Clause 8. "All the funds and estates at present belonging to the University of St Andrews as now existing, or to either of its present colleges, shall continue to be appropriated to university and college uses respectively in St Andrews, and all funds which are or shall be vested in or bequeathed to the said University, or to either of the said Colleges, by any deed or writing dated on or before the 31st December 1890, shall, if bequeathed for specific purposes, be appropriated to the purposes for which they have been bequeathed, and if bequeathed without designation of a specific purpose, shall be devoted to the further endowment of the offices of the principals, professors, lecturers, and class assistants, and to other university or college uses in St Andrews, and all funds thereafter gifted or bequeathed to either of the Colleges of the University of St Andrews at St Andrews shall also be devoted to the use of the College in St Andrews to which they are gifted or bequeathed."

Clause 10. "Subject to the provisions of the Universities (Scotland) Act, 1889, the scholarships, fellowships, and bursaries now attached to the Colleges and the University of St Andrews shall continue to be tenable only by students studying at St Andrews, and the scholarships, fellowships, and bursaries existing at Dundee shall be tenable only by students studying there."

† The Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), sec. 14, subsec. (1), limits the powers of the Commissioners in regulating bursaries, &c. to those "which have taken effect for more than twenty-five years previously to the passing of this Act, or if given within less than twenty-five years are wholly or partially inoperative or dormant, or which they may be asked to revise and regulate by the Senatus Academicus and the founder of the trust conjointly, with the approval of the University Court."

Ordinance No. 58 of the Commissioners under the Universities (Scotland

respondents did not state that they objected to this branch of the petition. No. 151.

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Argued for the petitioners;—The petition was described as a petition to extend the benefits of the fund, but the petitioners did not mean to appeal to the *nobile officium* of the Court; they did not suggest that the trust had become unworkable owing to change of circumstances; it was simply a question of the construction of the testator's settlement, it being kept in view that the trust was a trust for charitable purposes. In the case of a trust for charitable purposes the trustees were entitled to come to the Court for guidance as to the extent of their powers. On a fair construction of the settlement, University College, Dundee, was entitled to share in the benefits of the fund. It was now "one or other of the Colleges of St Andrews," although it was not so at the date of the settlement or of the testator's death. Had a third college been instituted in the town of St Andrews, and been incorporated with the University, such third college would have exactly corresponded with the language of the bequest, and it did not make any difference that the third college was situated locally in Dundee, especially considering that the testator was a Dundee lady whose family circumstances raised a strong presumption that she would have favoured the Dundee college had it existed in her lifetime. Practically the bequest was for the benefit of students in the University of St Andrews, and had the bequest been in terms so expressed that would have meant the University of St Andrews as it was extended or otherwise altered from time to time. It was said that according to the scheme of the trust the favoured college was to be fixed once for all by the two trustees named in the settlement, or by the survivor of them, and that the survivor of the trustees named, Mr Carmichael, having determined that the United College should be the favoured college, it was *ultra vires* of the trustees thereafter to alter that determination. As a matter of fact the minute of 12th April 1882, by which it was determined that the bursaries should be held by students of the United College, was the minute not of Mr Carmichael only, but of Mr Carmichael and the three trustees who had been assumed by him. That minute proceeded on a sound view of the trustees' powers. It was within the power of the trustees, original or assumed, in the exercise of their discretion, from time to time, to confine the bursaries to the students of any one college or to throw the bursaries open to the students of two or of all the colleges. It was further said that to give the students of University College, Dundee, the benefit of the fund would be to violate the agreement between the University of St Andrews and University College, Dundee. It certainly did not violate clause 8 of the agreement, which referred only to funds "belonging to" the University of St Andrews or to "either of its present colleges," and to funds "vested in or bequeathed to" the said university or either of its said colleges. "Now attached" in clause 10 might have a wider and vaguer mean-

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Act, 1889, sec. 1, empowers the University Court in each University to admit women to such number of open bursaries which have taken effect prior to the 30th day of August 1864, as the University Court may think fit. Sec. 2 provides:—"Save as hereinbefore provided, women shall not be allowed to compete for or hold any bursary, scholarship, or fellowship which is not expressly open to competition by women in terms of the deed of foundation."

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ing, but taking it so, if it was within the powers of the trustees, on a construction of the settlement, to extend the benefit of the fund to students at the Dundee College, then the fund was not "attached" to St Andrews University or to either of its two original colleges.

There was nothing in the settlement to shew that the testator intended to confine her bequest to men students; it was within the power of the trustees therefore to admit women students to the benefits of the bequest.[1]

Argued for the respondents;—The respondents opposed the petition in so far as it related to the admission of students at University College, Dundee, to the benefit of the fund. (1) University College, Dundee, was not "either one or other of the colleges of St Andrews." It was not locally situated in St Andrews, and it was not in existence at the date of the settlement or of the testator's death. To admit students at University College, Dundee, therefore, would be inconsistent with the plain language of the settlement. Had the bequest been for the establishment of bursaries "at the University of St Andrews," a different question would have arisen. It might then have been argued with force that the extension of St Andrews University by the inclusion of new colleges had the effect of extending the benefit of this bequest to such new colleges. But it was plain from the whole language of the bequest that it was not a bequest for the benefit of St Andrews University as such, nor for the benefit of both the two existing colleges at St Andrews, but only for the benefit of one or the other of these two colleges. (2) The particular college to be favoured was left to the determination of the two trustees named in the settlement or the survivor of them. These trustees were empowered either to create a continuing trust for the management of the fund, or to constitute a trust for that purpose "in the persons of the principal and professors of the said college," *i.e.*, of the particular college chosen. Had the latter alternative been adopted by the trustees named in the settlement the present question could hardly have arisen. The survivor of the two trustees named in the settlement had determined that the United College should be the favoured college. That determination was irrevocable. Where there was *delectus personæ* in regard to the trustees upon whom discretionary powers were conferred, these powers could not be exercised by assumed trustees.[2] Here the powers relating to the inception of the trust—and in particular the power to determine which should be the favoured college—were plainly conferred on the two trustees named, as individuals specially selected for the purpose of starting the trust, and when they or the survivor of them had exercised those powers and so started the trust, that exercise was final; thereafter the trustees—original or assumed—had merely the ordinary powers of trust management. It was true that the three assumed trustees signed the minute of 12th April 1882, but that minute derived its whole force from the signature of Mr Carmichael, the surviving original trustee. (3) Further, to extend the benefits of the trust to University College, Dundee, would be to violate the agreement between the University of St Andrews and University College, Dundee. It was a condition of the affiliation that

[1] Governors of Spence Bursary Trust, Oct. 16, 1897, 25 R. 11; Clark Bursary Fund (Mile End) Trustees, Feb. 5, 1903, 5 F. 433.

[2] Hill's Trustees v. Thomson, Oct. 30, 1874, 2 R. 68; Robbie's Judicial Factor v. Macrae, Feb. 4, 1893, 20 R. 358, at 362.

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bursaries now attached to the colleges at St Andrews should continue to be tenable only by students studying at St Andrews (clause 10). This fund was certainly "attached" to the United College in the sense of clause 10. It was contrary to the agreement on which the application proceeded that bursaries attached to one college should be made available to another college, and none the less because the fund so attached was held on a separate trust.

With respect to the admission of women the position of the respondents was this:—As a matter of policy they favoured the admission of women to their bursaries; they therefore left it to the Court to say whether, looking to the terms of Ordinance No. 58 of the University Commissioners, particularly section 2, it was competent for the trustees to admit women to the benefit of the fund.

LORD JUSTICE-CLERK.—The purpose of the testator as set forth in her settlement was to establish one or more bursaries in either one or other of the colleges of St Andrews as the trustees might determine. That refers plainly to the colleges existing then in St Andrews and in no other place, there being in fact at that time no colleges connected with the University of St Andrews in any other town. It is not necessary to decide whether both or only one of the colleges in St Andrews could share in the bursaries. The only question raised is whether the University College of Dundee, which has now been affiliated and brought into corporation with the colleges of St Andrews, is entitled to the benefit of this bequest. I am clearly of opinion that it would be inconsistent with the testator's intention that the bursaries should be available for a college which was not one of the colleges in St Andrews at the time when she made her settlement, which is not now situated in St Andrews, and which has only recently been affiliated to the St Andrews University. This is sufficient for the decision of the case.

As to the question of the admission of women, I am of opinion that the bursaries may be thrown open to them. It is true that the bequest only refers to students who then were eligible, and who of course were males only. But conditions have now altered, and there is nothing in the settlement to indicate, any more than there was in the case of the *Clark Bursary Fund*,[1] that the testator would have been opposed to the admission of women to the benefit of her bounty if they were admissible as students.

LORD KYLLACHY.—I am of the same opinion. This is described as a petition to extend the benefits of a certain bequest. It is not suggested that the Court has power to extend the purposes or alter the conditions of the bequest as expressed in the settlement, but, as explained by the counsel for the petitioners, the object of the petition is to obtain a declaration by the Court as to the extent of the trustees' powers under the settlement. What we have to decide therefore is simply whether the trustees have power to extend the benefits of certain bursaries at present confined to students attending the United College at St Andrews to students attending the University College, Dundee. The trustees claim to have this power because the college at Dundee is now one of the colleges composing the University of St Andrews, and though the bursary is limited to students

[1] 5 F. 433.

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attending "one or other of the colleges of St Andrews," they maintain that that may now be read as including the college at Dundee although it was not one of the colleges of St Andrews at the date of the death of the testatrix. Several answers have been made to this contention. It is said, in the first place, that, as the result of a certain determination made by the trustees in 1882 under a power in the settlement, the benefits of the bursary were confined, and confined finally, not only to students attending one or other of the two colleges at St Andrews, but to students attending the United College at St Andrews. Another answer is that the University College at Dundee forms part of the University of St Andrews only on certain conditions, one of which is that "the bursaries now attached to the colleges and the University of St Andrews shall continue to be tenable only by students studying at St Andrews." But the primary and perhaps best answer is that, on a just construction of the trust-settlement, the bequest is conceived in favour only of the colleges of St Andrews existing at the date of the testatrix's death, and so does not include the University College of Dundee. I think that view is correct, and as it is sufficient for the decision of the case, it is unnecessary to consider whether the other grounds of objection are well founded.

As to the question of the admission of females to the benefits of the bursary, I agree with what has been said, and have nothing to add.

LORD KINCAIRNEY.—I agree with what your Lordship has said both as to the extension of the bursary to the University College of Dundee and as to the admission of females to its benefits.

LORD STORMONTH-DARLING.—The testatrix, who founded these bursaries, died in 1880. At that date there were only two colleges at St Andrews, and her bequest is expressed to be "for the purpose of establishing one or more bursaries in either one or other of the colleges of St Andrews." In 1897, seventeen years after her death, the University College of Dundee became part of the University of St Andrews, but it did not thereby become one of "the colleges of St Andrews," for, geographically speaking, it remained a college, not at St Andrews but at Dundee. For that reason I am of opinion that it does not fall within the description of the object of the charity as expressed in the trust-deed. Further, I entirely concur with the argument for the University Court of St Andrews so far as it is founded on the terms of the agreement between St Andrews and Dundee on which the incorporation proceeded, and when the University Court, representing, as they do, both the contracting parties, tell us that they would regard the extension of the bursary to Dundee as a breach of that agreement, I do not think we can disregard their views. But I think it enough for the decision of this case to put it as your Lordship has done, that the bursary is confined to the two colleges existing at the date of the death of the testatrix.

On the other point I agree that females should be admitted to the benefits of the bursaries, for the simple reason that there is nothing in the trust-deed to indicate the intention of the testatrix to confine them to male students.

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THE COURT pronounced this interlocutor:—"Find that the petitioners have authority to admit to the benefits of the Blyth Scholarship Fund female students attending the United College of St Andrews: *Quoad ultra* refuse the prayer of the petition," &c.

DAVID R. M'CANN, S.S.C.—W. & J. COOK, W.S.—Agents.

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Murphy v. Blair & White.

JAMES MURPHY, Appellant.—*Crabb Watt, K.C.—Burt.*
BLAIR & WHITE, Respondents.—*Cullen—D. Anderson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *Second Schedule, sec.* 14 (*c*)—*A. S. 3d June* 1898, *sec.* 9 (*a*)—*Process—Stated Case—Non-compliance with regulations for obtaining.*—The Act of Sederunt, 3d June 1898, regulating procedure under the Workmen's Compensation Act, 1897, enacts, sec. 9 (*a*), that an application to the Sheriff to state a case shall be made by minute setting forth the proposed question or questions of law, and accompanied by a deposit of £1.

On the last day allowed for taking an appeal against an award by a Sheriff dismissing a claim for compensation, the claimant's Edinburgh agent telegraphed to the local agent to apply for a case for appeal. The local agent being out of town, his clerk obtained the services of another agent, who went to the Sheriff Court office and wrote on the interlocutor sheet "The pursuer appeals against the foregoing judgment, and requests a case to be stated." He did not set forth any question of law, and he did not make any deposit, having been informed by the clerk in attendance at the Sheriff Court office that a deposit was not necessary. The Sheriff stated a case. At the hearing on the appeal the deposit of £1 had not been made.

The Court, on the objection of the respondents, *dismissed* the appeal in respect of the appellant's failure to comply with the regulations enacted by sec. 9 (*a*) of the Act of Sederunt, 3d June 1898.

2D DIVISION. Sheriff of the Lothians and Peebles.

JAMES MURPHY, labourer, Edinburgh, having claimed compensation under the Workmen's Compensation Act, 1897, from Blair & White, contractors, Glasgow, the claim was referred to the arbitration of the Sheriff-substitute (Macleod), at Linlithgow, who dismissed the application, and at the request of Murphy stated a case for appeal.

The case, besides stating the facts and the questions of law on the merits, set forth as follows:—"On the submission by the Sheriff-clerk to parties' procurators of the draft stated case it was objected for the respondents that the application to state a case had not been made in accordance with the regulations thereanent laid down by section 9 of the Act of Sederunt of 3d June 1898.* My award is dated 5th May 1905, and the appellant's only application to me to state a case was made by the writing of the following words on the interlocutor sheets at the end of the note to the award, viz.:—

"'Linlithgow, 12th May 1905.—The pursuer appeals against the foregoing judgment, and requests a case to be stated.

'(Signed) PETER MILLER,
'For James Kidd, Pror. for Pursuer.'"

No question of law was stated, and no deposit accompanied the application.

The case further stated:—"At 4.45 P.M. on 12th May 1905, that being the last day allowed for taking an appeal, there was delivered

* See Rubric.

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at the office of the Linlithgow correspondent of the appellant's Edinburgh law-agent a telegram from the said law-agent asking his said correspondent to take an appeal. Unfortunately the said correspondent was absent in Glasgow, but his clerk took the telegram to several law offices in vain, but at last found a brother procurator who was able to attend to the matter. Just on the stroke of five o'clock (the usual closing time of the Court offices) the said brother procurator called at the Court offices, and having on his request obtained from the clerk in attendance therein the interlocutor sheets wrote thereon the minute above cited. The said clerk in attendance was asked on behalf of the appellant whether any fee was payable in connection with the taking of the appeal, and in the hurry of the emergency he replied that in respect it was in connection with a workman's compensation matter he thought there was no fee payable. The said brother procurator, who had very little knowledge of the particular case he was dealing with, was satisfied with that assurance. There is no reason to suppose that if the liability for a fee had been present to the mind either of the said brother procurator or the said clerk in attendance it would not at once have been paid, and in these circumstances it seemed to me that it would be a great hardship to the appellant if I refused to state and sign a case. Accordingly, I repelled the respondent's objection to my doing so."

At the hearing the deposit of £1 required by the Act of Sederunt had not been paid.

The respondents, in support of their objection to the competency of the appeal, argued;—Not one of the conditions required by the Act of Sederunt had been complied with, and even if a short indulgence as regarded time might have been permissible, the fact that the deposit of £1 had not been made even now was conclusive against the appellant, for the Court would not consider a process in which the statutory fees had not been paid.

Argued for the appellant;—The only serious objection was the non-payment of the deposit of £1, but for that the clerk, not the appellant's agent, was to blame. The case therefore had been competently stated.[1]

Lord Justice-Clerk.—This is a matter in which it is essential that a certain regularity of procedure should be observed, and for that purpose the Act of Sederunt of 3d June 1898, sec. 9 (*a*), enacts certain rules which regulate the method to be adopted in an application to a Sheriff to state a case on a question of law. I am clearly of opinion that these rules have not been observed in the present case, and that we cannot therefore consider the appeal which has come before us.

The history of the case is short. On the last day allowed for taking an appeal a telegram was sent to the Linlithgow agent in charge of the case asking him to take the necessary steps to obtain a stated case. Unfortunately he happened to be absent in Glasgow, but his clerk found another practitioner, who went to the Court offices and wrote upon the interlocutor sheet the words, "The pursuer appeals against the foregoing judgment, and requests a case to be stated." This practitioner apparently was not very

[1] Niddrie and Benhar Coal Co., Limited, v. Young, March 2, 1895, 22 R. 413; Greig v. Finlay, March 4, 1901, 3 F. (J. C.) 36, 3 Adam, 316.

familiar with the procedure in this matter, for under the Act of Sederunt there are two conditions essential to an application for a stated case—first, the minute of application must set forth the question (or questions) of law which is (or are) proposed as the subject-matter of the case; secondly, the minute must be accompanied by a deposit of £1. Neither of these conditions was complied with, and it appears to me that the party who wished to obtain the stated case must bear the consequences which have arisen from the mistakes or ignorance of those who acted for him. While therefore the fact that no proper minute was lodged is a sufficient ground for the decision I have come to, I may point out that we could not in any event consider this appeal, as the fee of £1 has, I understand, even yet not been paid. The cases to which we were referred in the course of debate were entirely different. If fees have not been timeously lodged owing to circumstances for which those who ought to lodge them are not responsible, as, for example, the impossibility of finding a magistrate or a clerk of Court, then I can well understand that the parties will not be allowed to be prejudiced by a failure for which they were not responsible. I need hardly point out that we have no such case here.

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LORD KYLLACHY, LORD KINCAIRNEY, and LORD STORMONTH-DARLING concurred.

THE COURT pronounced this interlocutor:—"In respect the appellant has failed to comply with sec. 9 (*a*) of the Act of Sederunt, dated 3d June 1898, regulating the procedure under the Workmen's Compensation Act, 1897, dismiss the case, and decern; find the appellant liable in expenses."

JOHN ROBERTSON, Solicitor—CUNNINGHAM & LAWSON, Solicitors—Agents.

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Manchester and Liverpool District Banking Co., Limited, v. Ferguson & Co.

MANCHESTER AND LIVERPOOL DISTRICT BANKING COMPANY, LIMITED, Pursuers (Respondents).—*Cullen—MacRobert.*
ALEXANDER FERGUSON & COMPANY, Defenders (Appellants).—*A. J. L. Laing.*

*Bill of Exchange—Proof—Parole—Competency—Bills of Exchange Act*, 1882 (45 *and* 46 *Vict. cap.* 61), *sec.* 100.—The Bills of Exchange Act, 1882, enacts, sec. 100,—"In any judicial proceeding in Scotland, any fact relating to a bill of exchange . . . which is relevant to any question of liability thereon, may be proved by parole evidence."

A bill of exchange, dated 15th February 1904, drawn by Ferguson on and accepted by his firm of Ferguson & Company, was indorsed by Ferguson to the Industries Company, by whom it was indorsed to the Manchester Bank.

In December 1904 the Manchester Bank brought an action against Ferguson & Company for payment of the sum in the bill.

Ferguson & Company in defence averred that the pursuers, the Manchester Bank, having made advances to the Industries Company, Ferguson & Company, at a date specified, agreed to give the bill in security of the advance on the condition agreed to by the pursuers, the Manchester Bank, that payment of the advance was not to be demandable until sufficient working capital had been raised by the Industries Company. Ferguson & Company therefore pleaded that they were not liable on the bill, sufficient working capital not having been raised by the Industries Company. The defenders did not state the amount of working capital to be raised, nor any limit of time within which it was to be raised.

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2D DIVISION. Sheriff of Lanarkshire.

*Held* that the defenders' averments were not relevant to be remitted to probation under the 100th section of the Bills of Exchange Act, 1882.

IN December 1904 the Manchester and Liverpool District Banking Company, Limited, brought an action in the Sheriff Court at Glasgow against Alexander Ferguson & Company, 106 and 108 West Regent Street, Glasgow, and Alexander Ferguson and W. Bruce Mount, the partners of that firm, praying for decree against the defenders for £200 (with interest as specified), being the balance alleged to be due on a bill dated 15th February 1904 for £500 at three months, drawn by the defender Ferguson upon and accepted by the defenders Ferguson & Company.

The pursuers averred;—(Cond. 2) "The said bill was indorsed by the said Alexander Ferguson to The Industries Development Company, Limited, by whom it was indorsed to the pursuers, who are now in right thereof." (Cond. 3) "The defenders, Alexander Ferguson & Company, failed to meet the said bill when it fell due, but they have made" payments to account amounting in all to £300, "leaving a balance of £200 of principal due to the pursuers by the defenders."

The defenders in answer averred that the bill was accepted by Ferguson & Company for the accommodation of The Industries Development Company, Limited. The defenders never received any value in respect of the bill. "Pursuers were aware of this when said bill was indorsed to them, and are not *bona fide* holders thereof for value without notice. . . . Said bill is held by the pursuers subject to the conditions stated in the statement of facts for the defenders."

In their statement of facts (as amended in the Court of Session) the defenders averred;—(Stat. 1) "The bill for £500 condescended upon is part of an original bill, dated 28th January 1902, amounting to £2500, drawn by The Industries Development Company, Limited, London, on and accepted by the defender Alexander Ferguson, in connection with an advance believed to have been made by the pursuers to The Mines Acquisition and Development Company, Limited, London. The latter company owned a gold mining property situated at Barberton, Transvaal, South Africa, and said advance was made by the pursuers to enable it to pay off a debt. The arrangement made at the time the advance was given was that the advance was to be repaid from the working capital which said company were to raise so soon as the state of the mining market would allow of their doing so successfully. This company, however, was not successful in raising said working capital, and its assets and debts were subsequently taken over by The Industries Development Company, Limited, aforesaid. This latter company having failed also to raise sufficient working capital to repay said advance, an agreement was come to between the pursuers, The Industries Development Company, Limited, and the defender Alexander Ferguson, that the last-mentioned defender should give his guarantee to the pursuers in connection with said advance, which, it was arranged, should not be enforced until said working capital had been raised. The said Alexander Ferguson . . . gave his name to said original bill for £2500 on the faith of said agreement amongst the parties." (Stat. 2) "The said original bill for £2500 was in terms of said agreement renewed from time to time until the beginning of 1903, when the pursuers asked for an additional name to said bill by way of further security, and the said defenders, Alexander Ferguson & Company, agreed to give two bills, dated 3d February 1903, for £2000 and £500 respectively, which

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were to be renewed from time to time, on the condition, agreed to by the pursuers, that payment of said advance was not to be demandable until said working capital had been raised to pay off same. The bill of which the sum now sued for is part was the last renewal so granted on 15th February 1904 for £500. The bills so far as cancelled and a statement shewing the whole bill transactions are produced. Said agreement above condescended on was made on or about 3d February 1903 at the pursuers' London office between Thomas Ferguson, their London manager, and Mr David Philip, S.S.C., on behalf of the defenders." (Stat. 4) "Although under no obligation to do so, in view of the agreement subsisting between the parties, the defender Alexander Ferguson, who had financed said Industries Development Company during the past two years, paid to the pursuers on account of this original bill for £2500 sums amounting in all to £2300, besides paying interest on the principal sum, and he has also spent a further sum of about £2000 in registering a new company, called The Scotia Development Company, Limited, for the purpose of raising said working capital, and negotiations are presently pending for the sale of the entire share capital of this new company." (Stat. 5) "The pursuers . . . are only entitled to claim against the said Alexander Ferguson & Company and The Industries Development Company, Limited, upon sufficient moneys being subscribed for working capital in connection with said gold mining property."

The defenders pleaded, *inter alia*;—(3) The bill sued on being accepted by the defenders, Alexander Ferguson & Company, merely for the accommodation of The Industries Development Company, Limited, and being indorsed to and accepted by the pursuers, in the knowledge thereof, the pursuers have no claim against the defenders, Alexander Ferguson & Company. (4) The bill founded on having been accepted by the pursuers on condition that they were not to ask payment until working capital had been raised by The Industries Development Company, Limited, and that capital not having been raised, the defenders should be assoilzied.

The pursuers denied the agreement averred by the defenders, and pleaded, *inter alia*, that the defenders' statements were irrelevant (*a*) in respect of want of specification in regard to said agreement; (*b*) in respect that parole evidence contradictory of the terms of the bill sued on was incompetent.

On 2d February 1905 the Sheriff-substitute (Balfour) pronounced this interlocutor:—"Repels the defences as irrelevant, and decerns against the defenders in terms of the prayer of the petition: Finds them liable to the pursuers in expenses: Allows," &c.

On 28th March 1905 the Sheriff (Guthrie), on appeal, adhered.

The defenders appealed, and argued;—The meaning of the agreement averred in defence was that the defenders were to be liable on the bill only if working capital was never raised for the working of this gold mining property—only if all attempt to raise working capital was abandoned. So long as there was a chance of raising working capital, the defenders' liability on the bill was to be suspended—that was to say, it could be met by a renewal bill without interest. Under the 100th section of the Bills of Exchange Act, 1882, it was competent to prove this agreement by parole. The question raised by the defence was certainly a question of liability on a bill, and the Act said that any fact which was relevant to any such question might be proved by parole. Therefore upon a literal reading of the Act it was

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competent so to prove the agreement here averred. It was, however, impossible to dispute that upon the construction of the Act there were two currents of authority—one which limited the Act to questions of liability as between the drawer and the acceptor, or at the most sanctioned parole proof of agreements with the holder under which the liability of the acceptor or the drawer to the holder was suspended for a definite time; the other, which sanctioned parole proof of agreements under which the liability of the drawer or the acceptor to the holder was suspended indefinitely, or even of agreements under which such liability was negatived absolutely. In the *National Bank of Australasia* v. *Turnbull & Co.*,[1] which was an action by the holders of an unaccepted bill against the drawers, the defence was that under an arrangement with the drawees, of which the holders had knowledge, the drawers were in no event to be liable on the bill. The First Division of the Court, reversing the judgment of Lord Wellwood, who had adopted the more liberal construction of the Act, held that this defence could not be admitted to probation, and Lord President Inglis and Lord M'Laren undoubtedly proceeded on the ground that the Act did not make it competent for the drawers to contradict by parole evidence their liability on the face of the bill as in a question with the holders, but Lord Adam and Lord Kinnear, while concurring in the judgment, proceeded on the ground that the agreement averred in defence had reference only to bills which had been accepted by the drawees, and Lord Adam expressed a very decided opinion in favour of the more liberal construction of the Act. *Gibson's Trustees* v. *Galloway*,[2] where the other Division again refused to allow parole proof of an agreement, was not really decided upon a construction of the Act, and Lord M'Laren, who delivered the only opinion, reserved the question whether parole proof of an agreement that a bill should be renewable for a definite time was competent under the Act. The question reserved by Lord M'Laren was answered in the affirmative by this Division in *Drybrough & Co.* v. *Roy*,[3] where it was held competent to prove by parole an agreement that a bill should be renewable for a definite time. Finally, in *Viani & Co.* v. *Gunn & Co.*,[4] this Division went a step further and held that the acceptors of a bill were entitled to prove by parole a verbal agreement that they were in no event to be liable to the holders. It was impossible to distinguish the present case from *Viani*.[4] It was said that the defenders' averments were irrelevant for want of specification, but that argument was advanced and rejected in *Viani*,[4] where the averments were, to say the least, as vague as they were here. The arrangement averred might be vague, but if it *de facto* was the arrangement, the vagueness of the averments would not make them irrelevant. The pursuers might have been very foolish to enter into such an arrangement, but if they had done so, why should the defenders not be entitled to prove that?

Argued for the pursuers;—(1) The defenders' averments were irrelevant for want of sufficient specification. The defenders did not appear to be able to make up their minds as to the precise nature of the agreement which they alleged in defence. As averred on record, the agreement seemed to be that the defenders were not in any event to be liable to the pursuers on the bill,—that was to say, neither the

[1] March 5, 1891, 18 R. 629.
[2] Jan. 22, 1896, 23 R. 414.
[3] March 17, 1903, 5 F. 665.
[4] July 14, 1904, 6 F. 989.

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defender Ferguson as drawer, nor the defenders Ferguson & Company as acceptors—and that the pursuers were entitled to payment of the sum in the bill only if and when sufficient working capital was raised—apparently by the Industries Development Company—and out of such capital. In short, the averment came to this, that the only party liable on the bill was the Industries Company, and even that liability was contingent on sufficient working capital being raised. The defenders now in argument stated that the agreement was that their liability on the bill was suspended until it should be seen whether sufficient working capital could be raised—that if sufficient working capital was raised the pursuers would be paid in that way, but that if the attempts to raise the capital were finally abandoned, the defenders' liability to the pursuers would emerge, but as to when these attempts were to be regarded as finally abandoned, and as to the person or persons who were to decide whether the attempts should be abandoned, the defenders' averments, whether on record or at the bar, were entirely vague. Averments so vague and indefinite ought not to be admitted to probation on any construction of the Act. The averments in defence were irrelevant on the further ground that it was not specifically set forth in Stat. 2 that the arrangement averred in Stat. 1 with reference to the original bill for £2500 to which Ferguson & Company were not parties, was continued with reference to the bill for £500 to which Ferguson & Company were parties.* The defenders' averments, therefore, were irrelevant for want of sufficient specification. (2) Whether the agreement averred by the defenders was taken as an agreement under which the defenders' liability was suspended for an indefinite time, or as an agreement under which their liability was negatived absolutely, it was an oral agreement which could not competently be proved by parole evidence. The only decision which supported the defenders' contention was the case of *Viani*.[1] In the case of the *National Bank of Australasia*,[2] and in the case of *Gibson*,[3] the decision was adverse to the admission of parole evidence, although there were *dicta* in certain of the opinions in the defenders' favour. *Drybrough* v. *Roy*[4] was an action by the drawers of a bill against the acceptor, who admitted that the acceptance was for value, but averred a verbal agreement under which the bill was to be renewable for a definite period of years. *Drybrough* v. *Roy*,[4] therefore, merely decided that, as between the acceptor and the drawer, it was competent to prove such an oral agreement by parole evidence, and the pursuers did not dispute that questions of liability as between the acceptor and the drawer of a bill might be decided by parole evidence. It was difficult to distinguish the present case from *Viani*,[1] although *Viani*[1] professed merely to follow *Drybrough*.[4] *Viani*[1] ought to be reconsidered.

LORD KYLLACHY.—Some of the cases on this subject have gone very far, but in this case we are asked to go further than has ever yet been proposed. We are asked to send to proof an averment of a mere verbal agreement to the effect that under a certain bill, expressed in the usual terms, no liability

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* Stat. 2 was amended in the course of the hearing with the view of meeting this objection. Stat. 2 as set forth in the text of this report is as amended. The defenders did not make any amendment except in Stat. 2.

[1] 6 F. 989. [2] 18 R. 629. [3] 23 R. 414. [4] 5 F. 665.

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of any kind should arise, until "sufficient" working capital should be raised by certain limited companies. It is not said what was the amount of the working capital which was to be raised, or to be held sufficient; nor, as regards the time within which it was to be raised, is there any mention of limit. For all that appears the time might be the Greek Kalends. Now, that is not, in my opinion, a kind of averment which could have been remitted to probation by writ or oath under the old law, or which in any view of the meaning of the 100th section of the Bill of Exchange Act can be remitted to proof now.

LORD JUSTICE-CLERK, LORD KINCAIRNEY, and LORD STORMONTH-DARLING concurred.

THE COURT dismissed the appeal, and affirmed the interlocutor appealed against.

F. J. MARTIN, W.S.—R. AINSLIE BROWN, S.S.C.—Agents.

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June 28, 1905.*
Herd v. Summers.

MRS SARAH JANE LENNON OR HERD AND OTHERS, Claimants (Appellants).—*Campbell, K.C.—J. A. Christie.*
JAMES SUMMERS, Respondent.
R. & W. CUTHBERTSON, Respondents.—*C. D. Murray.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 4—*Process—Competency of Claim—Joint and Several Liability.*—A workman, while engaged in the employment of a glass merchant in repairing the glass on the roof of a factory occupied by a firm of wool manufacturers, fell from a scaffold on the roof and was killed. In an arbitration under the Workmen's Compensation Act, 1897, his widow and children claimed compensation from the glass-merchant and the firm of wool manufacturers, "jointly and severally, or severally, or in such proportions between them as to the Court should seem just." *Held* that as the Act imposed no joint liability, the application, as directed against the two defenders jointly and severally, was incompetent, and application *dismissed.*

1ST DIVISION.
Sheriff of Lanarkshire.

THIS was a case stated on appeal from a determination of one of the Sheriffs-substitute (Fyfe) at Glasgow in an arbitration under the Workmen's Compensation Act, 1897, between Mrs Sarah Jane Lennon or Herd and others, the widow and children of the deceased William Herd, claimants and appellants, and James Summers, glass-merchant, Glasgow, and R. & W. Cuthbertson, wool and cotton-waste merchants, Glasgow, and Robert Cuthbertson, the only known partner of that firm, respondents, in which application was made by the claimants for a decree against the respondents "ordaining them, jointly and severally, or severally, or in such proportions between them as to the Court should seem just," to pay a certain sum to the claimants.

The case set forth that the deceased William Herd was employed as a painter and glazier by the respondent James Summers. "3. That on 29th August 1904 the deceased William Herd, in the ordinary course of his employment with the respondent James Summers, was engaged" in putting in panes of glass in the sky-light windows on the roof of the premises of the respondents R. & W. Cuthbertson,

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and that while proceeding with said work he was "thrown to the ground from a scaffold erected on the roof of said premises, and sustained injuries which terminated fatally."

"4. That said premises constitute a factory within the meaning of the Workmen's Compensation Act, 1897, in which machines driven by steam or other mechanical power are used.

"5. That on said date the respondent James Summers, or the respondents R. & W. Cuthbertson and Robert Cuthbertson, or one or other of them, had the occupation of said factory, and were the undertakers thereof.

"6. That the respondents R. & W. Cuthbertson and Robert Cuthbertson are the proprietors of said factory, and carry on the works of same.

"7. That the respondent James Summers had on said date the use and occupation of said factory for executing a contract between him and the respondents R. & W. Cuthbertson and Robert Cuthbertson, for the repairing of the roof of said factory, that scaffolding was used by them in repairing said roof, and that said factory and the walls thereof are over 30 feet in height."

The Sheriff-substitute "held that, as a party seeking compensation under the said Act must ask it from an undertaker, the applicant before coming into Court must elect his undertaker." He accordingly dismissed the application as incompetent.

The question of law was,—"Is this application in its present form competent?"

At the hearing the respondent James Summers was not represented.

Argued for the appellants;—Where, as in this case, "undertakers" contracted with another person for the execution of work, a workman in the direct employment of the subcontractor had, in the event of an accident occurring in the execution of the work, a claim for compensation, under sec. 4 of the Workmen's Compensation Act, 1897, against the undertakers as if he had been immediately employed by them. Accordingly under sec. 4 both the respondents were "undertakers" in the sense of the Act, and were employing the deceased workman at the same time.[1] In that situation a joint and several liability on the part of both undertakers was contemplated by the Act. In any case, the facts stated in the case shewed clearly that there was a good claim for compensation against the respondent Summers, and that being so, the Sheriff-substitute should not have dismissed the application, but should have allowed it to go on against Summers.[2] An application under this Act was not to be judged by the technical rules of pleading and procedure applicable in the case of an ordinary action at law.[3]

Argued for the respondents R. & W. Cuthbertson;—There was no claim under the Act against these respondents. The work which the respondent Summers contracted to do was "merely ancillary or incidental to," and in no way a "part of, or process in," the business of these respondents, so that the claim against these respondents was expressly excluded by sec. 4 of the Act.[4] Even if the case fell under

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[1] Cooper v. Crane & Wright, L. R. [1902] A. C. 302, at p. 318.

[2] Robinson v. Reid's Trustees, May 31, 1900, 2 F. 928; Douglas v. Hogarth, Nov. 19, 1901, 4 F. 148.

[3] Rankine v. Alloa Coal Co., Limited, July 16, 1903, 5 F. 1164.

[4] Dempster v. Hunter & Sons, Feb. 26, 1902, 4 F. 580.

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sec. 4, there was no joint and several liability contemplated by that section, and the Sheriff-substitute was right in holding that the claimants must elect against whom they were to make a claim,[1] and in dismissing the application in its present form as incompetent.

At advising,—

LORD PRESIDENT.—This is a stated case arising under the Workmen's Compensation Act. The point is whether the Sheriff-substitute was right in dismissing the application as incompetent. The application is made for decree against two separate persons specified, "ordaining them, jointly and severally, or severally, or in such proportions between them as to the Court should seem just," to pay a certain sum to the applicants. The applicants are the widow and family of a deceased man, William Herd, who met his death by falling from a scaffold erected on the roof of the premises of the respondents R. & W. Cuthbertson, he being at the time engaged in repairing these premises. The premises of R. & W. Cuthbertson were a factory. But Herd was not in their employment in the ordinary sense of the word. He was in the employment of the respondent James Summers, who had undertaken to repair the roof of R. & W. Cuthbertson's premises.

The application is directed against R. & W. Cuthbertson and Summers, with the prayer I have quoted. The reason of the Sheriff-substitute for dismissing the application is quite concisely stated by him in a single sentence as follows:—"I held that, as a party seeking compensation under the said Act must ask it from an 'undertaker,' the applicant before coming into Court must elect his undertaker." I am of opinion that the Sheriff was right. It is not every employer who is liable under the Workmen's Compensation Act, but only employers who are within the meaning of undertaker as defined in the statute. Although there is a provision in section 4 of the Act dealing with subcontracting, there is no provision in the Act for joint and several liability. That being so, I would have had no hesitation in saying that the Sheriff-substitute was right except for the consideration, which at one time I thought might affect the matter, that as this was a summary procedure by way of arbitration, it might be allowed to proceed against one of the respondents, although it was clear on the face of the pleadings that the applicant had no case against the other respondent. I am satisfied, however, that the Sheriff was right in dismissing the application. This is not the only case that may occur. If the Sheriff had opened the door to persons acting in this way there might be a great deal of unnecessary litigation. It would be *mala praxis* to have persons convened into Court, leaving it to the Court to determine against which of them a good action lay. A party must determine against whom he has a remedy before he brings his case into Court.

LORD ADAM.—This is a case under the Workmen's Compensation Act arising out of a fatal accident to a workman William Herd. At the time of the accident Herd was in the employment of one of the respondents, Summers, who was engaged in repairing the premises of the other respondents, R. & W. Cuthbertson. By this claim the appellants have brought

[1] Topping v. Rhind, May 27, 1904, 6 F. 666.

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into Court both Summers and R. & W. Cuthbertson, and ask decree against them "jointly and severally, or severally, or in such proportions between them as to the Court should seem just."

The Sheriff has not applied his mind to the facts of the case, or to the question whether both or either of the respondents are liable. He dismissed the action as incompetent on the ground that an applicant for compensation under the Act must elect his undertaker before coming into Court.

The primary purpose of the Act is—when a workman is killed or injured by accident in an employment to which the Act applies—to make his employer liable to pay compensation to himself or his dependants. There is only one case, so far as I know, where a workman has a claim against anybody else than his direct employer. That is the case dealt with in section 4 of the Act. The effect of that section appears to me to be that, when in an employment to which the Act applies, the undertakers, as defined by the Act, contract for the execution of any work, and an accident occurs in the execution of the work, which gives the workman a claim to compensation against his employers, it also gives him a claim against the undertakers as if he had been immediately employed by them. It, however, in no way interferes with his claim against his direct employer. It only gives him a right to claim his compensation from a second party if he so pleases.

I see nothing, accordingly, in this section, nor indeed in any part of the Act which can give rise to a claim of joint or several liability; and as regards several liability it is clear to me that the workman cannot get decree for the same compensation both against his direct employers and against the undertakers. I think he must elect to proceed against one or other. It is true that if he elects to proceed against the undertakers they may have a right of relief against the employer, as is shewn by the cases of *Cooper & Crane* v. *Wright*[1] and *Topping* v. *Rhind*,[2] but that is a matter with which the workman has no concern. The Act has put the undertakers in the same position as regards the workman as if they had been his direct employers, and I think the Sheriff was right in holding that the workman is bound to elect whether he will seek to recover the compensation due to him from them or from his employer.

Accordingly I think the appeal should be refused.

LORD M'LAREN.—I think it is quite clear that there can be no claim against Messrs R. & W. Cuthbertson, whose premises were in course of repair. There is not the shadow of an argument for preferring such a claim under the Workmen's Compensation Act. The language of the 4th section, which excludes work merely ancillary or incidental to the trade or business carried on by the undertaker, would of itself be sufficient to render a claim against them incompetent.

I must confess that my first impression was that the claim against Cuthbertson might be dismissed, leaving the claim against Summers to be determined by the arbitrator, but on consideration I concur most fully in the views expressed by the Lord President and by Lord Adam. For I am

[1] L. R. [1902] A. C. 302.

[2] 6 F. 666.

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of opinion that there can be no case of joint and several liability under the Workmen's Compensation Act.

On a careful reading of section 4 I think that where a workman proceeds against the undertaker in the sense of the Act instead of proceeding against his own employer, it results that the undertaker shall have relief against the other party liable. Now, if the workmen were allowed to proceed against both parties, and to get a decree against both, what would become of the right of relief?

It seems to me that it would be very inadvisable and embarrassing to allow duplicate claims of this kind to go before an arbiter.

While I think that if this were an ordinary action concluding against two defenders jointly and severally, or severally, there might be ground for separating the claims, it appears to me that in the present case such a proceeding would be at variance with a fundamental principle of the Act—that a workman must proceed either against the undertaker or against his own employer, but not against both.

LORD KINNEAR.—I am of the same opinion, and think that the Sheriff-substitute has put his decision on the right grounds.

I agree with all your Lordships that no joint and several liability is contemplated by the Act. Apart from the provision as to subcontracting, with which we are not concerned at present, the only person liable is the employer, who is the undertaker in the sense of the Act.

That would be a sufficient reason for dismissing a claim based on an averment of joint and several liability. In the present case, however, there did arise a question whether it would not be more convenient to separate the claims against the two defenders, and to dismiss the one which seems plainly unfounded, and to entertain the other and dispose of it on its merits, but I agree that it would be extremely inexpedient to take that course, because the probable effect would be to complicate instead of to simplify the procedure in the Court of the arbitrator.

There is nothing in the Act to relieve a workman or his dependants of the obligation to aver a relevant case against the person whom they bring into Court.

The Sheriff-substitute says that the party claiming compensation must seek it from the undertaker in the sense of the statute, and that he must before coming into Court make up his mind who that undertaker is, and bring his claim against the person whom he maintains to be liable. I agree with the Sheriff, and am not disposed to countenance the notion that a workman may call two or more persons into Court on the allegation that one or other of them, but he cannot say which of them, may be the undertaker in the sense of the statute.

THE COURT answered the question of law in the negative, affirmed the determination of the arbiter, and remitted to him to proceed as might be just.

ST CLAIR SWANSON & MANSON, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

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WILLIAM HYSLOP, Pursuer (Respondent).—*Sol.-Gen. Salvesen—Crabb Watt, K.C.—T. B. Morison.*

DAVID SHIRLAW, Defender (Appellant).—*Aitken, K.C.—Cullen.*

*Sale—Sale of Moveables—Pictures—Warranty—Disconformity to Contract—Rejection—Rejection not timeous—Sale of Goods Act*, 1893 (56 *and* 57 *Vict. cap.* 71), *secs.* 11 (2) *and* 35.—The purchaser of four pictures sold, delivered, and paid for in January and February 1901, continued to possess them without making any complaint until July 1902. Doubts having then for the first time been suggested to him as to the genuineness of the pictures, he took the advice of experts. In consequence of the opinions received he intimated rejection of the pictures, and in October 1902 brought an action for repayment of the price, alleging a warranty of the pictures as the works of certain artists. For the purposes of the action it was ultimately admitted that they were not the works of these artists.

*Held* that, even assuming the pictures to have been warranted as alleged, the buyer's rejection of them was not timeous, and that he was barred from maintaining the action.

*Sale—Sale of Moveables—Warranty—Proof of Warranty—Pictures—Receipt.*—The seller of pictures granted receipts for the price in which the pictures were described as "by" certain artists named.

*Opinions* that these receipts by themselves did not prove a warranty that the pictures were the works of these artists.

*Observations* as to the proof of such a warranty in a sale of pictures.

2D DIVISION. Sheriff of Lanarkshire.

ON 13th January 1901 David Shirlaw, surgeon-dentist, Glasgow, sold two pictures at the price of £235 for the one and £50 for the other, to William Hyslop, coalmaster, residing at Bank House, near Cumnock. For the price of these pictures Shirlaw granted a receipt in these terms:—"Received from William Hyslop, Esquire, Bank House, New Cumnock, Ayrshire, the sum of £285 by cheque for two pictures by John Phillip, R.A., and Thos. Gainsborough, R.A."

In February 1901 Shirlaw sold two other pictures to Hyslop, along with a third one as to which no question arose, at the price of £172. For the price of these pictures Shirlaw granted a receipt in these terms:—"Received from Wm. Hyslop, Esq., New Cumnock, One hundred and seventy-two pds. (£172) for three (3) oil paintings one by E. Verbockhoeven (dated), one by H. Tenkate, and another signed V.C."

All the four pictures were seen by Hyslop before he purchased them. They were delivered to him, and hung up by him in his house. He continued to possess them without making any complaint from the dates when he purchased them until the month of July 1902, when he intimated that some friends of his who professed to know about pictures had expressed doubts as to their being genuine. He thereafter demanded that Shirlaw should refund the sums paid for them, but this Shirlaw refused to do.

Hyslop then, in October 1902, brought an action in the Sheriff Court at Glasgow against Shirlaw, in which he craved decree for repayment of the sums paid by him for the pictures which he had bought from the defender.

The pursuer averred that the defender had warranted the two pictures sold in January 1901 as the genuine works of John Phillip, R.A. (the £235 picture), and Thomas Gainsborough, R.A. (the £50 picture).

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The pursuer also averred that the defender warranted the two pictures sold in February 1901 as the genuine works of E. Verbockhoeven and H. Tenkate respectively.

The defender denied that he had warranted any of the pictures as averred by the pursuer.

The pursuer also averred that in July 1902 he was "instructed" and now believed that the pictures in question were not the works of the artists mentioned, and were practically worthless, and that when this "came to his knowledge" he intimated it to the defender, and called upon him to refund the price.

The defender denied the pursuer's averments as to the pictures not being the works of the artists mentioned.

The pursuer pleaded, *inter alia*;—(1) The defender having sold to the pursuer the four pictures condescended on, and warranted same as the genuine works of the artists named, and such pictures being spurious, the pursuer is entitled to repayment of the price paid, with interest thereon, and expenses as craved.

The defender pleaded;—(2) The defender not having warranted said pictures or made any representation regarding said pictures equivalent to warranty, he ought to be assoilzied. (3) The pursuer having accepted delivery and paid price and retained said pictures for upwards of eighteen months after said sales, he is barred from maintaining the present action.*

It was not alleged that any new facts with regard to the history of the pictures had come to the pursuer's knowledge since he bought them, and it ultimately appeared that his later views with regard to their genuineness were purely the result of expert opinions offered to and obtained by him in and after July 1902.

The Sheriff (Strachan) repelled the defender's third plea, and allowed a proof, and the Sheriff (Guthrie) adhered.

A proof was led, but at the request of parties it was confined at first to the question of warranty. The Sheriff-substitute (Mitchell) held, upon the proof, that the defender had warranted the Verbockhoeven, and allowed a proof as to its genuineness.

On appeal it was not maintained that the Verbockhoeven was the work of that artist, and the Sheriff (Guthrie) found that the defender warranted the four pictures sold to the pursuer to be the works of John Phillip, R.A., Thomas Gainsborough, R.A., E. Verbockhoeven, and H. Tenkate, and decree was granted for £150 as the price of the Verbockhoeven.

Proof having then been allowed as to the genuineness of the alleged Phillip, Gainsborough, and Tenkate, the defender, while stating that he adhered to his opinion with regard to the genuine-

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts:—Sec. 11 (2). "In Scotland failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages."

Sec. 35. "The buyer is deemed to have accepted the goods . . . when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

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ness of the three pictures last mentioned, lodged a minute by which, for the purposes of this action and to avoid the expenses of proof, he agreed to the case being disposed of upon the footing that the three last-mentioned pictures were not painted by Phillip, Gainsborough, and Tenkate, *quoad ultra* reserving all pleas competent to him.

The Sheriff-substitute (M. G. Davidson) thereupon, in respect of the defender's minute, by interlocutor, dated 18th January 1905, found that the three pictures specified were not genuine, and decerned against the defender for payment to the pursuer of (1) £285, and (2) £22, being £172 less £150 already decerned for as the price of the "Verbockhoeven" picture.

The defender appealed to the Court of Session, and argued;—(1) Warranty, or representation amounting to warranty, was not proved.[1] (2) But even assuming that warranty was proved the rejection was too late. The pursuer had not rejected the pictures within a reasonable time.[2] In the case of specific articles seen before sale rejection must be immediate. A reasonable time meant a reasonable time for the examination of the goods. If after reasonable time and opportunity for examination the buyer did not reject, he was held to have departed from his right to do so.[3] This was not a latent defect. It could have been just as easily discovered at the date of delivery as eighteen months after. The pursuer was bound to satisfy himself as soon as possible. It was not enough that he did not discover the defect, because if he did not satisfy himself he could have done so. There must be some time within which the purchaser is bound to make his examination. Having hung the pictures on his walls the pursuer had done something inconsistent with the ownership of the seller, and was consequently thereafter barred from rejecting.[4] In the case of *Carter*,[5] it was held that reliance on the warranty was no excuse for the failure to examine the goods immediately. In the case of *Power* v. *Barham*[6] there was no decision upon the present point, but, whatever was the law of England, if a purchaser claimed the Scottish remedy of rescission he must reject within a reasonable time as provided by sec. 11 (2) of the Sale of Goods Act, 1893.

Argued for the pursuer and respondent;—(1) Warranty, or representation amounting to warranty, was sufficiently proved.[7] (2) The rejection was timeous. The question of what was a reasonable time depended upon the nature of the thing sold. No person who bought a

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[1] Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), sec. 62; Campbell v. Henderson, June 1, 1886, 23 S. L. R. 712; Jeudwine v. Slade, (1796) 2 Espinasse, 572.

[2] Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), secs. 11 (2) and 35.

[3] Ersk. Inst. iii. 3, 10; Sale of Goods Act, 1893, sec. 34; Carter v. Campbell, June 12, 1885, 12 R. 1075; Pearce Brothers v. Irons, Feb. 25, 1869, 7 Macph. 571, *per* L. P. Inglis, at p. 573, 41 Scot. Jur. 302, at p. 303.

[4] Sale of Goods Act, 1893, sec. 35.

[5] 12 R. 1075.

[6] (1836) 4 Ad. and El. 473, 7 C. and P. 356.

[7] Sale of Goods Act, 1893, secs. 62 and 11 (2); Scott v. Steel, Dec. 9, 1857, 20 D. 253, 30 Scot. Jur. 129; Stewart v. Jamieson, March 6, 1863, 1 Macph. 525, 35 Scot. Jur. 314; Benjamin on Sale (4th ed.) 609; Addison on Contracts (10th ed.) 507, 510; Power v. Barham, (1836) 4 Ad. and El. 473, 7 C. and P. 356; Lonie v. Tucker, (1829) 4 C. and P. 15.

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picture with a warranty immediately after purchase called in experts to decide whether the warranty was satisfied, and he was not bound to do so under pain of losing his right to reject. If the law were as contended by the defender, warranties in such cases would be valueless. The expert investigation would often cost more than the picture. But the law was not so. The purchaser was not bound to institute such an investigation until he was put upon his inquiry by doubts arising. Then he was bound to inquire, or else lose his right to reject. Here whenever doubts arose the pursuer immediately instituted inquiry. No doubt, where a defect was patent on examination, the purchaser was bound to examine at once and to reject immediately, if at all, but the defect here was latent. It was not discoverable by such examination as a purchaser usually made on delivery, or was bound to make then. It was only discoverable by a very small number of specially skilled persons. The delay here caused no injury to the things sold. This case was not analogous to the cases where the defect was discoverable on inspection. The rules as to rejection in such cases did not apply. This case was more like the cases of stolen goods or forged documents.[1] In such cases the time after which rejection must be timeous was the discovery of the defect. The purchaser was entitled to assume that what he had bought was genuine and not a forgery, and that it was not stolen goods. These pictures were practically forgeries. This case was very like the case of *Johnston* v. *Lawrie*,[2] where it was held in the case of a violin sold with a warranty as a Stradivarius, which turned out not to be genuine, having been pieced together by the seller from bits of different violins, that the purchaser was entitled to reject it eight years after the sale. In *Power* v. *Barham*[3] the pictures were kept for three years. The principles of *Patterson* v. *Landsberg & Son*[4] applied here. If there was a duty in such cases to investigate immediately on pain of losing the right to reject it made no difference whether the seller was guilty of fraud or not.

At advising,—

Lord Justice-Clerk.—This is a somewhat perplexing case, relating as it does to the genuineness of works of art, and the dispute not being a trade dispute, but one between friends who have had picture transactions. The pursuer maintains that he is entitled to recover certain sums paid by him to the defender in respect of the purchase of two sets of pictures, on the ground that they were warranted as being the genuine work of the artists whose names were attached to them in the carrying out of the transactions. The defender denies that any warranty was given, and pleads further that, even if a warranty were given, there was no rescission of the contract within "a reasonable time," and that therefore under the Sale of Goods Act the pursuer's case must fail.

It is necessary to distinguish between the two transactions, and I shall therefore speak of them separately. The first related to two pictures, which for convenience I shall call by the names which were used in speaking of

[1] Benjamin on Sale (4th ed.) 602, and cases there cited.
[2] Feb. 1, 1890 (O.-H.), Lord Kyllachy (not reported).
[3] (1836) 7 C. and P. 356.
[4] May 24, 1905, *supra*, p. 675.

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them in the transaction, viz., a Phillip, and a Gainsborough. It appears that the defender was a collector of pictures, and had a number hung in his house in Troon, and that upon a day in December 1901 a gentleman called Bailie Watt brought the pursuer to the defender's house to see the collection; that when there the pursuer proposed to buy two of them, which, he says, were represented to him as being works of Phillip, and of Gainsborough, and that the defender was willing to sell them to him. The pursuer bought the two pictures, the Phillip at the price of £235, and the Gainsborough at the price of £50. The pursuer says, that the defender described them as "genuine works of art." Such words cannot in my opinion be held as amounting to a warranty that they were painted by the artists named; and that they were not, if used, intended to be a warranty, is made plain by what occurred in regard to the Gainsborough, to which I shall refer later on. The pursuer's evidence as to the interview is not at all satisfactory, and he himself admits that he has "no distinct recollection of what took place," which is scarcely compatible with anything distinct of the nature of warranty being either asked for or given. If anything distinct had been said on that matter, it is scarcely to be conceived that the pursuer should not remember it. But it is not a little strange to find that the pursuer's evidence in chief is limited entirely to the bare fact that when he paid the money for these two pictures, he received a receipt which is in these terms:—"Received from William Hyslop, Esq., Bank House, New Cumnock, Ayrshire, the sum of £285 by cheque for two pictures by John Phillip, R.A., and Thomas Gainsborough, R.A." It is only in the defender's cross-examination of the pursuer that any question is asked as to the way in which the transaction was gone into, and the above phrase "genuine works of art" is the only expression out of which any suggestion of warranty can be spelled from the pursuer's deposition. But that the expression could not have been understood, or have been intended to be understood, as a warranty, is made plain by Bailie Watt's evidence, from which it appears very distinctly that, as regards the Gainsborough, the defender not only did not warrant it as genuine, but spoke of it in terms inconsistent with any such warranty. For his evidence is quite clear to the effect that as regards the Gainsborough the defender spoke of it as a picture that was "a probable or a possible Gainsborough," which the defender bought for £45, and would let the pursuer have at £50, and he says he has no recollection of the "pursuer asking for a warranty, or of the defender volunteering it." This is very much against the pursuer's case as regards both pictures, for the pursuer's case is that the one was as much warranted as the other.

As regards the Phillip, nothing importing a warranty is stated by the pursuer. As in the case of the Gainsborough, his evidence is limited to proving the receipt. And here again it never occurred to Bailie Watt that any warranty was being asked or given, and he declares that none was given in his hearing. All that he heard was that it was spoken of as a Phillip, and was sold as such. That certainly is stronger than the case of the Gainsborough, but it seems to come far short of a warranty, where nothing definite pointing to a warranty was said, and all that was uttered may be held to be only an expression of belief.

But then it is said that the terms of the receipt are sufficient to constitute

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a warranty. The transaction was by that time complete. The terms on which it was entered into were not then settled, but were settled at the interview at which the purchase was made, and it would, I think, be an extreme stretch in interpretation to hold that words of description, necessary for identification of the articles, constituted a binding written warranty. As regards the Gainsborough the receipt must be taken along with the parole evidence, and if this is done, the receipt could not have been intended or received as a warranty. And this strikes at the whole contention that warranty was given by the receipts. I am of opinion that the pursuer's case fails both as regards the Phillip and the Gainsborough.

Shortly after this transaction it appears from the evidence that a dealer in London sent down two pictures to the defender, one said to be by Verbockhoeven, and the other by Tenkate, and that the defender not wishing to buy them, but thinking them good pictures, gave the pursuer the opportunity of buying them, which he did. That the defender praised these pictures and spoke of them as being in his belief genuine, there can be no doubt, but as regards these pictures the difficulty in the pursuer's way is, that the evidence indicates that the pictures never belonged to the defender, and that therefore when the pursuer puts his case on a sale by the defender to him he puts it on a ground which is not supported by the evidence. I think it is proved that the pursuer knew that they came from a London dealer, and that the defender was only acting between him and the dealer in the transaction. So clearly is this the case that it comes out that the dealer sent a small picture said to be a Vicat Cole to the defender as a commission in kind on the sale of the two pictures, and that the defender—as the transaction was with a friend—threw in the picture by Cole with the others, on the footing that in the circumstances he would not take a commission. If this is a sound view of the transaction, as I think it is, then the pursuer's case must fail.

It only remains to say that even if there had been a warranty as regards any of the pictures, there is ground for holding that the pursuer has lost his remedy by keeping the pictures for a year and a half. He could have found out all he knows now had he thought of taking reasonable diligence at the time. It is not a case in which positive proof is or can be expected. The genuineness is to be determined by expert opinion. Such opinion was open to him from the first, and I am unable to hold that when he kept the pictures without objection for so long he can be held to have timeously rejected them.

I am therefore of opinion on these grounds that the interlocutors appealed against should be recalled, and the defender assoilzied.

Lord Kyllachy.—The pursuer in this action seeks to rescind a contract, or, rather, two contracts, by which he bought from the defender certain pictures so far back as the months of January and February 1901. His case is that there was in each case a warranty—that is to say, a representation forming part of the contract—to the effect that the pictures were respectively genuine examples of Gainsborough, Verbockhoeven, John Phillip, and Tenkate; whereas the fact, as he alleges, was that the pictures were *not* genuine examples of those artists and were therefore disconform to

contract. On that ground he claims to have validly rejected them in July 1902, and to be now entitled to rescind the contracts, and to recover from the defender the prices which he paid in 1901. And I suppose he would be entitled to that remedy, provided (1) that the representations were really made—made as matter of fact, and not merely as matter of belief; (2) that being so made, they were made parts of the contract—that is to say, amounted to warranties, or, speaking more correctly, to conditions of the contract; and (3) that the pursuer, having thus the right to reject and rescind, intimated his rejection within a reasonable time, as required both at common law and by the provisions of sec. 35 of the Sale of Goods Act of 1893.

As to the first two questions, which, between them, raise what may (for convenience) be called an issue of warranty, I confess I have had, up to a certain point, no great difficulty. I do not, I own, see how it is possible, upon the evidence, to hold that anything of the nature of warranty passed with reference to the "Gainsborough." The evidence of Bailie Watt—the friend of both parties—makes it, I think, clear (apart from the very moderate price) that the Gainsborough was represented simply as "a probable or possible Gainsborough of an early date." Again, as regards the two Dutch pictures, I think it is equally clear upon the correspondence that the pictures were recommended by the defender to the pursuer, not as pictures which he was himself selling, but simply as pictures which had been offered to him by a London dealer at certain prices, and the offer of which he passed on to the pursuer, not as matter of business or profit, but as matter of friendly obligement. It seems to me that the very nature of such a transaction excluded as between the parties any idea of warranty. Nor does it appear material, either as to these pictures or as to the Gainsborough, that the receipts granted to the pursuer described the pictures by the names of the supposed painters. That was, it seems to me, no more than a mode of identification, convenient and quite natural in the circumstances. So far, therefore, I have no particular difficulty.

But with respect to what is called the Phillip picture, there is, I think, a good deal of difficulty. I cannot, I confess, accept the pursuer's argument, that in this case, as in that of the other pictures, there was a warranty constituted by the terms of the *receipts*. As already explained, I think that in this matter the terms of the receipts have no particular significance. Neither am I able to agree with the Sheriff-principal in what seems to me to be the somewhat strained construction which he puts upon the correspondence between the parties which preceded the action. As to that I agree with the defender's argument founded on the explicit terms of the earlier letters. But, on the other hand, where a contract of sale has been, as here, made verbally, a warranty or condition may of course be constituted verbally, and proved like any other part of the contract. And to constitute a warranty no *voces signatæ* are necessary. A representation may be a warranty if it appears that it was so intended and understood; the question whether it was so or not being always a jury question depending upon the evidence. Therefore, looking to Mr Watt's evidence, I should have, I must say, difficulty in holding otherwise than that (in contradistinction to what passed as to the Gainsborough picture),

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the Phillip picture was represented and sold as a genuine Phillip, and was so in circumstances which made the representation a warranty. I do not say that the point is clear, but if it were necessary to decide it, I should incline to decide it in that way.

It is not, however, in my opinion necessary to decide whether as to this picture, or as to the others, there was or was not a warranty. For it seems to me sufficient to exclude the pursuer's case that he has failed to shew that his rejection of the several pictures was timeous, that is to say, made within a reasonable time. *Prima facie* a delay of eighteen months is unreasonable. That, I think, is conceded. Nor is it enough for the pursuer to say that he was entitled so long as he pleased to rely on the seller's description of the goods, and so to delay as long as he pleased the acceptance or rejection of the goods delivered under the contract. Such a doctrine, as applied either to the sale of specific goods or to a sale by description, would render nugatory the rule of law expressed in the 35th section of the Sale of Goods Act. Accordingly, it seems to me that the *onus* is on the pursuer to shew that he could not, by any examination reasonably possible, have discovered earlier the disconformity on which his rejection proceeded. And that *onus* I think the pursuer has failed to discharge. When he did reject—more than eighteen months after delivery—he did so as the result of an examination by experts, whom he might equally have consulted a week after his purchase. He is not, therefore, in the position of a person who has by accident discovered, perhaps years afterwards, something justifying rescission which could only have been discovered by accident. That is, of course, a different case altogether. The pursuer's rejection is founded, and his action is brought, on information which was available from the first; and in such circumstances it appears to me that he must be held to have accepted the pictures as satisfying the contract, and so to be barred from the remedy of rescission for which he concludes.

Lord Kincairney.—This is a case of interest and difficulty. The pursuer, Hyslop, sues for repayment of £285 and £172 paid by him to the defender, Shirlaw, for four pictures purporting to be by Gainsborough, Phillip, Verbockhoeven, and Tenkate, all of them artists of high repute. The sales were made by Shirlaw and the pictures delivered to Hyslop in January and February 1901. The pursuer, Hyslop, states that about July 1902 he discovered that the pictures sold to him were not the genuine works of these artists, and he has raised this action for repayment of the prices which he paid. I do not gather how he made that discovery.

The case of the Verbockhoeven was for reasons of convenience taken separately and first in the Sheriff Court, and by interlocutor of 2d August 1904 the Sheriff-substitute found, as the result of the proof, that the painting ascribed to Verbockhoeven was not painted by him, and that the pursuer, Hyslop, was therefore entitled to repayment of the price which he paid.

The parties came to an agreement that the case should be decided as if it had been ascertained that the pictures ascribed to Gainsborough, Phillip,

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and Tenkate were not painted by them, and decree for payment of the sums concluded for was pronounced by the Sheriff.

I do not find it essential to decide any question of warranty.

The defender, Shirlaw, has appealed the whole case, and it has come before the Court on the footing that the pictures sold were not painted by the artists to whom they were ascribed. I think that amounts to an admission that the seller, Shirlaw, had in that particular failed to perform a material part of the contract, and that the buyer is therefore, as provided by section 2 of the Sale of Goods Act, entitled to reject the goods and treat the contract as repudiated if, but only if, he has rejected the goods within a reasonable time after delivery—in this case a period of a year and a half. The seller's right of rejection, and the limitation of that right, is expressed more fully in section 35. The case is peculiar in this respect, that it does not appear clearly how Hyslop's change of view as regards the pictures has come about, or that anything new has been discovered about the pictures since they were sold. It is not said that the painters who were their true authors are now known, nor that the pictures from which they have been copied (if they are copies) have been discovered. Only the reputation of the pictures appears to have altered. At one time the pictures were thought authentic; but their authenticity is now doubted or denied. The question is after all, so far as the proof shews, one of mere opinion and connoisseurship, and the one opinion might be as plausible as the other. But then the opinion that they are authentic has been for the purposes of this action abandoned, and they are to be taken as not being the pictures of the artists named. The matter amounts, so far as the proof which has been led discloses, only to this, that within the year and a half Mr Hyslop has changed his mind about the pictures, but not that he has got any new information about them. If that be the true state of the facts, and it seems all that the proof discloses, then I am inclined to think that it could not be said to be reasonable that the pursuer, Hyslop, should remain in this state of vacillation of mind for a year and a half and should then, without any new facts to go on, be allowed to go back on his bargain.

The case is troublesome certainly, but it does not seem necessary or indeed reasonable to impute dishonesty to either side, and I am of opinion on the whole that the pursuer has shewn no sufficient ground for getting rid of his bargain.

LORD STORMONTH-DARLING.—I concur in the main ground of judgment, viz., that the pursuer's rejection of the pictures was non-timeous. But I am also disposed to agree in the view that there was no warranty as regards any of the pictures.

THE COURT pronounced this interlocutor:—"The Lords having heard counsel for the parties on the defender's appeal, sustain the same, and recall, &c. . . . Find in fact (1) that the defender sold to the pursuer on 13th January 1901 two pictures which the pursuer alleges the defender warranted as the works of John Phillip, R.A., and Thomas Gainsborough respectively, at the sum of £235 for the former and £50 for the latter; (2) that the defender sold to the pursuer in February 1901 three other pictures which the pursuer alleges the defen-

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der warranted as the works of E. Verbockhoeven, H. Tenkate, and one signed 'V. C.,' for the price of £172 in all; (3) that in or about the beginning of July 1902 the pursuer, being satisfied that the said pictures were not in truth the works of the artists by whom it is alleged the defender warranted the pictures were painted, called upon the defender to repay the said sums of £285 and £172 respectively; (4) that the pursuer has failed to prove that the defender warranted the said pictures as the genuine works of the said artists; and (5) that the pursuer continued to possess the said pictures without making any complaint from the dates when the same were purchased until the month of July 1902: Therefore sustain the second and third pleas in law for the defender, and assoilzie him from the conclusions of the action, and decern: Find the pursuer liable in expenses in this and in the inferior Court, and remit the same to the Auditor to tax and to report."

A. R. STEEDMAN, Solicitor—F. J. MARTIN, W.S.—Agents.

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PARISH COUNCIL OF THE PARISH OF GREENOCK, Pursuers (Respondents).—*Younger, K.C.—Spens.*

PARISH COUNCIL OF THE GOVAN COMBINATION, Defenders (Appellants).—*Sol.-Gen. Salvesen—Deas.*

*Poor—Settlement—Derivative Settlement—Illegitimate Minor—Mother with Derivative Settlement.*—Andrew M., an illegitimate child, was born in the parish of Govan. A year after the child's birth the mother married, and through her husband acquired a settlement in the parish of Greenock. When the child was eight years old the mother died. Down to the date of the mother's death the child had lived in the parish of Greenock with his mother and her husband, but after her death the child ceased to live with the husband. Two years after attaining puberty the child became chargeable.

In a question between Greenock and Govan, *held* that the mother having died while the child was still in pupillarity, and the child not having become chargeable until after attaining puberty, the settlement in Greenock possessed by the mother at her death, being a settlement acquired by her through marriage, and not by her own residence, did not enure to the child when he attained puberty; and consequently that the child's settlement was in Govan, the parish of his birth.

*Hay* v. *Thomson*, 18 D. 510; *St Cuthbert's* v. *Cramond*, 1 R. 174; *Caldwell* v. *Dempster*, 10 R. 1263; *Primrose* v. *Milne*, 17 R. 512; *Wallace* v. *Caldwell*, 22 R. 43, *distinguished.*

*Poor—Pauperisation—Maintenance by School Board of child in Blind Asylum—Education of Blind and Deaf-Mute Children (Scotland) Act*, 1890 (53 *and* 54 *Vict. cap.* 43).—The maintenance of a child in a blind asylum by a school board, under the Education of Blind and Deaf-Mute Children (Scotland) Act, 1890, has not the effect of pauperising the child.

2D DIVISION. Sheriff of Lanarkshire.

IN November 1904 the Parish Council of the Parish of Greenock brought an action in the Sheriff Court at Glasgow against the Parish Council of the Govan Combination for decree ordaining the defenders to relieve the pursuers of advances made by the pursuers on account of a pauper named Andrew M'Ilwraith M'Alpine.

The facts are set forth in the following joint minute of admissions:—

"1. That Andrew M'Ilwraith M'Alpine was born on 21st June

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1887 at 410 Mathieson Street, Glasgow, in defenders' parish, and is the illegitimate son of Elizabeth M'Ilwraith, who was born at Cullibacky, County Antrim, Ireland, in 1862, and on 31st August 1888 married John M'Alpine, a carpenter, residing in Cardwell Bay, Gourock.

"2. That the said Elizabeth M'Ilwraith or M'Alpine and the said John M'Alpine resided as man and wife in Greenock down till 1895, and that in September of that year the said Elizabeth M'Ilwraith or M'Alpine died in Greenock Infirmary, having through her husband, the stepfather of the pauper, a residential settlement in pursuers' parish.

"3. That the said Andrew M'Ilwraith or M'Alpine resided in family with his mother and stepfather down till the date of his mother's death, thereafter in Tignabruaich for one year and ten months, and thereafter in his grandmother's house in Drumfrochar Road, Greenock, for two years and six months.

"4. That in January 1900 Andrew M'Ilwraith M'Alpine was admitted to the Glasgow Blind Asylum, and was maintained there by the Greenock School Board in terms of the Education of Blind and Deaf-Mute Children (Scotland) Act, 1890,* until June 1903, when he reached sixteen years of age.

"5. That the advances specified in pursuers' account produced are for subsequent maintenance, and are correct, and that pauper was at time of relief a suitable object."

The pursuers pleaded;—The pursuers having made said advances on behalf of the pauper, and the defenders' parish being the pauper's parish of settlement, the defenders are bound to relieve the pursuers of said advances, and decree should therefore be granted as craved, with expenses.

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* The Education of Blind and Deaf-Mute Children (Scotland) Act, 1890 (53 and 54 Vict. cap. 43), enacts:—

Sec. 3. "If the parent of a blind or deaf-mute child between five and sixteen years of age is from poverty unable to pay for the education of such child as hereinafter mentioned, it shall be the duty of the school board of the parish or burgh in which such parent resides to provide out of the school fund, at rates to be approved by the Scotch Education Department, for the efficient elementary education of such child in reading, writing, and arithmetic, and for his industrial training either in a school belonging to such school board or in some other school or institution approved by the Scotch Education Department; and where necessary the school board shall be bound to provide for the boarding of the child at some place approved by the school board, and for the transit of such child to and from such school or institution or place, at rates to be approved of by the Scotch Education Department.

"Provided that" *inter alia*,

"(1) Where a school board making any payment in pursuance of this section is not the school board of the parish in which the parent of any such child as aforesaid has his legal settlement in terms of the" Poor-Law (Scotland) Act, 1845, "it shall be entitled to relief in respect of any such payment against the school board of the parish in which such parent has his legal settlement as aforesaid."

Sec. 7. "(1) The parent of a blind or deaf-mute child shall not by reason of any payment made under this Act in respect of the child be deprived of any franchise, right, or privilege, or be subject to any disability or disqualification."

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The defenders pleaded;—(1) The pauper's settlement not being in the defenders' parish, they are not liable for relief, and are entitled to be assoilzied, with expenses. (2) The pauper having a derivative residential settlement in the pursuers' parish by virtue of his mother's settlement in that parish, and they being accordingly liable for his maintenance, the defenders are entitled to be assoilzied, with expenses.

On 18th January 1905 the Sheriff-substitute (Davidson) pronounced this interlocutor:—"Finds that Andrew M'Ilwraith M'Alpine was born on 21st June 1887 in the parish of Govan; that he was the illegitimate son of Elizabeth M'Ilwraith; that the said Elizabeth M'Ilwraith married on 31st August 1888 John M'Alpine; that she and her son resided with the said John M'Alpine in Greenock thenceforward until 1895, when she died; that the said Andrew M'Ilwraith had become chargeable to the pursuers' parish, and that the sum sued for had been expended by them for his maintenance: Finds that the settlement of the said pauper is the parish of Govan, and that the defenders are liable to repay to the pursuers the said disbursements: Therefore finds the defenders liable in the sum sued for."

Govan appealed, and argued;—(1) In the matter of poor-law settlement an illegitimate child stood towards its mother in the same position as a legitimate child stood towards its father. A legitimate pupil child took its father's settlement and it retained that settlement, being the father's residential settlement, after reaching puberty, until it lost it in terms of the Poor-Law Acts.[1] The rule was the same with reference to illegitimate children, the settlement of the mother being substituted for that of the father.[2] *Craig* v. *Greig and Macdonald*[3] did not lay it down as a general rule that a child took its own birth settlement if its father had died while it was in pupillarity; all that *Craig* v. *Greig and Macdonald*[3] decided was that where a father died while his child was in pupillarity, and the father had not at the time of his death a residential settlement, the child on attaining puberty took its own birth settlement, not its father's birth settlement. *Greig* v. *Ross*,[4] which related to the settlement of an illegitimate child, appeared to sanction the view that *Craig* v. *Greig and Macdonald*[3] decided that a legitimate child took its own birth settlement on attaining puberty if only its father was then dead, but if that was the meaning of *Greig* v. *Ross*,[4] it was not supported by *Craig* v. *Greig and Macdonald*,[3] and was inconsistent with the cases on which the defenders founded, particularly *St Cuthbert's* v. *Cramond*,[5] which did not appear to have been cited in *Greig* v. *Ross*,[4] and was in terms repeated in *Simpson* v. *Miles and Auld*.[6] *Greig* v. *Adamson and Craig*[7] did not decide anything as to the

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[1] St Cuthbert's v. Cramond, Nov. 12, 1873. 1 R. 174; Simpson v. Miles and Auld, June 6, 1883, 10 R. 928.

[2] Hay v. Thomson, Feb. 6, 1856, 18 D. 510, 28 Scot. Jur. 191; Greig v. Young, June 21, 1878, 5 R. 977; Caldwell v. Dempster, July 20, 1883, 10 R. 1263; Primrose v. Milne, Feb. 27, 1890, 17 R. 512; Wallace v. Caldwell, Nov. 7, 1894, 22 R. 43.

[3] July 18, 1863, 1 Macph. 1172, 35 Scot. Jur. 670.

[4] Feb. 10, 1877, 4 R. 465.

[5] 1 R. 174.

[6] 10 R. 928.

[7] March 2, 1865, 3 Macph. 575, 37 Scot. Jur. 203.

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settlement of the children there.[1] On a consideration of the authorities as a whole, the settlement of the pauper here was in Greenock, the parish of his mother's settlement, not in Govan, the parish of his birth.

(2) Payments on account of a child under the Blind and Deaf-Mute Children (Scotland) Act, 1890, were payments of parochial relief.[2] Sec. 7 of the Act saved the parent from disqualification, but did not save the child, and as the child here had been received into the asylum under the Act when he was still in pupillarity, and when, consequently, his settlement was undoubtedly his mother's derivative settlement, that settlement, in any view, remained its settlement after it reached puberty.

Argued for Greenock;—(1) *Prima facie* a pauper's settlement was in the parish of his birth. The policy of keeping the members of a family together had introduced the doctrine of derivative settlements, in accordance with which children while in pupillarity, if legitimate, had the settlement of their father, and if illegitimate, that of their mother; but when a child emerged from pupillarity it became a poor-law *persona* with a capacity for acquiring a settlement for itself, and where the parent had died while the child was in pupillarity *in dubio* the primary rule applied, and the child on reaching puberty reverted to its own birth settlement.[4] It had no doubt been held that a derivative settlement which a pupil had at the date of his father's death in the parish of the father's residence was not lost in consequence of the child reaching puberty.[5] The reason of that rule was that a father acquired a residential settlement not only for himself but for his family. Perhaps the same rule applied where the mother of an illegitimate pupil had herself acquired a residential settlement, although she died before the child attained puberty;[6] but there was neither principle nor authority for extending the rule to a case like the present where the mother's settlement had been acquired not by her own residence but through her marriage, and she had died when the child was only eight years old. The husband of a woman acquired a settlement only for himself and his own family, and not for her children, whether by a former marriage or illegitimate.[7] Doubtless, while the children in such cases were in pupillarity their mother's settlement, although derived from her husband, would be their settlement, but the reasons for the exception to the primary rule in favour of the birth settle-

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[1] Parish Council of Shotts v. Parish Councils of Bothwell and Rutherglen, Nov. 24, 1896, 24 R. 169, *per* Lord Adam at p. 171.

[2] Education of Blind and Deaf-Mute Children (Scotland) Act, 1890 (53 and 54 Vict. cap. 43), sec. 2; Education (Scotland) Act, 1872 (35 and 36 Vict. cap. 62), secs. 43 and 44; Poor-Law (Scotland) Act, 1898 (61 and 62 Vict. cap. 21), sec. 1.

[3] Adamson v. Barbour, May 30, 1853, 1 Macq. 376.

[4] Craig v. Greig and Macdonald, 1 Macph. 1172; Greig v. Adamson and Craig, 3 Macph. 575; M'Lennan v. Waite, June 28, 1872, 10 Macph. 908, 44 Scot. Jur. 496; Ferrier v. Kennedy, Feb. 8, 1873, 11 Macph. 402, 45 Scot. Jur. 274; Greig v. Ross, 4 R. 465.

[5] St Cuthbert's v. Cramond, 1 R. 174; Simpson v. Miles and Auld, 10 R. 928.

[6] Wallace v. Caldwell, 22 R. 43.

[7] Beattie v. Mackenna and Wallace, March 8, 1878, 5 R. 737; Parish Council of Shotts v. Parish Councils of Bothwell and Rutherglen, 24 R. 169.

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ment entirely failed in the case of an illegitimate child whose mother had died while it was in pupillarity and it had reached puberty.

(2) Maintenance of a child in an asylum under the Blind and Deaf-Mute Children (Scotland) Act, 1890, did not pauperise either the parent or the child. The maintenance was given out of the school-rates, not out of the poor-rates; and poverty in the sense of the Poor Law was not the ground on which the maintenance was given.

At advising,—

LORD KYLLACHY.—The pauper in this case was born in the parish of Govan in the year 1887. He was the illegitimate child of a woman who died when he was eight years old. At the time of her death she had no residential settlement—that is to say, no settlement obtained by her own residence. But she had a derivative settlement in the parish of Greenock, obtained by her marriage subsequent to the pauper's birth to a man who had a residential settlement in Greenock. The pauper himself in January 1900, while still a pupil, was admitted into the Glasgow Blind Asylum, and was maintained there for some years by the Greenock School Board under the provisions of the Deaf-Mute Children (Scotland) Act, 1890. But (apart from that circumstance, as to which a question arises,) it is common ground that he did not become an object of parochial relief until September 1903, when, being then a minor, he applied for relief to the parish of Greenock.

The present question arises between Govan as the pauper's parish of birth, and Greenock the parish of his mother's derivative settlement. It is not suggested that he had acquired any residential settlement for himself.

The first point to be determined is whether the pauper's admission to the Blind Asylum while still a pupil amounted to receipt of parochial relief. If it did, there is no doubt that, having become chargeable during pupillarity, and having since continued chargeable, his mother's settlement, although derivative and acquired simply by marriage, was his parish of settlement. For during pupillarity an illegitimate child takes its mother's settlement however acquired; and parochial relief having been once obtained, there can be no change of settlement while it continues.

It is not, however, in my opinion possible to hold that the reception of this pupil child into the Blind Asylum made him a pauper. That question depends on the construction of the Blind and Deaf-Mute Children Act of 1890; and it does not appear to me that payments out of the school fund, such as are there provided, had the effect of pauperising either the child or its parent.

It must therefore be taken that the pauper attained puberty without having become chargeable under the Poor Law. And therefore the question is, what settlement did he take when he attained puberty? Did he retain his mother's derivative settlement? or did he, on attaining puberty, take a settlement in his own parish of birth?

The authorities on this branch of the Poor Law are not perhaps quite harmonious, but there are some propositions which are I think clear,—(1) An illegitimate child stands towards his mother's settlement in the same

relation as a legitimate child stands towards his father's settlement. (2) Up to puberty a legitimate child takes his father's settlement whatever it is, and however constituted. (3) Similarly an illegitimate child takes up to puberty his mother's settlement, whatever it is and however constituted; whether by residence, or birth, or marriage. (4) On the other hand, at puberty a legitimate child takes his father's residential settlement—that is to say, the settlement, if any, acquired by his father's own residence, and retains that settlement until it is lost in the manner provided by the 76th section of the statute. (5) Similarly an illegitimate child takes at puberty any residential settlement acquired by its mother—that is to say, any settlement acquired by its mother's own residence, and retains that settlement until lost in terms of the statute.

The first of these propositions has never been questioned. The second and third have at least been long settled, particularly by the cases of *Hay* v. *Thomson*,[1] *Caldwell* v. *Dempster*,[2] and *Primrose* v. *Milne*.[3] The fourth and fifth propositions have been the subject of controversy; but may be held as now firmly established as regards legitimate children by the case of *St Cuthbert's* v. *Cramond*,[4] and as regards illegitimate children by the case of *Wallace* v. *Caldwell*.[5]

The appellant in the present case seeks to deduce from the principles thus established a further proposition which they certainly do not cover, and which is this—that an illegitimate child not merely takes, before puberty, his mother's settlement whatever it is, and, after puberty, his mother's residential settlement if acquired by herself, but also takes, even after puberty, his mother's settlement however acquired, including, as in the present case, a derivative settlement acquired by her through marriage. In other words, the suggestion is that an illegitimate child takes after puberty his mother's settlement whatever it is, just as he would have done if he had become chargeable before puberty.

Now, I am of opinion that there are no grounds in principle or social expediency to justify such an extension of the doctrine of *St Cuthbert's* v. *Cramond*,[4] and of *Wallace* v. *Caldwell*,[5] or (if it is preferred to put it) of the doctrine of *Hay* v. *Thomson*,[1] *Caldwell* v. *Dempster*,[2] and *Primrose* v. *Milne*.[3] These cases are all themselves exceptional. They all involve modifications on grounds of social expediency of what is I think the undoubted primary rule, viz., that expressed by Lord Barcaple in the case of *Craig* v. *Greig*, where he says,—"The primary rule or rather principle in this matter is, that every pauper, in the widest sense of that word, in which it means every person, old or young, who must be supported by a parish, ought to be supported by his own parish—that is, the parish of his birth or of his own residential settlement." That is the undoubted primary rule, as I have said; and although, as Lord Barcaple goes on to point out, there have been modifications made upon it by way of exception, no one has yet, so far as I know, proposed to make the further modification, the further exception which is suggested here—an exception and modification to the

[1] 18 D. 510.
[2] 10 R. 1263.
[3] 17 R. 512.
[4] 1 R. 174.
[5] 22 R. 43.
[6] 1 Macph. 1172, at p. 1191.

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effect that after his mother's death and after his own puberty an illegitimate child takes the settlement of his stepfather—the settlement of his stepfather as possessed at his mother's death.

I am not myself prepared to sanction such a result, and therefore I am on the whole matter of opinion that the pauper takes his own birth settlement, and that the interlocutor of the Sheriff should be affirmed.

LORD KINCAIRNEY.—I agree. I am of opinion that the settlement of this pauper is in the parish of his birth.

LORD STORMONTH-DARLING.—The case for Govan Combination involves the rather startling proposition that when a lad of sixteen, eight years after his mother's death, becomes a proper object of parochial relief, the burden of maintaining him falls not on the parish of his birth, but on the parish in which his mother had at the time of her death acquired a residential settlement through marriage.

The primary ground of liability, as explained by Lord Barcaple in *Craig* v. *Greig*,[1] is that every pauper entitled to relief ought to be supported by his own parish, *i.e.*, the parish of his birth or the parish of his own residential settlement. But the course of decision—mainly induced by certain considerations of social duty and humanity—has superimposed upon that primary ground of liability certain modifications, which are now quite as firmly fixed as the original rule itself. Thus, the wife of a living husband and the pupil (or unemancipated) lawful children of a living father follow his settlement. Nay, more, a settlement thus acquired through a father is not lost by a pupil child after the father's death by the child's attainment of puberty, but is retained in his own right until he loses it by his own failure to fulfil the statutory conditions—*St Cuthbert's* v. *Cramond*.[2] In the case of a bastard similar considerations have led to the rule being fixed that during pupillarity the child's settlement is that of its mother to the exclusion even of the parish of its own birth—*Caldwell* v. *Dempster*,[3] and that that settlement, however derived, is not lost even by the death of the mother, the child being still a pupil at the date of chargeability—*Primrose* v. *Milne*.[4] The only case cited to us in which a residential settlement derived from the mother was held to be still available to the bastard after pupillarity was that of *Wallace* v. *Caldwell*,[5] but that was a case in which the settlement had been not merely acquired by the mother's own residence (as distinguished from a settlement derived through marriage), but the residence had been continued in the same parish by both mother and son for some years after the bastard's attainment of puberty.

The argument for Govan has for its foundation the theory that in the case of a bastard a settlement derived from the mother is attended by the same consequences as the settlement derived by a legitimate child from its father, and in particular that it may continue after the child's attainment of puberty, even when it was derived through the mother's marriage and the

[1] 1 Macph. 1172, at p. 1191.
[2] 1 R. 174.
[3] 10 R. 1263.
[4] 17 R. 512.
[5] 22 R. 43.

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mother herself is dead. I think this is an unwarrantable extension of the doctrine applied in *Primrose* v. *Milne* [1] and *Wallace* v. *Caldwell*.[2] The analogy seems to me to fail when the settlement attributed to the bastard after puberty is not the mother's own settlement, but is a settlement derived from a husband with whom, of course, the bastard never had any connection. There is no decision which requires us to carry the theory of derivative settlement so far, and the reasons which have induced the Court to adopt it do not apply to the present case.

I would only add that I do not think that the education afforded to M'Alpine at and after January 1900 under the Blind and Deaf-Mute Children (Scotland) Act, 1890, had the effect of making him a pauper while he was still a pupil.

I am therefore of opinion, with the Sheriff-substitute and your Lordships, that Govan is liable.

LORD JUSTICE-CLERK.—The case for Govan is that the rule, applied in the case of legitimate children, whereby the residential settlement of the father rules, even after puberty, till the children acquire another settlement, must logically be applied to the settlement of the mother in the case of a bastard where she is dead and had at her death a derivative settlement through her marriage. I do not think that there is any ground for so holding. The rules in regard to such cases are rules of policy modifying the law of birth settlement.

I agree that there is no ground for carrying the modification to the extreme that would be the result of giving effect to the contention of Govan parish.

THE COURT pronounced this interlocutor:—"Dismiss the appeal, and affirm the interlocutor" [of 18th January 1905] "appealed against; of new find that the settlement of the pauper is in the parish of Govan, and that the defenders are liable" as sued for.

CADELL, WILSON, & MORTON, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—Agents.

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GEORGE ALEXANDER OAG GREEN, Pursuer (Respondent).—*Watt, K.C.—D. Anderson.*
PETER REID & COMPANY, Defenders (Reclaimers).—*Sol.-Gen. Salvesen—Hunter.*

*Reparation—Slander—Newspaper—Innuendo—Criticism of Management of Hospital Funds—Action of damages by Secretary.*—A newspaper published in Wick contained an anonymous letter to the editor to the following effect:—"Is there any way by which the public can ascertain how the money is spent in the management of the B. Hospital? So long as Sir A. B. was paying the whole bill himself some people argued that he had a perfect right to squander a lot of it on the retainers who form his Bridge Street bodyguard . . . The position is now somewhat different. The public are now being appealed to for assistance. . . . Appeals have been made by the secretary to all the churches in town and county. . . . As there has been such a very strong flavour of jobbery about the institution . . . would it not be fair . . . that a statement should be produced

[1] 17 R. 512. [2] 22 R. 43.

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shewing how the money is being spent on the hospital? How are the church collections being disposed of?"

Sir A. B., mentioned in the letter, was member for the Northern Burghs, of which Wick was one. He had founded the B. Hospital, and had for a time supported it entirely out of his own means. The secretary and treasurer of the hospital was G., a solicitor in Wick, who was also Sir A. B.'s political agent, with an office in Bridge Street, Wick.

G. brought an action against the publishers of the newspaper for damages for slander alleged to be contained in the letter. He innuendoed the letter to mean that he was guilty of dishonest conduct in the application of the funds of the hospital, and was a person unfit to be entrusted with the management of public funds.

*Held* (*rev.* judgment of Lord Ardwall) that the letter would not support the innuendo, and issue *disallowed.*

2D DIVISION.
Lord Ardwall.

IN the issue for 24th February 1905 of the *John o' Groat Journal* newspaper, Wick, there appeared a letter to the editor in the following terms:—

"The Bignold Hospital Management.

"Sir,—Is there any way by which the public can ascertain how the money is spent in the management of the Bignold Hospital? So long as Sir Arthur Bignold was paying the whole bill himself some people argued that he had a perfect right to squander a lot of it on the retainers who form his Bridge Street bodyguard, although others maintained that, as he represented all the electors equally, there should be an equal division of the spoil among them.

"But whatever might be said about that, the position is now somewhat different. The public are now being appealed to for assistance. Although the hospital has been named after the gentleman, who is thereby advertising himself so assiduously in his own newspaper and elsewhere, an attempt is being made to save his pocket. Appeals have been made by the secretary to all the churches in town and county to raise money for it, while concerts and other means are being used to raise money for such a good object.

"Church-goers and others have already subscribed. A good object will always raise money. But as there has been such a very strong flavour of jobbery about the institution from the beginning, would it not be fair and right, seeing that the public are being called on to assist, that a statement should be produced shewing how the money is being spent on the hospital? How are the church collections being disposed of? The public surely has a right to know that. Such a statement is, I think, necessary to gain the confidence of the subscribing public.—I am, &c. A SUBSCRIBER."

Sir Arthur Bignold, mentioned in this letter, was member of Parliament for the Northern District of Burghs, of which Wick was one.

In March 1905 George Alexander Oag Green, solicitor, Wick, and secretary and treasurer of the Bignold Cottage Hospital, Wick, brought an action against Peter Reid & Company, proprietors and publishers of the *John o' Groat Journal*, and against Ernest Buik, sole partner of the firm, concluding for decree for £1000 as damages for slander alleged to be contained in the above letter.

The pursuer set forth the letter, and also referred to a leading article in the issue of the *John o' Groat Journal* for 3d March 1905—(Cond. 3) " . . . In said leading article the defenders take pains to exonerate from blame both the board of managers and the medical and nursing staff. As the pursuer is the only other official connected

with the hospital, and the management and care of the funds are practically under his charge, the said leading article makes it most plain and pointed that the charges of jobbery and dishonesty and dishonourable conduct contained in said letter are meant to apply only to the pursuer. The pursuer's office is situated in Bridge Street, Wick, and the reference in the letter of 24th February to Sir Arthur Bignold's retainer forming his Bridge Street bodyguard clearly applies to the pursuer, who is the only person in Bridge Street who is closely associated with Sir Arthur Bignold, and is Sir Arthur's agent in Wick."

(Cond. 4) The said letter and leading article "were written of and concerning the pursuer, and falsely, maliciously, and calumniously represent that the funds of the Bignold Cottage Hospital have been diverted from their proper purpose, and improperly applied for the personal benefit of the pursuer, that the pursuer has been concerned in perpetrating jobbery in connection with the affairs of the said hospital, whereby he has been personally benefited at the expense of the funds of the hospital." The said letter and leading article "further represent that the pursuer has improperly appropriated to his own uses the funds of said hospital, and that, while subscriptions have been canvassed for and received from the public ostensibly for a public object, these have been applied for the personal gain of the pursuer." The said letter and leading article "also represent that no regular or proper accounts have been kept, and that, for the purpose of concealing the personal benefits accruing to himself therefrom, the true state of the funds and their application have been improperly withheld by the pursuer from the public or those who have a right or interest to know, and that the appropriation of the funds to his own uses has thereby been facilitated." By said letter and leading article "the defenders have represented the pursuer as guilty of dishonest and dishonourable conduct, and as one who is unworthy to be entrusted with the management of public funds, and who improperly and dishonourably uses the funds of a public charitable institution, and also funds subscribed by the public for its objects, for his own personal aggrandisement and pecuniary benefit."

(Cond. 6) "The said statements published by the defenders are of and concerning the pursuer, and were understood by the whole community to refer to him. They have obtained wide currency in the district in which the pursuer lives and carries on business as a solicitor, and they have caused great injury to his character and reputation." The statements in the said letter and leading article, "which was one of a long series of articles reflecting on pursuer, were maliciously made by the defenders for the purpose of holding the pursuer up to public contempt and ridicule, and were calculated to do so, and had that effect." (Cond. 7) "The said statements . . . are entirely false, and there is not, nor ever has been, the least ground for the unfounded charges made against the pursuer. The defenders were well aware in making said charges that they were without foundation. . . ." (Cond. 8) "The Bignold Cottage Hospital was gifted to trustees for behoof of the community of Wick and district by Sir Arthur Bignold, M.P. for the Northern Burghs, by deed of trust and gift, dated 28th August 1900. . . . By said deed of trust and gift it was provided that the pursuer should be appointed clerk to the trustees at such salary as they may fix, and that it should be the duty of the clerk to keep the minutes of the trustees and also to keep

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a correct account of all moneys received and disbursed, and at the annual meeting in December that he should submit his accounts" to the trustees for audit. "On said accounts being passed and certified, it was further provided that the clerk should deliver an abstract thereof to the editor or publisher of each newspaper in Wick or Pulteneytown, and that he should give access to the book of annual accounts to any of the public desiring to see the same at reasonable hours and free of charge. . . . Under said appointment the pursuer, in terms of the deed of gift, combines the offices both of clerk and treasurer." The pursuer then averred that he had hitherto not received any remuneration for his services. "Since the institution of the hospital a report of the managers has been annually printed and circulated among the public. This annual report has appended to it a printed abstract of the treasurer's accounts as audited. In terms of the directions of the trust-deed these reports and abstracts of accounts have been sent annually to the publishers of the newspapers in Wick and Pulteneytown, including the defenders. The foregoing facts were all within the knowledge of the defenders, but they have, in pursuance of their malicious design to injure the pursuer, wilfully ignored them." The pursuer further averred that the defenders had refused to disclose the name of the writer of the letter. (Cond. 9) "The letter . . . is only one of a series in which the defenders have sought to injure the pursuer's reputation, and it is believed and averred that it is not a *bona fide* letter received by them from a member of the public, but was composed and written by the said Ernest Buik, or by some member of his staff, or by some other person specially instructed by him to do so."

The defenders replied;—(Ans. 4) "Explained that said letter deals with a matter of public interest. It correctly sets forth what is matter of fact, and the observations and questions about the hospital constitute perfectly fair and legitimate comment and inquiry. No reflection upon the personal character of the pursuer is made or intended to be made."

The pursuer pleaded, *inter alia;*—(2) The defender having slandered the pursuer as condescended on, the pursuer is entitled to damages.

The defenders pleaded, *inter alia;*—(1) No relevant case. (2) The statements contained in the letter complained of not being of and concerning the pursuer, and not bearing or being capable of bearing the innuendo proposed by the pursuer, the action ought to be dismissed. (3) The defenders ought to be assoilzied in respect that the letter complained of deals with a matter of public interest, and contains only fair criticism of what had occurred in connection therewith.

On 1st June 1905 the Lord Ordinary (Ardwall) pronounced an interlocutor allowing an issue founded on the letter of 24th February 1905, and disallowing an issue founded on the leading article of 3d March 1905.*

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* "OPINION.—I must say that I have difficulty in allowing an issue in this case, and I am clear that the pursuer is not entitled to an issue upon the article complained of, and therefore I disallow the second issue.

"With regard to the letter, were it not for the statements in the opening paragraph I do not think I would be disposed to grant an issue on it either. But the letter commences with a statement that, at a former period when the Bignold Hospital funds were all provided by Sir Arthur Bignold, these

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As the pursuer acquiesced in the Lord Ordinary's judgment disallowing the second issue, it is unnecessary here to notice that issue further.

The issue allowed by the Lord Ordinary was in the following terms:—"Whether the defenders printed and published in the *John o' Groat Journal* newspaper of 24th February 1905 the letter signed 'A Subscriber,' printed in Schedule I. hereto annexed, and whether the said letter or part thereof is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had been guilty of dishonest conduct in having improperly applied the funds of a public charitable institution for his own personal benefit, and is thus a person who is unfit to be entrusted with the management of public funds—to the loss, injury, and damage of the pursuer? Damages laid at £1,000."

The defenders reclaimed.

After the hearing on the reclaiming note had proceeded some length, *Watt, K.C.*, for the pursuer, stated that he did not maintain that the letter of 24th February would support the innuendo that the pursuer had been guilty of personal dishonesty by appropriating to his own uses funds belonging to the Hospital, and as the issue as it stood was ambiguous he moved for leave to lodge an amended issue. The hearing was accordingly adjourned.

Thereafter the pursuer lodged the following amended issue:—"Whether," &c., "falsely and calumniously represents that the pursuer was guilty of dishonest conduct in the application of the funds of the Bignold Cottage Hospital, and is a person who is unfit to be entrusted with the management of public funds, to the loss, injury, and damage of the pursuer?"

Argued for the defenders and reclaimers;—The pursuer's case was that the letter of 24th February meant that he had been guilty of personal dishonesty in the management of the Hospital funds; there were suggestions on record that the defenders had in their newspaper been persistently holding the pursuer up to public ridicule and contempt, but the pursuer did not ask for an issue on that ground. The letter of 24th February did not make, or imply, a charge of dishonesty against anyone, and certainly not against the pursuer. The only direct reference to the pursuer was that, as the secretary of the Hospital, he had sent out appeals to the Churches for subscriptions;

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funds were squandered upon the Bridge Street bodyguard (Bridge Street being the site of the pursuer's office, which is the headquarters of the Unionist party in Wick); and further, that this bodyguard divided the 'spoil' amongst themselves without communicating any of it to the other electors; then the letter goes on to say that that was the state of matters then, but that now it is different, and the letter may be so construed as to suggest that instead of only Sir Arthur Bignold's money being squandered, it is the money of the public that is now being treated in that way and possibly is forming part of the spoil of the Bridge Street bodyguard. Accordingly, the writer of the letter calls for a statement shewing 'how the money is spent on the Hospital,' and 'how the church collections are being disposed of.' Of course calling for a full statement of the accounts of a charity is quite a proper and reasonable thing to do, but when we look into the reason why the statement is being called for, I think that the letter may be viewed as libellous. The innuendo proposed by the pursuer may be a little strained, but he undertakes to satisfy a jury that it sets forth the meaning of the letter, and I do not see my way to refuse an issue."

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but there was nothing dishonest about that; the pursuer in sending out the appeals was simply obeying the instructions of the Hospital trustees. The Bridge Street bodyguard was the Liberal Unionist Club, whose clubhouse was in Bridge Street, and the "squandering" referred to at the beginning of the letter meant, as everybody in Wick would understand, that the contracts in connection with the building of the Hospital had been given to Sir Arthur Bignold's political supporters exclusively. The writer of the letter went on to say that while the public might have no right to complain of that so long as it was Sir Arthur's money that was being spent, it was a different matter now that the Hospital was supported by public subscriptions. That was a perfectly legitimate line of criticism to take in a matter of public interest in the locality.

Argued for the pursuer;—The letter was capable of bearing the innuendo proposed, viz., that the pursuer was guilty of dishonesty in the application of the Hospital funds, and was a person who was unfit to be entrusted with the management of public funds—not, that was to say, of dishonesty in the sense of dishonestly appropriating to himself funds belonging to the Hospital, but of (in the language of the letter itself) "jobbery," which meant official corruption—using a public office to gain some private end. The fair meaning of the letter was that the writer intended to accuse someone of dishonesty in this sense. The first paragraph plainly meant—the defenders did not dispute it—that the funds of the Hospital had, at first, at all events, been used to advance Sir Arthur Bignold's political influence in the burgh, and the writer proceeded to suggest that the money was being used in the same way now. No doubt it was put as a question, but a question might, and here did, mean a slander. It was, at all events, for a jury to determine whether the question was a *bona fide* one. It was said that there was nothing to shew that the writer had the pursuer specially in view. That also was a matter for a jury. The pursuer was Sir Arthur's political agent in the burgh, and he was also the secretary and treasurer of the Hospital. He certainly therefore was the person through whom the "squandering" on the Bridge Street bodyguard alleged in the first paragraph of the letter took place; and if the latter part of the letter meant that this squandering was being continued, but with public funds and not with Sir Arthur's only, that simply meant that the pursuer was using his public official position as secretary and treasurer of the Hospital to advance his private ends as Sir Arthur's agent. The whole tenor of the letter, and especially the reference to the appeals to the churches sent out by "the secretary," followed by the question as to how the church collections were being disposed of, would make it plain to anyone in Wick that it was the pursuer and no one else who was attacked. Indeed the defenders themselves had made that plain, for in their leading article of 3d March they had exonerated everybody connected with the management of the Hospital except the pursuer. The defenders argued that the letter did not go beyond the limits of fair criticism, but if the pursuer's averments were well founded the letter was really a part of a systematic attack on the pursuer personally under the cover of a criticism of the Hospital management.

Lord Kyllachy.—I do not think it necessary to say much in proposing to your Lordships that this issue should be refused. The innuendo now submitted to us does not appear to differ at all materially from that which

we considered the other day. It rests, like the latter, on the theory that the letter complained of imputes dishonesty to the pursuer in connection with the application of these Hospital funds. Now, it does not appear to me that the letter can reasonably be read as imputing such dishonesty to the pursuer. I cannot so read it; nor can I conceive a jury doing so. At least I should not consider they acted reasonably if they did.

LORD KINCAIRNEY.—I concur. I cannot read any part of this letter as imputing dishonesty to the pursuer.

LORD STORMONTH-DARLING.—Actions of reparation for slander or libel exist in order to clear character, and do not exist for the mere purpose of stirring up dirty water which had better be allowed to remain stagnant. They are not meant to encourage mere recrimination. The whole object of such actions is to clear character and nothing else, and if character is not seriously attacked the action should not be allowed to proceed. Here the pursuer is not even named in the letter of which he complains, and unless we can fairly read that letter as imputing personal dishonesty to the pursuer, I do not think that an issue should be allowed either with the innuendo which the Lord Ordinary with great difficulty passed or with the innuendo now proposed. I cannot find any charge of, or any implication of, personal dishonesty against the pursuer in this letter, and I therefore concur with your Lordships.

LORD JUSTICE-CLERK.—Mr Watt took the opportunity of improving his issue, but I do not think that he has succeeded in doing so. The new innuendo is not satisfactory. It sets forth that the letter "falsely and calumniously represents that the pursuer was guilty of dishonest conduct in the application of the funds of the Bignold Cottage Hospital, and is a person who is unfit to be entrusted with the management of public funds." Now, I should have expected that the issue would have gone on to say, after the words "Bignold Cottage Hospital," "by doing" so and so, giving the mode by which he was said to have acted dishonestly. Mr Watt when asked said that he could not say in what particular way the writer of the letter represented that the pursuer had acted dishonestly. I find it difficult to see that the pursuer is intended to be attacked at all in the letter. The only reference to the pursuer is in relation to the sending out of appeals which are said to have been made "by the secretary." If the words "by the secretary" are left out, there is nothing to connect the pursuer with the letter, and it is, I suppose, matter of course that circulars should be signed by the secretary. I am unable to see that this mere reference to the secretary as an official can be innuendoed to mean that the pursuer was guilty of personal dishonesty. I therefore agree with your Lordships.

THE COURT recalled the interlocutor reclaimed against and disallowed the issue.

S. F. SUTHERLAND, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 158. CHARLES SIMON ROMANES (Ferguson's Curator Bonis), Petitioner.—*A. M. Anderson.*

July 4, 1905.

Ferguson's Curator Bonis.

*Administration of Justice—Inner-House—Junior Lord Ordinary—Judicial Factor—Curator Bonis—Enforcement of Decree to deliver document—Warrant to open lockfast places.*—The curator bonis of an incapax obtained a decree in absence against the wife of his ward, ordaining her to deliver to the curator a certain policy of insurance on his ward's life. A charge upon this decree having expired without result, the curator, being in a difficulty, presented a note to the Junior Lord Ordinary, in which, on the narrative that he believed that the execution of a warrant to imprison would not be effectual to enforce production, he craved for a warrant to messengers-at-arms to search for and recover the document, and if necessary, to open all shut and lockfast places.

The Junior Lord Ordinary having reported the matter to the Inner-House, the Court *granted* the warrant asked for.

1ST DIVISION. THE JUNIOR LORD ORDINARY (Lord Johnston) reported orally to the First Division a note presented to him by a curator bonis, which set forth that the curator had found it necessary to obtain delivery of a policy of assurance, part of the property of the ward. The policy was in the possession of the wife of the ward, and she had refused to deliver it. In these circumstances the curator had raised an action against the ward's wife to ordain her to deliver to him the policy, and decree had been pronounced in absence against her. A charge had followed on the decree, but the days of charge had expired without the decree being obtempered. The curator had obtained warrant to imprison on the expiry of the charge, but was of opinion, from his experience in the curatory, that personal diligence against the wife without power to institute a search would not lead to the recovery of the document.

In these circumstances, the curator brought the matter before the Junior Lord Ordinary, and asked that warrant should be granted to messengers-at-arms to search for and recover the document, and, if necessary for that purpose, to open lockfast places.

LORD PRESIDENT.—(After narrating the circumstances above set forth) —Lord Johnston has had the matter before him, and reports that if the order is to be obeyed other means than imprisonment must be used to get the document. I am of opinion that the order of the Court must be obeyed, and the document produced. Imprisonment in such cases is not only *in modum pœnæ*; its object is to compel performance, and here, if, as we are informed, it would fail in that object, and the document would not be forthcoming, we must have recourse to other means. I am of opinion, therefore, that we should grant warrant to messengers-at-arms to search for the policy, and, if necessary, to open all shut and lockfast places.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT pronounced this interlocutor:—"The Lords, on the verbal report of Lord Johnston, Ordinary, and having considered the note for the curator bonis, with relative statement by the curator bonis, grant warrant to messengers-at-arms to

search for, recover, and take possession of the policy of assurance for £300 . . . and if necessary for that purpose, to open all shut and lockfast places, and to deliver the said policy of assurance to the petitioner, Charles Simon Romanes, as curator bonis to the said John Scotland Ferguson." No. 158. July 4, 1905. Ferguson's Curator Bonis.

BALFOUR & MANSON, S.S.C., Agents.

BARON DE BILDT, Petitioner.—*MacRobert.* No. 159.

*Process—Proof—Commission—Evidence to be laid before a foreign Court—Appointment of Commissioner—Foreign Tribunals Evidence Act*, 1856 (19 *and* 20 *Vict. cap.* 113), *sec.* 1.—*Held* that the Foreign Tribunals Evidence Act, 1856, in authorising a Court to pronounce an order for the examination of witnesses on oath at the request of a foreign tribunal does not authorise an order for their examination before a Court, but only before a Commissioner. July 4, 1905. Baron de Bildt.

BARON DE BILDT, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Sweden and Norway to the Court of St James, presented a petition to the First Division under the Foreign Tribunals Evidence Act, 1856,* in which he set forth, *inter alia*:—"That in an action in regard to a civil or commercial matter presently 1ST DIVISION.

* The Act 19 and 20 Vict. cap. 113, enacts, sec. 1, that, "Where upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in a foreign country before which any civil or commercial matter is pending is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly, and it shall be lawful for the said Court or Judge by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just, and any such order may be enforced, in like manner, as an order made by such Court or Judge in a cause depending in such Court or before such Judge."

Section 2 enacts that "A certificate under the hand of the ambassador, minister, or other diplomatic agent of any foreign power, received as such by Her Majesty, or, in case there be no such diplomatic agent, then of the Consul General, or consul of any such foreign power in London, received and admitted as such by Her Majesty, that any matter in relation to which an application is made under this Act is a civil or commercial matter pending before a Court or tribunal in the country of which he is diplomatic agent or consul having jurisdiction in the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matter so certified; but where no such certificate is produced, other evidence to that effect shall be produced."

By the 6th section the Court of Session is declared to be a Court having authority under the Act.

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pending in the Town Court of Halmstad in the kingdom of Sweden, being a Court of competent jurisdiction, between James Stiven of Dundee,—Plaintiff; and Alfred Johansson of Halmstad aforesaid,—Defendant; the said Court is desirous of obtaining for use in such action the testimony upon oath of the following persons, viz.:—John Sorby of Millhouse, Tayport, Fife, and David Ferguson of Ogilvy Street, Tayport, Fife."

"That the petitioner makes the present application for authority to examine the said witnesses before the Sheriff-substitute at Dundee, whom failing, such other person as your Lordships may appoint, and for an order commanding their attendance."

The prayer of the petition was in these terms:—"May it therefore please your Lordships to order the examination of the said John Sorby and David Ferguson, upon oath, before the said Sheriff-substitute, whom failing, such other person as your Lordships shall appoint; and further, to appoint the said Sheriff-substitute or such other person to examine the said witnesses upon the questions contained in the letter of request by said Town Court of Halmstad, and translation thereof, Nos. 7 and 8 of process, and to command the attendance of the said witnesses at such place and at such time or times, and at such hour or hours as the said Sheriff-substitute may fix, upon giving the said witnesses forty-eight hours' previous notice of the day and hour fixed, to give evidence in the said suit, and also to bring with them, exhibit, and produce before the said Sheriff-substitute, upon oath, all such writings and documents as they may have in their hands, custody, or keeping, which they may be required so to exhibit and produce in evidence of any of the matters at issue, and to declare where and in whose hands, custody, or keeping all or any of said writings and documents are, or may be; and further, to dispense with the adjustment of interrogatories, and to grant authority to messengers-at-arms to cite the said witnesses to appear at the place and date so fixed and give evidence in the said suit; or to do further or otherwise in the premises as to your Lordships may seem proper."

The necessary certificate under sec. 2 of the said Act, signed by the petitioner as the minister of the foreign power received by His Majesty, was produced to the Court.

The prayer of the petition was framed in accordance with the terms of the letter of request from the foreign Court, in which it was asked that the examination should take place before the Sheriff-substitute[1] at Dundee, whom failing, such other person as the Court should appoint.

LORD PRESIDENT.—This petition raises a question of practice which I think ought to be dealt with, because it involves a proceeding which might be appealed to as a precedent for the practice to be followed in similar cases. The petition is presented by the Baron de Bildt, who is Envoy Extraordinary and Minister Plenipotentiary of his Majesty the King of Sweden and Norway to the Court of St James, and the object of it is to obtain the testimony of two witnesses, who appear to be Scotsmen, and who

[1] For the previous practice in such matters see the cases of Blair, July 14, 1883, 10 R. 1223; Stemrich, July 14, 1886, 13 R. 1156; and Reid, May 23, 1890, 17 R. 790, in the First Division; and the case of Robinow, July 19, 1883, 10 R. 1246, in the Second Division, and the unreported cases therein referred to.

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are easily available at Dundee. Their testimony is required for a civil action which is at present in dependence in the Town Court of Halmstad, a Court of competent jurisdiction. The application is made under the 1st section of the Foreign Tribunals Act, 1856, which provides that where the testimony of witnesses is required in relation to civil and commercial matters pending before foreign tribunals, and an application is made to a Court having authority under the Act, it shall be lawful for such Court "to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses," and then follow appropriate provisions for securing the attendance of such witnesses. Now, the criterion for determining whether the application is in relation to a civil or commercial matter is provided in section 2, which enacts that the certificate of the ambassador, minister, or other diplomatic agent of the foreign power to this effect shall be evidence of the matter so certified. We have that evidence here, for we have a certificate from Baron de Bildt, who, as your Lordships are judicially aware, is the Minister of the King of Sweden, requesting the Court to grant this application, and testifying that the evidence is required in a civil or commercial matter pending in a tribunal having competent jurisdiction.

So far then this application is competent and in order, and I am sure that I am expressing the feelings of your Lordships when I say that we should always be anxious, in accordance with the comity of nations, to do all in our power to facilitate the granting of an application presented by the minister of a friendly power. But there is a small point of practice raised here by the fact that the prayer of the petition asks that the examination should take place before the Sheriff-substitute at Dundee, and we are informed that this is done because the Foreign Court has specially desired it. I have here a translation of the application by the Foreign Court, and an examination of that document makes it plain that the Foreign Court have made this particular request under a misapprehension. They seem to have thought that they were entitled to apply to this Court, or to any inferior Court, to examine these witnesses before them as a Court. Now that is, of course, a misapprehension, because this examination has to be conducted in accordance with the provisions of the Foreign Tribunals Act, and that Act does not provide for any such procedure. So we are not doing any discourtesy to the Foreign Court by not carrying out that part of this application which requests that this inquiry should proceed before a particular individual. We must treat the application as a good application, and the only question we have to consider is to whom this inquiry is to be remitted. I do not treat the request that it should be sent to the Sheriff-substitute as part of the prayer, but merely as a suggestion. I do not think it is a suggestion that we can follow, for, in my view, it is not in accordance with the provisions of the Foreign Tribunals Act. It would have been easy for that Act to say, had such been the intention, that these inquiries should take place before this Court or before the Judge Ordinary of the bounds, but it does not do so. It seems to me then that such an inquiry is just like an ordinary commission, and, as some questions of evidence may arise in the course of this examination, I think it would be proper to remit it in the usual way to a member of the bar.

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LORD PRESIDENT.—This petition raises a question of practice which I think ought to be dealt with, because it involves a proceeding which might be appealed to as a precedent for the practice to be followed in similar cases. The petition is presented by the Baron de Bildt, who is Envoy Extraordinary and Minister Plenipotentiary of his Majesty the King of Sweden and Norway to the Court of St James, and the object of it is to obtain the testimony of two witnesses, who appear to be Scotsmen, and who

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So far then this application is competent and in order, and I am sure that I am expressing the feelings of your Lordships when I say that we should always be anxious, in accordance with the comity of nations, to do all in our power to facilitate the granting of an application presented by the minister of a friendly power. But there is a small point of practice raised here by the fact that the prayer of the petition asks that the examination should take place before the Sheriff-substitute at Dundee, and we are informed that this is done because the Foreign Court has specially desired it. I have here a translation of the application by the Foreign Court, and an examination of that document makes it plain that the Foreign Court have made this particular request under a misapprehension. They seem to have thought that they were entitled to apply to this Court, or to any inferior Court, to examine these witnesses before them as a Court. Now that is, of course, a misapprehension, because this examination has to be conducted in accordance with the provisions of the Foreign Tribunals Act, and that Act does not provide for any such procedure. So we are not doing any discourtesy to the Foreign Court by not carrying out that part of this application which requests that this inquiry should proceed before a particular individual. We must treat the application as a good application, and the only question we have to consider is to whom this inquiry is to be remitted. I do not treat the request that it should be sent to the Sheriff-substitute as part of the prayer, but merely as a suggestion. I do not think it is a suggestion that we can follow, for, in my view, it is not in accordance with the provisions of the Foreign Tribunals Act. It would have been easy for that Act to say, had such been the intention, that these inquiries should take place before this Court or before the Judge Ordinary of the bounds, but it does not do so. It seems to me then that such an inquiry is just like an ordinary commission, and, as some questions of evidence may arise in the course of this examination, I think it would be proper to remit it in the usual way to a member of the bar.

No. 159. LORD ADAM and LORD KINNEAR concurred.

July 4, 1905. Baron de Bildt. LORD M'LAREN was absent.

THE COURT pronounced an interlocutor ordering the examination to proceed before Mr R. A. Lee, advocate, and granting commission to the said R. A. Lee for said examination.

HOPE, TODD, & KIRK, W.S., Agents.

No. 160. FERME, FERME, & WILLIAMSON, Claimants (Reclaimers).—*Hunter—T. B. Morison.*

July 6, 1905. Ferme, Ferme, & Williamson v. Stephenson's Trustee. J. CAMPBELL DEWAR (Trustee in Stephenson's Sequestration), (Respondent).—*A. M. Anderson—J. A. Christie.*

*Trust—Testamentary Trust—Agent and Client—Expenses—Bankruptcy—Liability of trust-estate to law-agents for expense of unsuccessfully defending an action.*—In an action against the sole trustee under a testamentary trust, the final interlocutor decerned against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate." The trust-estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law-agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses.

*Held* that as the law-agents for the trustee were presumably acquainted with the whole circumstances of the trust, they were not entitled to rank for their account.

Bill-Chamber. 2D DIVISION. Lord Low. IN an action for payment of a sum of money at the instance of the executor of Miss Margaret Somerville against Cornelius Smith, sole testamentary trustee of William Stephenson, farmer, Samuelston, Loanhead, Haddingtonshire, the Second Division of the Court on 3d February 1904 pronounced an interlocutor granting decree as concluded for in favour of the pursuer, Miss Somerville's executor, and containing, *inter alia*, the following finding:—"Find that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate of the deceased William Stephenson: *Quoad ultra* reserve the defender's right of relief against said estate and decern."

On 22d June 1904, on the petition of Miss Somerville's executor, William Stephenson's testamentary trust-estate was sequestrated under the Bankruptcy Acts. J. Campbell Dewar, C.A., Edinburgh, was appointed trustee in the sequestration.

A claim was lodged in the sequestration by Ferme, Ferme, & Williamson, solicitors, Haddington, who claimed to be ranked preferably (1) for their business account as agents for Stephenson's testamentary trustee in the action with Miss Somerville's executor above mentioned; and (2) for their general business account as agents for Stephenson's testamentary trustee. It is with the former branch of the claim alone that this report is directly concerned.

The trustee in Stephenson's sequestration having rejected the claim, Ferme, Ferme, & Williamson appealed to the Lord Ordinary on the Bills.

On 11th May 1905, the Lord Ordinary on the Bills (Low) pronounced this interlocutor:—"Finds that the appellants are not

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entitled to make a claim against the sequestrated estates of the deceased William Stephenson in respect of professional services rendered or expenses incurred by them as law-agents for Cornelius Smith, sole testamentary trustee of the said William Stephenson, in connection with the action against the said Cornelius Smith at the instance of the executor of the deceased Miss M. Somerville, and that to that extent and effect the appeal falls to be dismissed, and the deliverance appealed against affirmed; with that finding appoints the cause to be enrolled for further procedure." *

The claimants, Ferme, Ferme, & Williamson, reclaimed, and argued;—The claimants had acted on the employment of the testamentary trust, and not on the employment of the testamentary trustee, and their claim therefore was a direct claim against the testamentary trust-estate.[1] The English authorities on this question were altogether inapplicable, a trust being a separate *persona* according to the theory of Scots law. The interlocutor of 3d February 1904 did not affect the present claimants, who were not parties to that litigation. The fact that they were the law-agents of the testamentary trustee did not make them *eadem persona* with him.

Argued for the respondent, the trustee in the sequestration;—The present claim, if it had been made by the testamentary trustee, would have been barred by the interlocutor of 3d February 1904, and the claimants, who were his law-agents in the litigation, could have no higher right than he had. They had not a direct claim against the trust-estate.[2] Being the law-agents of the trust, they must be held to

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* "NOTE.—I am of opinion that the deliverance of the trustee is right in so far as regards that part of the appellants' account which relates to the expenses of the litigation with the representatives of Miss Margaret Somerville. It is plain that the appellants' client (the defender in that action) could not, in view of the interlocutor of the Second Division, have claimed these expenses, and the appellants cannot be in any better position.

"The claim of the appellants in respect of their professional services in managing the testamentary trust apart from the Somerville claim, and before that claim was known or intimated, may be in a different position. I do not think it can be affirmed as an absolute rule that the claim of the law-agent in a testamentary trust for remuneration for his professional services lies only against the trustees who employed him, and in no case directly against the trust-estate. I think that the result of the Scotch authorities is correctly stated by Lord M'Laren in his work upon 'Wills and Succession' (volume 2, p. 1233), where he says:—'The presumption is that he (the law-agent of the trust) is employed as agent for the estate, and not on the personal responsibility of the trustees or trustee.'

"The question is no doubt very much one of circumstances, but I think that where, as here, the law-agents in the trust had also been the law-agents of the truster, and were therefore fully conversant with the position of the trust-estate, the case is a favourable one for the presumption to which Lord M'Laren refers." (His Lordship then explained why the appellants' claim to rank for their general business account ought to be enrolled for further procedure.)

[1] M'Laren on Wills and Succession, 3d ed., p. 1234; Cullen v. Baillie, Feb. 20, 1846, 8 D. 511, 18 Scot. Jur. 231; Shepherd v. Hutton's Trustees, Feb. 24, 1855, 17 D. 516, 27 Scot. Jur. 219.

[2] Pelly v. Wathen, 1851, 1 De G. Mac. and G. 16; Worrall v. Harford, 1802, 8 Vesey Jun. 4; Hall v. Laver, 1842, 1 Hare, 571; Staniar v. Evans, 1886, L. R., 34 Ch. Div. 470; Lewin on Trusts, 11th ed., p. 779; M'Laren on Wills and Succession, p. 1235.

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have been in full knowledge of its circumstances, and consequently to have taken the risk of not getting payment of their business account.

At advising the following were the opinions delivered in so far as bearing on the question now reported:—

LORD JUSTICE-CLERK.—This Division in the interlocutor of 3d February 1904, in the case of Somerville against Smith (Stephenson's Trustee) found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate of the deceased William Stephenson."

Sequestration has now taken the place of the testamentary trust, and in that sequestration the law-agents in the litigation to which the above finding refers demand a ranking on the ground that the trustee had power to employ agents, and that their costs form a charge against the estate. The position they take up is that they are entitled to their charges, just as any tradesman who did work for the trust, such as repairing buildings, or painting, or similar work, would be entitled preferably to be paid. I agree with the Lord Ordinary in holding that the contention of these law-agents is unsound. They are, I think, plainly not in the position of persons so employed. Such persons do not know, and cannot know, the affairs of the trust. They are not employed to serve the trust, but simply to do work in their own business as ordinary tradesmen, such work being presumably to the advantage of the estate, and ordered for that reason. But law-agents are in a totally different position. The whole facts in connection with the estate are patent to them. They can judge whether as matter of prudence they should accept the employment as for the trust. It is not in their power to maintain that they did not look into matters for themselves, and were entitled to take it for granted that when the trustee asked them to act for the trust they thereby tacitly got a guarantee of there being funds to meet the expense. It appears to me that this is already well established in the law, and if so, it is conclusive of the whole question in the present case, and debars the law-agents from the ranking which they seek. There is no right in them to a ranking. I would propose to your Lordships that the interlocutor under review be affirmed so far as relates to the suit against Stephenson's trustee and the deliverance of the trustee in the sequestration thereanent.

LORD KYLLACHY.—In this case it is common ground that by the interlocutor of the Court of 3d February 1904, in the action at the instance of Somerville's executor, the trustee in this testamentary trust was effectually debarred from including in the expenses of his administration the expenses incurred by him in that litigation. The question which has now to be decided is whether the law-agents of the trust, who were not parties to the action, are similarly debarred from ranking for these expenses in the sequestration which has now displaced the testamentary trust. The law-agents maintain the negative, on the ground that ostensibly the trustee had power to employ them as in other matters of trust management, and to pledge the credit of the trust-estate for their proper charges, and that they were not bound, any more than tradesmen employed (say) to make repairs

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on the trust property, to go behind the trustee's apparent authority, or to investigate the limitations, actual or possible, of his powers.

The Lord Ordinary has held that the law-agents have in this matter no higher rights than the trustee himself, and that, as the trustee is debarred from charging the expenses in question as against the estate, the law-agents are in the same position. I do not know that I should be prepared to state the principle quite so barely as the Lord Ordinary, but I agree with his conclusion, and do so upon a ground which I think must have been present to his Lordship's mind, being indeed indicated by the authorities cited in the passage in M'Laren on Wills (pp. 1233-37) to which he refers.

The ground I refer to is this,—that, whatever may be the rights of ordinary persons contracting with a trustee without notice of any limitation of his (the trustee's) powers to pledge the credit of the trust-estate, the law-agents of the trust are, and are necessarily, in an exceptional position. For they have notice of everything. They are, or are presumed to be, conversant not only with the terms of the trust-deed, but with the whole circumstances of the trust-estate, its amount, the claims upon it, actual or anticipated, and the results, probable or possible, of unsuccessful litigations. They are not, therefore, in the position of tradesmen or other persons employed in the ordinary course of the trust management. Unlike such ordinary employees, they cannot, if the trust funds prove inadequate, proceed against the trustee personally on the ground of his implied warranty of the adequacy of the trust funds. On the contrary, knowing all that the trustee knows, they are held, with respect to their charges, to take their chance of recovering from the trust-estate. That, I think, must be held as settled by the authorities mentioned. And that being so, it seems to me to follow by parity of reasoning that if employed, as here, to conduct and advise as to a litigation which may or or may not be successful, they take their risk of such contingencies as may be involved; including, in particular, the contingency that as the result of the litigation the trust-estate, or a large part of it, may not be available for their costs.

I therefore consider that the appellants have in the circumstances no claim to be ranked for the expenses in question—no claim to be ranked either preferably or at all. And accordingly I agree with the Lord Ordinary as to the only matter really in controversy. Our interlocutor will, I suppose, be to affirm the Lord Ordinary's interlocutor and the deliverance of the trustee in the sequestration in so far as relating to the expenses of the litigation with Somerville's executor.

LORD KINCAIRNEY.—I have found this case one of extreme difficulty, but I assent to the interlocutor of the Lord Ordinary and am prepared to affirm it.

LORD STORMONTH-DARLING concurred.

THE COURT adhered.

A. C. D. VERT, S.S.C.—WATSON & MATHERS, W.S.—Agents

No. 161.

July 6, 1905. Sir Wm. Arrol & Co., Limited, v. Kelly.

SIR WILLIAM ARROL & COMPANY, LIMITED, Appellants.—*Younger, K.C.—C. D. Murray.*
JAMES KELLY, Respondent.—*Watt, K.C.—C. A. Macpherson.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7 (2)—*Dependants*—"*In part dependent upon the earnings of the workman.*"—The father of a workman who died from injuries sustained in the course of his employment claimed compensation under the Workmen's Compensation Act. The son's average weekly earnings from his employment were £1, 4s. 1d. He also practised a systematic course of betting, which brought him a substantial profit. The father, who was a widower, 54 years of age, and without dependants, suffered from bronchitis and rheumatism, and his capacity for work was consequently precarious, but his average weekly earnings during a period of forty weeks were £1, 4s. 11d. The son made payments to his father which averaged 10s. per week. Father and son did not live together.

*Held* that the father was not in part dependent upon the earnings of his son within the meaning of section 7 (2) of the Workmen's Compensation Act, 1897.

*Legget & Sons* v. *Burke*, 4 F. 693, *distinguished.*

2D DIVISION. Sheriff of Lanarkshire.

IN an arbitration under the Workmen's Compensation Act, 1897, brought in the Sheriff Court of Lanarkshire at Glasgow, James Kelly, boltmaker, 9 South William Street, Perth, claimed compensation under the Act from Sir William Arrol & Company, Limited, Glasgow, in respect of the death of his son.

The Sheriff-substitute (Boyd), having awarded compensation, Sir William Arrol & Company, Limited, appealed.

In the stated case the Sheriff-substitute stated as follows:—

"The following facts were established:—(1) That the respondent is the father of the deceased Edward Kelly, labourer, who was, at the time of his death, in the employment of the appellants at Provanmill Gas Works, Glasgow. (2) That on 19th April 1904 the deceased was engaged in the erection of the upright columns of a gasometer, when he fell from the top of one of the columns, and was so injured that he died. (3) That the average weekly wage of the deceased was £1, 4s. 1d. (4) That besides his ordinary employment the deceased practised a systematic course of betting, which brought him a substantial profit. (5) That the respondent, whose wife had died on 25th March 1902, for the past three years has suffered from bronchitis and rheumatism, which prevented him engaging in steady work, but for a period of forty weeks, from 18th July 1903 to 23d April 1904, immediately prior to his son's death, he earned an average wage of £1, 4s. 11d. in the employment of the Locomotive Department of the Caledonian Railway Company at Perth. That during the said period of forty weeks his work was irregular by reason of his bronchitis and rheumatism, and the wages earned by him fortnightly for the said period were as follows:—(Then followed a table shewing the wages earned by the respondent in each fortnight. These sums varied between a maximum of £3 earned upon four occasions and a minimum of £1, 3s. 6d.) (6) That his capacity for work is still precarious owing to his attacks of bronchitis and rheumatism. (7) That the deceased was in the habit of making payments to him which amounted on an average to 10s. per week.

"On these facts, I found in law that the deceased was fatally injured while in the employment of the appellants by an accident

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arising out of and in the course of his employment at an engineering work of which the appellants were the undertakers in the sense of the Workmen's Compensation Act, 1897, and that the respondent was partially dependent on the earnings of the deceased, and that he was entitled to compensation therefor from the appellants.

"I therefore awarded the respondent the sum of £78, with expenses."

The question of law was:—"Was the respondent in part dependent on his son the deceased Edward Kelly at the date of the latter's death within the meaning of the Workmen's Compensation Act, 1897?"*

It appeared from statements made at the bar that the respondent was 54 years of age and had no dependants.

Argued for the appellants;—The respondent was not either wholly or in part dependent on the earnings of the deceased. Receipt of money from the deceased was not enough. Dependence for the necessaries of life was essential.[1] The money paid must be required for the support of the recipient. One of two single men earning the same wage could not be dependent on the other. The payment made by the deceased must also have been made out of his earnings as a workman. Here that was not the case. The legitimate inference from the facts was that the payments were made from the deceased's earnings as a bookmaker, and not from his earnings as a workman. The cases of *Barrett* v. *North British Railway Company*,[2] and *Legget & Sons* v. *Burke*,[3] were distinguished. This was not a case of a payment into a family fund for the support of the family.

Argued for the respondent;—This was a question of fact. The Court could only interfere with the finding of the arbitrator if there was no sufficient evidence to support it.[4] Here there was sufficient evidence to justify the arbitrator's finding. The ability of the father to maintain himself was not conclusive against his being a dependant.[5] The Act said "dependent upon the earnings of the workman." It did not say "dependent for maintenance upon the earnings of the workman as workman." The additional words were required to support the appellants' contentions. Further, there was here no specific finding as to the amount earned by the deceased from betting. No legitimate inference could be drawn that the deceased's payments to the respondent came from that source.

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), enacts, as follows, sec. 7 (2),—"In this Act—. . . 'Dependants' means . . . (*b*) in Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or *solatium* in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death."

[1] Simmons v. White Brothers, L. R. [1899], 1 Q. B. 1005; Main Colliery Company v. Davies, L. R. [1900], A. C. 358; Robert Addie & Sons' Collieries, Limited, v. Trainer, Nov. 22, 1904, *ante*, p. 115; Moyes v. William Dixon, Limited, Jan. 13, 1905, *ante*, p. 386.

[2] July 11, 1899, 1 F. 1139.

[3] March 18, 1902, 4 F. 693.

[4] Legget & Sons v. Burke, 4 F. 693, at p. 697; Main Colliery Company v. Davies, L. R. [1900], A. C. 358.

[5] Main Colliery Company v. Davies, L. R. [1900], A. C. 358, *per* Lord Halsbury, L. C., at p. 362; Howells v. Vivian & Sons, 1901, 18 T. L. R. 36.

No. 161. At advising,—

July 6, 1905. Sir Wm. Arrol & Co., Limited, v. Kelly.

LORD JUSTICE-CLERK.—The facts in this case are that the respondent is a workman who is a widower and has no dependants; that he is occasionally off work from bronchitis and rheumatism, but that he is able to earn an average weekly wage amounting to £1, 4s. 11d., and has done so continuously for years up to the time of the petition being raised. His son, in consequence of whose death the claim is made, was a workman whose average wages amounted to £1, 4s. 1d. He was addicted to betting, and was successful, the case stating that he made a substantial profit. He gave his father sums which amounted to 10s. a week on an average.

These being the facts, the Sheriff acting as arbitrator has found that the respondent was partially dependent upon the earnings of the deceased, and has awarded compensation accordingly.

I am unable to agree with the learned Sheriff. There is, as I think, no ground for saying that at the time of the son's death the respondent was in any way dependent upon the earnings of the deceased. Each of the two persons, father and son, were earning wages quite sufficient for their maintenance respectively, and the father having no dependants cannot be said not to have had by his own earnings fully provided for his necessities as a working man. He was in fact earning a little more per week than the son was doing. It is difficult to see how, if it is a question of earnings, the father should have been dependent on the son, seeing that whatever the son might give to the father out of earnings would necessarily bring what he had for his own maintenance far below what *ex hypothesi* was necessary for the father's maintenance. If, as it appears from the case, the son made money by betting, and chose to give his father a share of his illgotten gains, I cannot see how that can affect the present question, which is, whether the respondent made a loss by the death of his son, in consequence of there no longer being a source of assistance to him from his son's earnings in the work at which he was killed, and on which source, from his own inability to earn wages himself, he was wholly or partially dependent. The father and son were making earnings for themselves of similar amount in each case. To say that in these circumstances the one was dependent on the other, to the effect of making a substantial inequality in favour of the father, seems to me to be an untenable proposition. I say this with full consideration of the case of *Legget*.[1] That case decided nothing as regards the position here, in which the father stands in no special circumstances as regards other members of the family. He is a lone man with no burdens, legal or moral.

I therefore am of opinion that the question should be answered in the negative.

LORD KYLLACHY.—In this case we do not, I think, require to lay down or adopt any general rule as to what constitutes dependence or partial dependence in the sense of the statute. The facts are, it appears to me, such that, applying any rule or test or standard which has yet been suggested, the claim here is outside the statute.

[1] 4 F. 693.

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It is not necessary to go into particulars. But I may say this, that, for myself, I cannot conceive of a man of fifty-four, without wife or family, and earning a wage of 25s. a week, being in any reasonable sense dependent on a son residing in a different town and earning 24s. a week. Exceptional cases may of course always be figured. But in any ordinary circumstances I do not, I confess, see how, as between a father and son, placed as the father and son were placed here, there could be as regards maintenance, or even comfortable maintenance, either need of help on the one hand, or obligation—legal or moral—to give help on the other. It may be true, as found by the Sheriff, that the son did, for some purpose, and from some source, send his father from time to time sums amounting, it is said, on the average to 10s. a week. But a parent who has a wage which is sufficient for his support is not, I think, in any reasonable sense dependent upon his family merely because they, or some of them, may have from time to time been in the way of making him presents, larger or smaller.

Moreover, in this connection it is impossible to overlook what is found by the Sheriff, that this unfortunate "deceased practised a systematic course of betting, which brought him a substantial profit." It is at least probable that the 10s. a week referred to was in whole or in part derived from that source—a source which I do not suppose can be taken into account in a question of dependence on earnings.

I have not, I should add, overlooked that the respondent (the father) has for some years been subject to attacks of rheumatism and bronchitis, and that his power of wage-earning may be to some extent thereby impaired. That may be so. But still, with all his disabilities, he has, on an average of forty weeks, been earning 25s. a week—and, so far as appears, there is in present circumstances no prospect of any change for the worse.

LORD KINCAIRNEY.—The question of law stated in this case is whether the applicant was, within the meaning of the Workmen's Compensation Act, in part dependent on his son who has been killed. The admitted facts are that the father and his son have earned for a considerable period nearly the same weekly wage, which was about £1, 4s. per week, and may be held to have been sufficient for the maintenance of each of them. But it is said that the applicant's capacity for work is precarious owing to bronchitis and rheumatism. The applicant has no dependant living with him. The somewhat singular averment is made that the deceased made a substantial profit by a systematic course of betting. It is further stated that the deceased was in the habit of paying his father 10s. per week, but whether that payment was made out of his earnings or out of the profits of his betting does not appear.

The applicant referred to various cases decided in England, among which may be noticed in particular *Howell* v. *Vivian*,[1] and to *Legget & Sons* v. *Burke*,[2] which is somewhat closely in point. In that case a father was found entitled to a compensation for the death of his son. But in that case there were resident in family with the father the deceased himself, a cripple brother unable to earn anything, and a sister of this father's. That was

[1] (1901) 18 T. L. R. 36.

[2] 4 F. 693.

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the family to the support of which the deceased had contributed. It was held, apparently with some hesitation, that the award should be confirmed. I do not think the cases should be carried further than in that case, and am prepared to hold that there is no relevant averment of dependence in this case.

LORD STORMONTH-DARLING was absent at the hearing.

THE COURT answered the question of law in the negative, recalled the award of the arbitrator, and remitted to him to dismiss the claim.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—COUTTS & PALFREY, S.S.C.—Agents.

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Lawrie's Trustees v. Lawrie.

REV. JOHN METHVEN ROBERTSON AND ANOTHER (Lawrie's Trustees), First Parties.—*Younger, K.C.—Hunter.*
JOHN FULTON LAWRIE, Second Party.—*Sandeman—W. J. Robertson.*

*Succession—Vesting—Express provision as to vesting—Vesting on youngest child attaining twenty-five—Claim by sole surviving child at age of twenty-three.*—A testator directed his trustees to hold the residue for behoof of his children equally, payable on the youngest attaining the age of twenty-five, the lawful issue of children dying before that period being entitled to the share which their parent would have taken, and the share of children dying without issue being divisible among the survivors jointly with the issue of predeceasers. He also directed that until the period of division the income of each child's share should be applied for its education and to paying their mother for their maintenance between the ages of fifteen and twenty-five. It was declared that the period of vesting should be as at the date when the youngest child should attain twenty-five. The testator was predeceased by his wife, but survived by two children, one of whom died without issue before the period of payment. The surviving child when twenty-three years of age demanded payment of the residue from the trustees.

*Held* that on a true construction of the settlement the clause of vesting was still applicable although only one child survived, and that consequently the residue had not yet vested in him.

*Maitland's Trustees* v. *M'Dermaid*, 23 D. 732, *distinguished.*

2D DIVISION.

JOHN WILLIAM LAWRIE, grocer and wine-merchant, Edinburgh, died on 10th June 1891, leaving a trust-disposition and settlement dated 31st July 1883, by which he conveyed his whole means and estate, heritable and moveable, to trustees for the purposes therein mentioned.

By his trust-disposition and settlement, after certain provisions for his wife, and directing his trustees to make payment of annuities to certain annuitants, the testator directed as follows:—"Eleventh, that my said trustees shall hold, apply, pay, and convey the whole rest, residue, and remainder of my means and estate, and the interest and other annual produce thereof . . . to and for behoof of my children equally among them, payable to them on the youngest attaining the age of twenty-five years complete, and in the event of any of my children dying before the said period of division, leaving lawful issue, such issue shall be entitled equally among them to the share to which their parent would have been entitled if in life, and in the event of any of my children dying before the said period of

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division without leaving lawful issue, the share of such deceaser shall fall to and be divided equally among the survivors and survivor of my said children jointly with the lawful issue of any of them who may have deceased, leaving lawful issue, such issue succeeding equally among them to the share to which their parent would have been entitled if in life: Declaring that until the said period of division my said trustees shall apply so much of the income of each child's share as they may see fit, first, in defraying the cost of his or her education, which I desire to be of a high class; and second, in paying to their mother such a moderate annual allowance as to my said trustees shall seem proper for his or her maintenance, clothing, and upbringing from the period between the dates when my children respectively attain the age of fifteen and the period when they respectively attain the age of twenty-five, when my said children shall be entitled to the whole income of their respective shares: Declaring that the period of vesting of my said children's provisions under these presents shall be as at the date when my youngest child shall attain the age of twenty-five years as aforesaid, but that notwithstanding, my said trustees shall, in addition to paying for their education and maintenance, have power, should they see fit, to advance to one or more of my said children out of their prospective share or shares such sum or sums as they may deem advisable in the case of sons for the purpose of educating them for a profession or setting them up in business, and in the case of daughters, for moderately fitting them out in the event of their being married."

The testator was predeceased by his wife. He was survived by two children, a son (John Fulton Lawrie) and a daughter. The daughter died in 1898. The son was born in 1881.

The son, when twenty-three years of age, having called upon the trustees to denude in his favour, and the trustees having refused, the present special case was presented for the opinion and judgment of the Court.

The parties to the special case were—(1) the trustees, and (2) the testator's son.

The first parties contended that upon a sound construction of the trust-disposition and settlement the second party was not entitled to receive payment of the trust-estate until he attained the age of twenty-five years.

The second party contended that he had a vested interest in the trust-estate, and that he was now entitled to call upon the first parties to denude in his favour, after making provision for the sole remaining annuity. He maintained that the clauses in the trust-disposition and settlement postponing vesting and payment, and the clauses conditionally instituting the issue of a predeceasing child, were not applicable to the case of there being only one child of the testator surviving.

The questions of law were:—"(1) Are the first parties bound now to pay and convey to the second party the trust-estate, with the exception of such part thereof" as was necessary to secure an annuity of £10? or "(2) Are they bound to retain and administer the same until the second party attains the age of twenty-five years?"

Argued for the first parties;—Vesting was postponed until the second party attained the age of twenty-five. This appeared (1) from the special clause as to vesting, and also (2) from the whole tenour of the eleventh purpose. The conditional institution of issue, apart from the special provision as to vesting, postponed vesting until

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the second party was twenty-five.[1] Whether the conditional institution of issue operated as a suspensive or a resolutive condition, it was at least an ulterior trust purpose which prevented the rule laid down in *Miller's Trustees* v. *Miller*[2] from applying here. In *Maitland's Trustees* v. *M'Dermaid*,[3] there was no express clause as to the period of vesting. In that case the ground of decision was that there was vesting *a morte* in the class, and when there was only one survivor of the class vesting in him. But here vesting *a morte* was expressly excluded. *Maitland*[3] proceeded upon a view as to the effect on vesting of a conditional institution of children which was at variance with the more recent authorities.[1]

Argued for the second party;—A conditional institution of children or issue might postpone vesting, but it could only have that effect if there was a postponed period of payment. Here in the event which had happened there was no postponed period of payment, because whenever there came to be only one child, the provision as to payment on the youngest child attaining twenty-five became inapplicable and inoperative,[3] and vesting took place at latest when the artificial period of payment became inapplicable. The express clause declaring the period of vesting became also inoperative whenever there came to be only one child. The reasoning which formed the ground of judgment in *Maitland's Trustees*[3] applied directly here, and that decision was binding upon the Court as an authority in favour of the second party.

Lord Kyllachy.—It is not necessary in this case to lay down or refer to general rules, or to do more than express shortly what in our opinion is the true construction of this trust-disposition and settlement. All I need say is that I am unable to hold, on the just construction of this settlement, that the second party, who is the last survivor of the truster's children, but is not yet twenty-five years of age, is in the position of having a vested interest in the trust-estate—a vested interest sufficient to bring his claim to immediate possession within the principle of the case of *Miller*.[2] It is, I think, quite unnecessary to consider what would have been the result in the absence of the express declaration as to vesting which the deed contains. In that case the question must have depended simply on the effect of the postponed term of payment taken along with the destination over to grandchildren, and failing grandchildren to the surviving children. And I am far from saying either (1) that the survivorship clause could have operated to suspend vesting when the survivors had been reduced to one, or (2) that the destination over to grandchildren could have suspended vesting, or done more at most than make the vesting subject to defeasance, as explained in recent decisions. But the position in fact is that we have here an express clause fixing the time of vesting—fixing it like the term of

[1] Bowman v. Bowman, July 25, 1899, 1 F. (H. L.) 69; Thompson's Trustees v. Jamieson, Jan. 26, 1900, 2 F. 470; Forrest's Trustees v. Mitchell's Trustees, March 17, 1904, 6 F. 616; Wylie's Trustees v. Wylie, Nov. 29, 1902, 10 S. L. T. 397 (O.-H.); Parlane's Trustees v. Parlane, May 17, 1902, 4 F. 805; Snell's Trustees v. Morrison, March 20, 1877, 4 R. 709 (O.-H.).

[2] Dec. 19, 1890, 18 R. 301.

[3] Maitland's Trustees v. M'Dermaid, March 15, 1861, 23 D. 732, 33 Scot. Jur. 372.

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payment at the date when the youngest child of the truster reaches twenty-five years of age—and so fixing it quite generally with respect to the interest of each child, and without, so far as appears, any reference to the question whether there were ultimately more children than one. I am not, I confess, prepared to expunge and read out of the settlement this express clause, and the clauses which form its context. And, standing these clauses, they appear to me conclusive against the claim now made. It may be true that the expression "youngest child" is not strictly appropriate where only one child survives. The same might be said where only two children survive. But the expression is in a quite intelligible sense applicable to a youngest surviving child—a child, that is to say, who has ceased to have any brother or sister younger than himself. At all events it seems to me that that is the sense in which the term is used in this settlement.

Reference was made to the case of *Maitland*,[1] where it was said that a different view had been expressed as to the construction in a similar deed. Now, I am sure we should all be unwilling to treat, or appear to treat, that judgment with any want of respect. But it does not appear to me that anything of that kind is involved. In the first place, there has been no suggestion that the actual decision in that case is open to doubt. The only suggestion has been that if the case were to be decided now it would probably be so upon a simpler ground, viz., this, that there was there no express postponement of vesting,—that the destination over to survivors had become inoperative,—and that the destination over to issue involved, as is now settled, only a resolutive condition. But apart from that, and with respect even to the assigned grounds of judgment, we do not require or propose to express any adverse opinion. As applied to the particular deed those grounds may have been quite right. But it does not of course follow that they are applicable to a deed such as that which we have here—a deed which differs from the deed in *Maitland's*[1] case, amongst others, in the important particular, that it contains, as I have pointed out, an express clause regulative of vesting, with a context, before and after, which has at least considerable significance.

On the whole matter I am of opinion that we should answer the first query in the negative and the second in the affirmative.

LORD KINCAIRNEY.—I am of the same opinion as Lord Kyllachy. We must look at the deed as it stands. Vesting is postponed till the youngest child is twenty-five. There is now only one child. In that state of affairs I concur in the opinion that vesting does not take place until this sole survivor is twenty-five. It is not necessary to say what would happen if the second party died without issue.

LORD STORMONTH-DARLING.—I concur. The argument for the second party goes so far as to say that because there is now only one child surviving we must read out the whole of the elaborate provisions for the benefit of grandchildren, and for the maintenance and education of children until the youngest attains twenty-five. I cannot assent to that. I think the clause

[1] 23 D. 732.

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postponing vesting till the youngest child is twenty-five is of binding force, although there is now only one child.

The LORD JUSTICE-CLERK concurred.

THE COURT answered the first question in the negative and the second question in the affirmative.

J. & J. MILLIGAN, W.S.—J. S. & J. L. MACK, S.S.C.—Agents.

No. 163.
July 6, 1905.
Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees.

THE CLIPPENS OIL COMPANY, LIMITED, Pursuers.—*Clyde, K.C.—Pitman—T. B. Morison.*

THE EDINBURGH AND DISTRICT WATER TRUSTEES, Defenders.—*Cooper, K.C.—Macphail.*

*Process—Expenses—Amendment of Record—Court of Session Act*, 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 29.—In an action for damages raised by the Clippens Oil Company, Limited, against the Edinburgh and District Water Trustees a proof was led and judgment given in favour of the pursuers. Reclaiming notes having been lodged by both parties, the defenders craved leave to amend their record by adding a plea in law, founded on the Public Authorities Protection Act, 1893, which, if sustained, would have rendered the action incompetent. The pursuers objected to the amendment being allowed except on condition of payment of expenses since the closing of the record.

The Court *allowed* the amendment, reserving all questions of expenses.

1ST DIVISION. Lord Pearson.

THE CLIPPENS OIL COMPANY, LIMITED, raised an action against the Edinburgh and District Water Trustees concluding for £137,000 in name of damages for wrongous interdict. The Lord Ordinary, after a proof which lasted fourteen days, pronounced an interlocutor decerning the defenders to pay to the pursuers the sum of £15,000.

Against this interlocutor reclaiming notes were lodged for both parties, and thereafter the defenders lodged in Court a note craving leave to amend the record by the addition of this plea in law:—"The present action is excluded by section 1 of the Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61)." That section provides that no action shall lie against any person for any act done in pursuance of any public duty or authority unless the action is commenced within six months.

The pursuers objected to the amendment being allowed except on the condition of the payment of all expenses since the closing of the record, and argued;—The Court, in the exercise of the discretion conferred upon it by section 29 of the Court of Session Act, 1868,* had never, so far as appeared from the reported cases, allowed such an amendment as this, which if successful would exclude the action, except on the condition of payment of expenses.[1] Here the great

* Section 29 of the Court of Session Act, 1868 (31 and 32 Vict. cap. 100), enacts,—"The Court or the Lord Ordinary may at any time amend any error or defect in the record or issues in any action or proceeding in the Court of Session upon such terms as to expenses and otherwise as to the Court or Lord Ordinary shall seem proper; and all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made. . . ."

[1] Keith v. Outram & Co., June 27, 1877, 4 R. 958 (Lord President Inglis, p. 959); Gray v. The Scottish Society for the Prevention of Cruelty

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expense of an extremely long proof had been incurred, which, if this plea had been timeously stated, might have been avoided.

Argued for the defenders;—The question of expenses should be reserved, for it was impossible to ascertain until the final determination of the action what expenses, if any, had been needlessly incurred. If the new plea were sustained then no doubt the defenders would have to pay to the pursuers the expenses of their proof; but if the plea were repelled the defenders might yet be successful on the merits, and it would be most inequitable if they had now to pay to the pursuers the expenses of the very proof by which they might eventually succeed in maintaining their defence.

LORD PRESIDENT.—This is an action of damages by the Clippens Oil Company against the Edinburgh and District Water Trustees in respect of a wrongous interdict obtained against the Company. The matter was the subject of a proof, and the Lord Ordinary decerned against the defenders for £15,000. A reclaiming note has been lodged against this interlocutor, but before the case comes on for discussion the reclaimers ask leave to amend their record by adding a plea founded on the Public Authorities Protection Act, 1893. The effect of such a plea, if sustained, is to render the action incompetent, and the respondents in this case, while admitting that the amendment is competent, ask for the payment of full expenses up to date as a condition of its being received. A considerable number of authorities were quoted to us by Mr Clyde, who contended that in no case where the result of a new plea if successful would be to put an end to the action, had the amendment been allowed without the payment of the whole expenses up to date. I think Mr Clyde's statement on the authorities is correct. But a generalisation may be true of all cases up to date, and yet not found a proposition universally applicable to all cases, and in looking into the matter I have come to the conclusion that it does not apply here. I think this observation may be made, that if the Legislature had intended that these late amendments should be allowed only on condition of the payment of all expenses up to date, it would have said so. But the matter is left entirely to the discretion of the Court. There are amendments and amendments. Some are only amendments to the effect of bringing to a clearer issue points already pleaded on record; others cut deep into the substance of the action. Each one must be dealt with as it arises. The cases quoted were nearly all cases in which the amendment was made by the pursuer introducing a new ground of action changing the complexion of facts on the old record. Apart from authority I should hold that the judgments in these cases were right. The case of *Keith* v. *Outram & Company*[1] is nearest to the present case. That was an amendment by the defenders, and consisted in adding an averment and plea of *veritas* after an issue had been adjusted and notice of trial given in an action of damages for slander. Lord President Inglis in imposing as a condition of allowing the

to Animals, May 22, 1890, 17 R. 789; Morgan, Gellibrand, & Co. v. Dundee Gem Line Steam Shipping Company, Limited, Dec. 9, 1890, 18 R. 205; Gallagher v. Pattison, Nov. 10, 1891, 19 R. 79; Murdison v. Scottish Football Union, Jan. 30, 1896, 23 R. 449.

[1] 4 R. 958.

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amendment the payment of all expenses since the closing of the record, said, "All that the pursuer has since done may be thrown away if he is now induced to abandon the action. This rule is not confined to this defence, but applies to all defences which put it upon the pursuer to consider whether or not he will go on with his action. When we allow such an amendment the payment of all expenses incurred since the defence ought to have been stated must be imposed upon the defender." These words carry Mr Clyde all the way he wishes, but the Lord President, with great prescience, adds—"At the same time, the particular circumstances of any case will always fall to be taken into consideration." So it is clear that the Lord President is laying down a general and not a universal rule. The general principle is well stated by Lord Adam in the case of *Murdison*[1]—"The true principle is that the expenses caused by amendments should be put upon the party desiring to make these amendments." In some cases it is easy to apply this principle, in some not. If the amendment is allowed and is successful, then I concede Mr Clyde is entitled to the whole expenses, because if the plea had been timeously stated the proof which has been led would have been unnecessary. So we are deciding nothing which will prevent the pursuers getting expenses if the plea is successful. If the plea is unsuccessful then the case must be decided on the merits, and in the event of our deciding to reverse the judgment of the Lord Ordinary, then, if we had at this stage allowed all expenses against the reclaimers, we should be allowing expenses *in modum pœnæ*, and not merely with a view to seeing that the person against whom the amendment is made should not have been put to unnecessary expense. I am therefore of opinion that the amendment should be allowed, and the question of expenses reserved.

Lord Adam.—I have also read all the cases quoted by Mr Clyde. I cannot find anything in them to the effect that, where a plea is proposed to be added to the record which goes to exclude the action, it can only be allowed on condition of payment of the whole expenses irrespective of the circumstances of the particular case. There is nothing in the cases to fetter the discretion of the Court in dealing with each case on its own merits. Accordingly in the special circumstances of the present case I concur in the judgment your Lordship has expressed.

Lord Kinnear.—I agree. The most general rule in these cases—and they form a consistent and harmonious series of decisions—is the rule laid down by the Lord President in the case of *Keith* v. *Outram & Company*,[2] that where a plea of this kind is brought forward by a defender at a late stage of the process, it is the duty of the Court in allowing it to place the pursuer in the same position with regard to expenses as if the plea had been stated at the proper time. In many cases the practical application of this rule will be, as it was in the case of *Keith*,[2] to allow the amendment only on condition of the payment of all expenses, except the expense of actually bringing the action into Court. This proceeds on the view that the expense incurred previous to the amendment must be thrown away if the plea is a

[1] 23 R. 449. [2] 4 R. 958.

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good one, since the action must have been thrown out if it had not been abandoned without further proceedings. This creates the one difficulty in the application of the rule to particular cases, which is that we must know what expense has in fact been uselessly incurred; and in this case we cannot know what the expense is that has been rendered nugatory by the new plea until we have considered the proof. If the pursuers had maintained that all expenses incurred in the proof were unnecessary, because this proposed plea would have excluded the proof, and may now be sustained without considering it, they would have had a good claim for such expenses. But they are not disposed to admit that, and therefore we must wait to see the result of this amendment before we can say how the expenses are affected by it. In my opinion it is clear that sooner or later the expense created by bringing forward this plea must be borne by the party who should have stated it earlier. But we must know what expense was incurred by the absence of the plea.

LORD M'LAREN was absent.

THE COURT allowed the amendment, "reserving all questions of expenses in connection with said amendment."

DRUMMOND & REID, W.S.—MILLAR, ROBSON, & M'LEAN, W.S.—Agents.

No. 164.
July 6, 1905.
Buchan v. Grimaldi.

JEANNIE BUCHAN, Pursuer (Reclaimer).—*Watt, K.C.—Gunn.*
GEORGE FREDERICK GRIMALDI, Defender (Respondent).—*Sol.-Gen. Salvesen—Mackenzie Stuart.*

*Jurisdiction—Forty days' residence in Scotland.*—Jurisdiction constituted over a foreigner by his residence in Scotland for over forty days ceases when he leaves Scotland; it does not continue for forty days after he has left.

*Jurisdiction—Ownership of heritage in Scotland—Sale of the heritage.*—A foreigner, the proprietor of a house in Scotland, conveyed it to his daughter by an absolute disposition, which was recorded a few days before a Court of Session summons in a petitory action was served upon him. *Held* that the Court had not jurisdiction over him by reason of the ownership of Scots heritage.

2D DIVISION. Lord Dundas.

IN December 1904, Jeannie Buchan, residing at The Bungalow, Milltimber, Aberdeenshire, raised an action against George Frederick Grimaldi, designed as "carrying on business as a meat salesman, Central Markets, London, and residing at No. 74 Hamilton Place, Aberdeen," concluding for decree for £1000 as damages for seduction alleged to have been committed in Wales.

The summons was signeted on 28th December 1904, and was served by leaving a copy at the house No. 74 Hamilton Place, Aberdeen, on 30th December 1904.

Defences were lodged in which the defender pleaded, *inter alia*;—(1) No jurisdiction.

The averments bearing on this plea were as follows:—

The pursuer averred;—(Cond. 1) "The defender . . . carries on an extensive business in London and Aberdeen as a meat salesman. At the date of this action he had his residence at 74 Hamilton Place, Aderdeen, where he had resided at least a year previous. The defender has funds and effects in Scotland which have been arrested. The statement in answer is denied."

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The defender answered;—(Ans. 1) " . . . Admitted that the defender . . . carries on business in London. *Quoad ultra* denied. He does not reside in Aberdeen or elsewhere in Scotland, and has not done so since 1st October 1904. He is a domiciled Englishman."

A proof on the question of jurisdiction was allowed and led.

The evidence was largely directed to the question whether the defender had, at the date of the service of the summons, a permanent domicile in Scotland. The present report is not directly concerned with that branch of the case.

It was further proved that the defender left Scotland fourteen days before the service of the summons, but it was not disputed that he had, before leaving Scotland, resided in Aberdeen for more than forty days, and the pursuer maintained that the defender thereby became subject to the jurisdiction of the Scots Courts in an action like the present, and that this jurisdiction did not cease until after the lapse of forty days from the time that the defender left Scotland.

The pursuer further maintained that defender was subject to the jurisdiction of the Scots Courts by reason of the possession of heritage in Scotland. The evidence bearing on this branch of the case sufficiently appears from the opinion of the Lord Ordinary.

On 23d March 1905, the Lord Ordinary (Dundas) pronounced the following interlocutor:—"Finds (1) that the defender's domicile of origin was in England, and that he had never changed that domicile or acquired a domicile in Scotland; and (2) that on 30th December 1904, when the summons in this action was served, the defender was not the owner of heritable property in Scotland: Therefore sustains the first plea in law for the defender: Dismisses the action, and decerns: Finds the defender entitled to expenses," &c.*

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* "OPINION.—In this action, which is one of damages for alleged seduction, the defender's first plea in law is 'No jurisdiction.' The averments of parties in regard to this plea are of the most meagre description, and are to be found at the end of Answer 1 and Condescendence 1 respectively. I allowed a proof of them, which has now been led at considerable length. The defender avers that 'he is a domiciled Englishman.' His case, as disclosed by the proof, is that his domicile of origin was in England, and that he has never abandoned that domicile or acquired any other. There is, I think, no room for doubt that the defender's original domicile, and that of his father and grandfather before him, was in England, and its alleged abandonment by him, and the acquisition of a domicile of choice in Scotland, are only within quite recent years. It is, I apprehend, well settled that a very heavy burden lies upon anyone who seeks to prove that another has thrown off his domicile of origin, and has acquired a domicile of choice elsewhere. The gravity of that *onus*, and the character of the evidence requisite to discharge it, are fully dealt with in the well-known case of *Steel* v. *Steel*, 15 R. 896. It is true that the burden may not be so great where it is sought to establish that an Englishman has acquired a Scots domicile, or *vice versa*, as where the proposition is that an Englishman or a Scotsman has acquired a domicile in a purely foreign country—*Vincent* v. *E. of Buchan*, 16 R. 637. But even under such circumstances a heavy *onus* lies upon the pursuer in the issue; and in the present case I am of opinion that the pursuer has failed to prove that the defender threw off his English domicile of origin, and acquired a domicile of choice in Scotland.

"The defender has long carried on the business of a meat salesman in Smithfield, in premises leased from the Corporation of London. He acquired this business from his father, with whom, prior to the latter's death, he was

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The pursuer reclaimed, and argued;—(1) There was here jurisdiction *ratione domicilii*. The evidence shewed that when the summons was served the defender, though by origin an Englishman, had acquired a Scots domicile of succession. In any view he had a domicile of residence in Scotland which gave the Court jurisdiction over him in a petitory action like the present. It was for the Courts of each country to say what length and character of residence would subject persons living in the country to the jurisdiction of its Courts. In Scotland it had long been settled that continuous residence for forty days gave jurisdiction, and the jurisdiction so constituted lasted for forty days after the person had left Scotland.[1] The defender here had left Scotland only fourteen days before the service of the summons; he consequently was subject to the jurisdiction of the Court. (2) The defender was subject to the jurisdiction of the Court by

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in partnership, and the requirements of the business have for years past caused the defender to visit centres of the meat and cattle trade all over the country, and among other places Aberdeen, which, it appears, is a centre of much importance, and where he has been accustomed to see consignors and to purchase cattle. . . . He has no house of his own in London. His wife and he apparently prefer to live in hotels or apartments, or with friends, and they travel about a good deal, partly for pleasure, partly when the defender's business requires it, and partly upon a combination of pleasure with business. . . . Undoubtedly, during some parts of 1900, 1901, and 1902 they resided for periods of varying length in Aberdeen in furnished apartments or rooms. . . . In the spring of 1903 he bought a house, 74 Hamilton Place, Aberdeen, taking the title in his own name. . . . It appears that a daughter of the defender by his first wife, having entered into an unhappy marriage, was in 1899 deserted by her husband. Since that time the defender has wholly, or almost wholly, supported her, as she had and has no means of her own. The defender succeeded in getting a situation for this daughter, Mrs Mitchell, in Aberdeen, in a meat business which at one time he had bought, but which he shortly afterwards sold. He depones, and Mrs Mitchell fully corroborates his evidence, that the purchase of the Hamilton Place house was made by him in order to provide a permanent home for her, but that it was considered imprudent that the title should be taken in her name, lest her husband should interfere and give trouble in the matter. Divorce proceedings at the lady's instance were pending in London, and decree *nisi* was obtained on 1st November 1904. In December 1904 the house was conveyed by the defender to Mrs Mitchell by absolute disposition, under circumstances to which I shall advert more particularly at a later stage." (His Lordship then further adverted to the evidence bearing on the question whether the defender had acquired a permanent domicile in Scotland.) "Upon the whole matter, therefore, my opinion is that the evidence adduced by the pursuer is inadequate in character and quality to prove that the defender's original domicile was ever abandoned or lost by him.

"Holding as I do this opinion, it is unnecessary for me to decide or even to discuss the question whether or not, assuming that the defender did acquire a Scottish domicile of choice, his original domicile revived upon his

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[1] Joel v. Gill, June 10, 1859, 21 D. 929, *per* Lord Justice-Clerk Inglis at p. 938-939, 31 Scot. Jur. 511; Calder v. Wood, Jan. 19, 1798, F. C. and M. 2250; International Exhibition, 1890, v. Bapty, May 26, 1891, 18 R. 843; Pedie v. Grant, June 14, 1822, 1 S. 460, rev. July 5, 1825, 1 W. and S. 716; 6 Geo. IV. cap. 120, sec. 53; A. S. Dec. 14, 1805; Mackay's Manual of Practice, p. 54; Dove Wilson, Sheriff Court Practice, p. 66.

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reason of his ownership of heritage in Scotland. It was true that he had disponed his Scots heritable property to his daughter a day or two before the service of the summons, but the case ought to be determined on the footing that he was still, at the time of the service, the owner of the heritage,—in the first place, because the disposition of the property was for the purpose of escaping the jurisdiction, and secondly because the summons would have been served while he was still the proprietor of the heritage had it not been for the circumstances set forth in the Lord Ordinary's note.

Argued for the defender;—(1) A person's permanent domicile was important only in questions of succession and of status. In any view it was abundantly clear that the defender had never acquired a Scots domicile. A domicile of residence ceased as soon as the person had left Scotland; that must now be taken as settled.[1] (2) At the date when the summons was served the defender *de facto* was not the

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departure from Scotland in December 1904, before the raising of the action —(2 Fraser on Husband and Wife, p. 1270; *Udny* v. *Udny*, 7 Macph. (H. L.) p. 89).

"But an entirely separate and distinct answer is pressed by the pursuer to the defender's plea of 'no jurisdiction,' and must now be considered. It is not distinctly stated on record, but it is based upon his alleged ownership of heritable property in Scotland, viz., 74 Hamilton Place, Aberdeen, as at the date of service of the summons. This argument has, of course, nothing to do with the aspect of the case previously considered, and would, if well founded, subject the defender to the jurisdiction of this Court, even upon the assumption that he was and is a domiciled Englishman. But, *prima facie* at least, the pursuer's case fails upon the facts. The summons was served on 30th December 1904, at the house in Hamilton Place, which was then uninhabited. The house itself had been conveyed by the defender to Mrs Mitchell by absolute disposition, dated 16th, and recorded 20th December. The present case is therefore even a stronger one for the defender than that of *Bowman* v. *Wright*, 4 R. 322. Nor do I think that the defender's position would be in any way weakened or altered if it were clear that the disposition, assuming it to be an absolute one, and with no back-letter,—and there is no evidence of any such document,—was made with the intention and for the purpose of escaping the jurisdiction of the Scottish Courts. The defender admits that he had been told of and had in view the law of the matter, and depones that under the circumstances he thought the occasion a good one for carrying out his original intention, to which I referred at an earlier portion of my opinion, of gifting the house to his daughter. And the conveyance being duly made before service of the summons, the matter would, in my judgment, there take an end, except for a disagreeable topic which is introduced into the evidence, and which, the pursuer urges, is sufficient to bar the defender from founding upon the disposition as excluding jurisdiction.

"The evidence upon this matter stands as follows:—It is proved that on 14th December 1904 the defender had an interview in Edinburgh with Mr Robert Stewart, S.S.C., at which Mr Stewart was instructed to prepare the disposition, which he did, and the disposition was signed on the 16th and

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[1] Corstorphine v. Kasten, Dec. 13, 1898, 1 F. 287; Watt v. Watt, Jan. 31, 1902, 9 S. L. T. 400; Colley v. Cameron, Feb. 18, 1902, 9 S. L. T; 462; Ritchie v. Fraser, Dec. 11, 1852, 15 D. 205, 25 Scot. Jur. 139. Johnston v. Strachan, March 19, 1861, 23 D. 758, 33 Scot. Jur. 386; Prescott v. Graham, Feb. 2, 1883, 20 S. L. R. 573; Pickering v. Aitken, Feb. 2, 1883, 20 S. L. R. 574; Bankton, iv. 6. 5 and 6; Erskine, i. 2. 16; Darling's Practice, vol. i. p. 148; Shand's Practice, vol. i. pp. 238, 239.

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proprietor of heritage in Scotland. His motive in getting rid of his heritage and the manner of getting rid of it were immaterial if *de facto* he had got rid of it. A person was entitled to escape from the jurisdiction of the Courts of a country if he could, and the Court could not exercise jurisdiction if the basis of the jurisdiction had ceased. In any view, the Lord Ordinary's estimate of the evidence regarding the delay in serving the summons was incorrect, but the Lord Ordinary was right in holding that delay was not necessary since a simple disposition like that in question could have been put on record in a few hours.

At advising,—

LORD KYLLACHY.—I agree generally with the interlocutor of the Lord Ordinary, subject to a certain addition to his Lordship's findings which I think is necessary—an addition to the effect that on 30th December 1904, when the summons in the action was served, the defender was not resident in Scotland and had not been so for about fourteen days previous.

I do not at all differ from the Lord Ordinary's conclusion that the defender being by origin a domiciled Englishman had not, *animo et facto*, acquired a domicile of succession in Scotland. I think that is so. And I think, further, that even if that were otherwise it is sufficiently clear

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recorded on the 20th. Now, on the same day, 14th December, Mr Stewart called upon Mr Mackay, the pursuer's Edinburgh agent, and after a conversation, which the latter gentleman narrates with clearness in his evidence, Mr Stewart asked and obtained from Mr Mackay an undertaking that nothing further should be done in the matter until Mr Stewart should communicate with him again. I think that Mr Mackay, who gave his evidence with marked moderation, was well entitled to trust and rely upon Mr Stewart, who was an old and intimate friend, to deal fairly with him in regard to this undertaking. It was not until 28th December that Mr Mackay learned from Mr Stewart that he had decided not to act for the defender in the case, and that the summons had better be served in the usual way, which was done on the 30th. By this time the disposition in favour of Mrs Mitchell had been executed and recorded as already explained. It is not proved whether or not, when Mr Stewart called upon Mr Mackay upon 14th December, he had already had his meeting with the defender. But it is difficult, upon either hypothesis, to justify Mr Stewart's conduct, and he did not enter the witness-box to explain it. The pursuer's counsel maintained that, in these circumstances, I ought to hold that the defender is barred from pleading the execution of the disposition as exempting him from the jurisdiction of this Court. I have some sympathy with this view, but I do not think that I can give effect to it. It is not, in my opinion, proved or at all clear that Mr Stewart's request for delay, under whatever state of knowledge on his part it may have been made and acceded to, was necessarily the cause of the summons not being served until after the disposition had been executed. The execution and even recording of a simple conveyance such as this could obviously have been carried through in the course of a period of hours rather than of days. It seems to me, therefore, that if the defender desired to have the thing done, he would have been able to effect his purpose before the summons was prepared and served, quite apart from any delay asked from or granted by the pursuer's agent. For these reasons, I think that upon this branch of the case also the pursuer's contention fails.

"It follows, in my judgment, that the defender's plea of 'no jurisdiction' must be sustained, and that the action must be dismissed, with expenses."

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that he had prior to the service of the summons renounced, *animo et facto*, any Scotch domicile which he had acquired.

I rather wish, however, to guard against the assumption, which rather seemed to pervade the argument, that in ordinary civil jurisdiction—that is to say, in actions for debt as distinguished from actions affecting status—the defender's domicile of succession is necessarily an important circumstance. For, apart from the ownership of heritage in Scotland or arrestment *jurisdictionis fundandæ causa*, residence, (and not domicile) is what in ordinary actions determines the jurdisdiction. Domicile—that is to say, domicile of succession—may be important in judging of the character of a residence or in questions of continuity. But while that is so, it would not, I apprehend, be possible to sue, say for debt, in the Scotch Courts, and to cite edictally, a Scotsman who had resided abroad for many years, supporting the jurisdiction upon the ground merely that having been born in Scotland he had not yet lost his domicile of origin. Neither, on the other hand, is there, as we all know, any difficulty in sustaining jurisdiction against a foreign debtor irrespective of his domicile, and on the ground simply that he has resided in Scotland for forty days. These are all matters more or less elementary, and I only refer to them to avoid misconception. But I may just add that the two cases mentioned at the close of the argument do not appear to have much bearing one way or the other. The question in the case of *Calder*[1] was a question of citation, not of jurisdiction; and as to the case of *Pedie* v. *Grant*[2] all that was there decided was that the Scotch Courts had not jurisdiction, *ratione originis* merely, over a defender who though born in Scotland had been long domiciled and resident in England.

Lord Stormonth-Darling.—The Lord Ordinary has sustained the plea of "no jurisdiction" and dismissed the action. Certainly the defender states that plea in circumstances that do not entitle him to any favour, but unless jurisdiction has been constituted in one of the recognised modes it cannot be exercised.

The action is one of damages for seduction alleged to have been committed in Wales. A great part of the proof is directed to shew that the defender, whose domicile of origin was undoubtedly English, has abandoned that domicile and adopted Scotland as his domicile of choice. I do not mean to say or imply that it is necessary for the purpose of giving jurisdiction in an action for a civil debt to establish domicile such as would regulate a man's succession. But since issue has been joined on that question, I am content to say that I agree with the conclusion of the Lord Ordinary.

It is also urged that jurisdiction is constituted by the defender's ownership of heritable property in Scotland, *i.e.*, a house in Hamilton Place, Aberdeen, of which he was owner from May 1903 to 16th December 1904. But the answer is that the summons was not served upon him till 30th December 1904. It is attempted to get rid of this obvious difficulty by urging that the transfer on 16th December was a mere trick or device which the defender's agent was enabled to carry out by asking for and

[1] Jan. 19, 1798, F. C. [2] 1 W. & S. 716.

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obtaining delay in raising the action. But I agree with the Lord Ordinary that it is not proved that the request for delay was necessarily the cause of the summons not being served until after the disposition had been executed. Nor do I think that the defender's plea is affected even if it were clear that the disposition, assuming it to be an absolute and not merely a simulate one, was made with the intention and for the purpose of escaping the jurisdiction of the Scottish Courts.

Again, it is said that in an action of this kind a residence of forty days is enough to give jurisdiction. That may be if the summons had been served while the defender was still in this country. But he had left Scotland fourteen days before the summons was served. As I am responsible for some observations in *Bapty's* case[1] to the effect that jurisdiction which had been acquired over a foreigner by forty days' residence in Scotland endured for forty days after he had left it, it is right that I should say that the fuller discussion which this question received in the case of *Corstorphine*[2] has convinced me that there is no sufficient warrant for this artificial extension of time. Be it observed at the same time that both *Bapty's*[1] and *Corstorphine's* case[2] related to the citation of foreigners, and nothing that was said or decided in either of them can affect the case of a man whose usual place of abode is in Scotland.

I am of opinion that we should adhere to the Lord Ordinary's interlocutor, with the slight variation proposed by Lord Kyllachy.

The LORD JUSTICE-CLERK and LORD KINCAIRNEY concurred.

THE COURT pronounced this interlocutor:—"Refuse the reclaiming note, and with the following finding in fact, (3) that the defender was not resident in Scotland on 30th December 1904, and had not been so residing for at least fourteen days previous to said date, affirm the said interlocutor reclaimed against, and decern," &c.

MACKAY & YOUNG, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

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THE BRITISH LINEN COMPANY, Pursuers (Respondents).—*M'Clure, K.C.—G. C. Stewart.*
JANET GOUDIE PURDIE, Defender (Appellant).—*Deas.—Spens.*

*Lease—Management and Occupation—Shop—Affixing show-cases outside shop—Reasonable use of premises.*—The tenant of a draper's shop in Ayr, without the consent of the landlord, put up show-cases attached by stanchions to the outside walls of the shop.

*Held* that, in the absence of proof of general custom of trade in Ayr, this was not impliedly authorised by the lease.

2D DIVISION.

BY lease, dated 7th and 30th July 1902, William Bain as commissioner for the British Linen Company, let to Miss Janet Goudie Purdie, draper and milliner, Ayr, a shop No. 119 High Street, Ayr, for ten years from Whitsunday 1902, to be used by her "as a shop in connection with the carrying on of her business of draper and milliner, and for no other purpose."

The premises let formed part of the ground floor of the British

[1] 18 R. 843. [2] 1 F. 287.

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Linen Company's Bank buildings. The central portion of the ground floor was occupied by the Bank as their office. The shop let to Miss Purdie was separated from the Bank's office by an entrance leading to dwelling-houses above. The side walls of the shop let terminated in piers or butts projecting on to the pavement. To the outside ends of each of these piers, Miss Purdie, without obtaining leave from the landlords, affixed a show-case. The landlords requested her to remove these show-cases, but she refused to do so.

The British Linen Company thereupon brought the present action in the Sheriff Court at Ayr against Miss Purdie. The pursuers prayed the Court to ordain the defender to remove the two show-cases and to restore the front of the property to the condition in which it was prior to the defender's interference therewith, and failing her so removing and restoring, for warrant to the pursuers so to remove and restore at her expense.

The pursuers pleaded;—The defender having interfered with the outside walls of the property of the pursuers as libelled, she is bound to remove said show-cases, and to restore the walls to the condition in which they were prior to her interference.

The defender pleaded;—(2) The defender having, in accordance with custom of trade, a right to erect show-cases on the outside walls of her shop, the petition should be dismissed, with expenses. (3) The defender being entitled to the full use and enjoyment of her premises, leased by her from the pursuers, and no infringement of the terms of the lease having been committed, she is entitled to absolvitor, with expenses.

A proof was allowed, and led. The manner in which the show-cases were affixed to the piers is stated in the interlocutor of the Sheriff-substitute. The defender ultimately conceded that she had failed to prove a custom of trade, but she founded upon the evidence led as shewing that the affixing of the show-cases was such a reasonable use of the premises let as to be impliedly sanctioned by the lease. The evidence so founded upon was to the effect that it was common for drapers to have such show-cases affixed to the outside of their shops.

On 20th December 1904 the Sheriff-substitute (Shairp), pronounced an interlocutor in which he found in fact,—"(1) That defender is tenant of the shop, No. 119 High Street, Ayr, under the pursuers, for the period of ten years from Whitsunday 1902, conform to the lease No. 10 of process. (2) That, without the consent of the pursuers, the defender, on or about 15th June 1904, erected the two show-cases in front of said premises of the size and in the position detailed on the plan No. 22 of process, and that she has so maintained them since the foresaid date without the consent of the pursuers. (3) That each of the defender's show-cases is attached by screw nails to two hold-fasts driven into the concrete pavement in front of the premises in question, and that at the top each show-case is held in position by attachment to a metal pin about half an inch in diameter inserted inward for a distance of about two inches between the stones of the channelled ashlar front of the butts belonging to the pursuers, as shewn on the plan No. 22 of process. (4) That no general custom of trade has been proved to exist in Ayr under which tenants are in the habit of erecting show-cases, in such positions as the defender's cases, and with similar attachments, without the consent of the proprietors of the respective subjects"; found in law,—"That in these circumstances the

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defender was not entitled originally to erect the said show-cases, with such attachments, in the position in which they stand, without the consent of the pursuers, nor is she now entitled so to maintain them, without such consent," and accordingly granted decree in terms of the prayer of the petition.

The defender appealed to the Sheriff (Brand), who by interlocutor, dated 6th April 1905, adhered to the interlocutor appealed against, and dismissed the appeal.

The defender appealed to the Court of Session, and argued;—The only ground of action pleaded was the interference with the outside walls by driving in the nails. The encroachment on the pavement in front of the shop was not pleaded as a ground for the action. No injury to the walls was proved. Even if the evidence was not sufficient to prove a custom, it was sufficient to shew that this was a reasonable use of premises let for a draper's shop. The putting up of show-cases was necessary for the purposes of the defender's business, and was not injurious to the landlord. In such circumstances the landlord was not entitled to object during the currency of the lease.[1] There was no inversion of the purposes for which the premises were let.[2] This was just the same as the case of a barber putting up his pole, or a druggist his pestle and mortar, or any shopkeeper his signboard.

Argued for the pursuers and respondents;—The defender had no exclusive right in the ends of the side walls of her shop, which were outside the subjects let to her altogether. There was no rule of law that a tenant had an implied right to do anything to the outside walls which a Court might consider a reasonable use of the premises if it was advantageous to himself and not specially injurious to the landlord. The terms of the lease could not be modified or added to except by clear proof of universal custom.[3] Proof of what generally happens was not enough.[4] There could be no implied right under a lease to interfere with the outside walls unless such interference was sanctioned by universal usage, as in the case of putting up a signboard shewing the tenant's name and business. Putting up show-cases was not so sanctioned.

LORD STORMONTH-DARLING.—This is a regrettable litigation about a very small matter, arising between landlord and tenant. The British Linen Company are proprietors of a building in the town of Ayr, where they have their bank offices, and the defender is their tenant of premises let to her "as a shop in connection with the carrying on of her business of draper and milliner, under a ten years' lease. She has erected against the outer wall abutting upon her shop two show-cases for the purpose of exhibiting her goods, and these cases are attached to the wall in the manner described by the Sheriff-substitute in his judgment of 20th December 1904, as follows:—"Each of the defender's show-cases is attached by screw-nails to two hold-fasts driven into the concrete pavement in front of the premises in question, and at the top each show-case is held in position by attachment to a metal pin about half an inch in diameter inserted inward for a distance of

[1] Stirling v. Strang, Feb. 26, 1857, 19 D. 568, 29 Scot. Jur. 268; Keith v. Reid, June 16, 1870, 8 Macph. (H. L.) 110, 42 Scot. Jur. 425.
[2] Rankine on Leases (2d ed.), p. 225.
[3] Dickson on Evidence, sec. 1093.
[4] Brown v. M'Connell, June 7, 1876, 3 R. 788.

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about two inches between the stones of the channelled ashlar front of the butts belonging to the pursuers."

The Bank has brought this action for the removal of these show-cases, and the prayer of the petition is "to ordain the defender to remove two show-cases which she has fixed on the front walls of the shop, No. 119 High Street, Ayr, of which the pursuers are the proprietors, and the defender is the tenant, and to restore the front of the property belonging to the pursuers to the condition in which it was prior to the defenders' interference therewith." Both the Sheriff-substitute and the Sheriff have given decree in terms of the prayer of the petition. The case which the learned Sheriffs had to consider was entirely based on custom of trade, and the plea to that effect is the second plea for the defender, which is,—"The defender having, in accordance with custom of trade, a right to erect show-cases on the outside walls of her shop, the petition should be dismissed, with expenses." The learned Sheriffs have found that the defender has failed to prove her averment of custom of trade. The defender's counsel here, feeling that it would be difficult to maintain that plea, has given it up, and has fallen back on the argument that this was reasonable use of the premises let, and so impliedly allowed by the lease, and he has used the evidence to shew that this was a reasonable use to make of the outside wall. This new argument must rest on the proposition that, when erections attached to the outer wall of the premises let are found to be useful and convenient to the tenant and not materially injurious to the landlord, they are therefore within the lease, and impliedly authorised by it. I find myself unable to assent to that proposition. I do not say there might not be such attachments. For instance—and this is probably the instance which would occur to everyone—a signboard bearing the name of the shopkeeper is so universally recognised as part of the equipment of a shop that the law would hold it to be authorised by implication. But that is not the case here. The defender's witnesses do not say that the show-cases were necessary for the shop, but merely that they were convenient. If that is all that can be said in their favour, I do not think we can hold that there is any implication that the tenant may thus interfere with the outer structure of the building without the consent of the landlord.

On this ground I concur with the conclusion to which the Sheriffs came.

Lord Kyllachy.—I agree with Lord Stormonth-Darling that the alleged custom has not been proved. On the question whether the affixment of these show-cases to the outside of the defender's shop was, apart from custom, so reasonable a use of the premises let to her as to be impliedly authorised by her lease, I also agree with Lord Stormonth-Darling.

Lord Kincairney.—I have considerable doubt as to this case, but I am not prepared to dissent from your Lordships' decision. I agree that there is no sufficient proof of custom. The question comes to be whether what the defender did was so impliedly within the lease that she was entitled to do it. It is not said that what she did was injurious to the proprietor, and it is said that it was in accordance with the purposes for which the premises were let. What, then, are the things which a tenant of a shop may do to

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the shop as being within the scope of the lease? Some things undoubtedly the tenant may do without special sanction. He may, for example, put up his name on the shop. Such a use of the subject of lease would be sanctioned by universal custom, and there may be other uses of a like kind. It is said that what was done here was going a long way beyond that, and certainly no such custom in support of it has been proved. I am not prepared to say that she can put up these show-cases. There is no authority to the effect that she can. But I am very averse to saying that she cannot.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor:—"Find in fact and in law in terms of the findings in the interlocutor of the Sheriff-substitute of Ayrshire, dated 20th December 1904: Dismiss the appeal, and affirm the said interlocutor, and also the interlocutor of the Sheriff dated 6th April 1905; of new ordain the defender to remove the two show-cases described in the prayer of the petition within ten days from the date of intimation hereof, and to restore the front of the property belonging to the pursuers to the condition in which it was prior to the defender's operations thereon: Failing the defender removing and restoring in terms hereof, Grant warrant to the pursuers to have the necessary removal and restoration effected at the expense of the defender, and Decern."

MACKENZIE & KERMACK, W.S.—J. A. KESSEN, S.S.C.—Agents.

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July 11, 1905.
Wilson v. Wordie & Co.

WILLIAM BROWN WILSON, Pursuer (Reclaimer).—*Dunbar.*
WORDIE & COMPANY, Defenders (Respondents).—*Watt, K.C.*—*R. S. Horne.*

*Reparation—Negligence—Safety of the Public—Accident to member of the public caused by horse let out on hire—Liability of owner of the horse to the member of the public.*—A child was run over and killed in a public street by an ammunition waggon belonging to a regiment of volunteer artillery. The waggon was drawn by horses which had been hired out by a firm of carting contractors, two of the volunteers being the drivers. The father of the child brought an action against the contractors. He averred that the horses had run off and got beyond the control of the drivers, who were young members of the volunteer regiment; that the horses were unsuited for the purpose for which they were hired, being young and restive and unaccustomed to drawing ammunition waggons; that they had never previously been driven as a pair; and that the defenders were aware of these defects.

*Held* (*aff.* judgment of Lord Ardwall) that the pursuer had not stated a relevant case of fault against the defenders.

*Opinion per curiam* that it could not be affirmed as an absolute proposition that under no circumstances could a horse-hirer be liable to a member of the public for injuries caused by horses hired out by him.

2D DIVISION. Lord Ardwall.

(SEE *Wilson* v. *1st Edinburgh City Royal Garrison Artillery Volunteers*, Nov. 30, 1904, *supra*, p. 168.)

In April 1905 William Brown Wilson, tramway inspector, Edinburgh, brought an action against Wordie & Company, carting contractors, Lothian Road, Edinburgh, concluding for decree for £500 as

No. 166. damages on account of the death of the pursuer's daughter, Marjory Wilson.

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The pursuer averred;—(Cond. 2) "On Saturday, 14th March 1903, the pursuer's wife was walking up Lothian Road in the direction of Grindlay Street, with her youngest child in a perambulator and her only daughter, Marjory Wilson, who was then six years of age, walking by her side. As they were passing the island platform situated for the accommodation of foot-passengers directly opposite the Lothian Road Board School, an ammunition waggon belonging to the 1st Edinburgh City Royal Garrison Artillery Volunteers, and drawn by two horses hired by them as after mentioned from the defenders, suddenly came from the direction of Grindlay Street at a furious, runaway pace. Marjory Wilson accordingly took refuge on the said island platform, but the horses of the said ammunition waggon dashed on to the platform, knocked her down, and so seriously injured her that she died shortly afterwards. The said horses, which were quite unsuited for the purpose of drawing guns and ammunition waggons, on account of being untrained and unaccustomed to such work, had run off and got beyond the control of the drivers, who were young members of the volunteer corps." (Cond. 3) "The said volunteer corps, for the purposes of a march-out on the public streets of Edinburgh, had entered into a contract of hire with the defenders, under which the defenders undertook to supply a considerable number of horses for the purpose of drawing heavy guns and ammunition waggons along the public streets. It was the duty of the defenders, knowing that the said horses were for use on the public streets, to have supplied quiet and well-trained horses, but they failed to do so, and the death of the pursuer's said daughter was thus caused by the defenders' fault or negligence. The defenders, knowing that the horses which they used for their business had not been trained or exercised in drawing guns and ammunition waggons, and that their use involved danger to the public, stipulated with the said volunteer corps that they should be relieved of any damage which happened to the public while the horses were under their charge. In point of fact the horses so supplied by the defenders, including the horses which ran away, had not been trained or exercised in any way in such work, and such training or exercise was necessary before they could be safely used in the public streets. In particular, the horses attached to the runaway gun waggon already condescended on were young and restive and had never previously been yoked together as a pair, and had never before drawn an ammunition waggon. They were harnessed differently from what they were accustomed to. The defenders were aware of all these circumstances, and should not have hired out said horses for said purpose. The defenders were further well aware that the horses could not be safely yoked as a pair to the said military waggon. The said horses, in consequence of their not having been trained, resisted violently being yoked at the yard at Lochrin Place, to which they were sent by the defenders to be harnessed to the gun waggons." (Cond. 4) "The accident was caused through the fault of the defenders. It was gross negligence on their part to hire out the said untrained horses for use on the public streets in Edinburgh. . . ."

The pursuer pleaded, *inter alia*;—(1) The pursuer's daughter having been killed through the fault of the defenders, they are liable in reparation.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments

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are irrelevant and insufficient to support his pleas. (3) The said accident not having occurred through any fault on the part of the defenders, they ought to be assoilzied.

On 9th June 1905 the Lord Ordinary (Ardwall) sustained the first plea in law for the defenders, and dismissed the action.*

The pursuer reclaimed.[1]

LORD JUSTICE-CLERK.—The question for our decision is whether the pursuer has stated upon record a relevant case entitling him to an issue.

I am far from saying that a person who hires out horses is absolutely exempt from a claim for damages at the instance of a person who has been injured by them merely because he has hired them out to a third party, under whose temporary control they are for the time. I can well conceive a case in which blame might be brought home to him, *e.g.*, supposing he were to hire out without notice or warning a notoriously vicious and dangerous animal. I am not prepared to say that the owner might not in such a case be liable although the horse was at the time of the accident under the control of another.

We have, however, no such case here. There are no averments that the horses were vicious. What is said is that they should not have been hired out to draw these ammunition waggons through the streets. But it is not

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* "OPINION.—On 14th March 1903 the pursuer's child was run over and killed while on an island platform in Lothian Road by an ammunition waggon belonging to the 1st Edinburgh City Royal Garrison Artillery Volunteers drawn by horses belonging to the defenders and driven by a young artilleryman. The accident was a sad and deplorable one, but I am of opinion that the pursuer has failed to state a relevant case against the present defenders, and that he is not entitled to an issue. The defenders are carting contractors, and use a number of horses in their business. They were applied to by the 1st Edinburgh City Royal Garrison Artillery Volunteers for horses to draw their guns and ammunition waggons on Saturday, 14th March 1903. They gave them horses which the pursuer states (Cond. 3) 'they used in their own business,' and the pursuer seeks to make them liable as for fault because such horses 'had not been trained or exercised in drawing guns and ammunition waggons.' This is really the whole case, and it seems to me to be irrelevant. No duty lay on the defenders, who were mere carting contractors, and not horse-dealers or horse-breakers, to train horses for artillery service; indeed they had not the means of doing so. Further, it cannot be said they were in fault in not refusing to give the artillerymen horses at all; it was not for them, but for the artillerymen, to judge whether the horses in question were fit for artillery purposes, and could be safely used for drawing guns and ammunition waggons on the public streets.

"But apart from all this, I am of opinion that the person liable to members of the public for an accident such as this is the person using the horses either by himself or his servants, and not the person who hired out the horses to him, and who has no control of them when they leave his stable. It may be that the person who takes the horses on hire will have an action of relief against the person who hired out the horses, if the accident was due to inherent vice in the horses. But the horse-hirer has in the ordinary case no contract with, and no duty to, the public, whatever may be his liabilities to the person to whom he has hired out a horse."

[1] *Cited at the hearing by Pursuer:*—Cotteril v. Starkey, 1839, 8 Carr. and Payne, 691; *by the Defenders*—Laugher v. Pointer, 1826, 5 Barn. and Cress. 547.

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said that they had never drawn waggons through the streets before, nor is anything stated to shew that an ammunition waggon differs in any material respect from any ordinary waggon. It is said that the animals were young and restive, and had never previously been yoked together as a pair. But it is evident that the quietness and safety of horses is a matter of degree. Many horses are more or less addicted to shying and other indications of nervousness or excitability, yet it cannot be said that no such horses are to be used, and that they should all be sent to the knacker. It is all a question of degree. Some horses are restive in the hands of an inexperienced man, while perfectly docile in those of a better rider or driver, and it is a noticeable point in this case that the pursuer himself avers that these horses were put under the control of young members of the Volunteer Corps, which would seem to point to fault or incapacity on the part of the drivers selected by the persons who hired them, and not the hirers-out. The latter were entitled to assume that their horses would be under the control of competent men. There is no averment that in the hands of such men they would have been dangerous. As to the averment that they had never been in double harness together, it is quite absurd to suggest that a jobmaster is only entitled to send out as a pair horses which have actually been together in harness previously. It is said, too, that they were differently harnessed from what was usual. But there is no indication of any respects in which the military harness was abnormal, nor is it said that the attention of the hirers was drawn to the fact that their animals would be put into anything other than ordinary double harness to which they were broken. I have alluded to these points as illustrating the general vague and unsatisfactory nature of the averments upon which I have no doubt in holding the pursuer is not entitled to an issue. Subject to the qualification indicated at the commencement of my opinion, I agree with the Lord Ordinary.

Lord Kyllachy.—I concur. I am not prepared to affirm the proposition suggested in the last paragraph of the Lord Ordinary's opinion, namely, that in no circumstances could a horse-hirer be liable to members of the public for injuries caused by horses let out by him. Cases I think might well be figured in which it would be very difficult to affirm that proposition. But the position here is that we have no averments raising any question of that nature—no averments of circumstances involving any such responsibility. On the contrary, there is nothing in the pursuer's averments inconsistent with the supposition that the horses were safe and free from vice, and that, as indeed some of the pursuer's averments seem to suggest, the true and proximate cause of the accident was the fact that the persons to whom the horses were let placed them under the charge of young and inexperienced drivers.

Lord Kincairney.—I am entirely of the same opinion. I quite assent to all that has been said, and do not find it necessary to add anything.

Lord Stormonth-Darling concurred.

The Court adhered.

R. S. Rutherford, Solicitor—Connell & Campbell, S.S.C.—Agents.

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Galloway v. Campbell's Trustees.

GEORGE WILLIAM GALLOWAY, First Party.—*Munro.*
ANDREW GRAHAM AND ANOTHER (Campbell's Trustees), Second Parties.—*J. S. Mackay.*

*Trust—Administration—Powers—Power to sell—Specific Legacy—Power to sell specific subject held in trust for liferenter and fiars.*—A testator, *inter alia*, directed her trustees "to hold in their own name my shares of the G. C. Railway Company, and pay the dividends or annual income thereof to" her nephew George "during his lifetime, and immediately after the decease of the said" George "I direct my said trustees to realise the said shares and to pay the price or value thereof" to George's children, whom failing to his heirs, executors, or successors whomsoever. The truster empowered her trustees "to sell and realise . . . the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion." In 1905, as the shares were yielding no income, George requested the trustees to sell them and to reinvest the proceeds.

In a special case presented by the trustees *held* (*diss.* Lord Stormonth-Darling) that the trustees had power to sell the shares.

2D DIVISION.

MRS JESSIE GALLOWAY OR CAMPBELL, widow of John Campbell, wine and spirit merchant, Slateford, died on 13th January 1899, leaving a trust-disposition and settlement, dated 30th November 1898, by which she conveyed her whole means and estate, heritable and moveable, real and personal, to certain persons (including her nephew George William Galloway) as trustees for the purposes specified.

The third purpose was in the following terms:—"(Third) I direct my trustees to hold in their own name my shares of the Great Central Railway Company, and pay the dividends or annual income thereof to the said George William Galloway during his lifetime, and immediately after the decease of the said George William Galloway, I direct my said trustees to realise the said shares and to pay the price or value thereof to such child or children of the said George William Galloway, at such ages or times, in such shares and in such manner and form as the said George William Galloway shall by a writing under his hand direct and appoint, and failing such direction and appointment to and in favour of the lawful child or whole children of the said George William Galloway, equally among them, share and share alike; and failing children of the said George William Galloway, to and in favour of his heirs, executors, or successors whomsoever."

The trust-settlement conferred the following powers on the trustees:—"Declaring that my trustees shall have the fullest powers and privileges, statutory and otherwise, and in particular they may, without prejudice to their statutory and legal powers, appoint factors and law-agents out of their own number, and pay him or them the usual professional remuneration. They may sell and realise either by public roup or private bargain the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion, and any of my trustees or beneficiaries may become purchasers. They may borrow money on the security of the trust-estate or any part of it, and may grant bonds and dispositions in security and all other necessary deeds. They may invest the trust funds on heritable security or on mortgages or debentures of public companies or corporations or the purchase of feu-duties, ground-annuals, and heritable subjects, or retain the same in bank, or continue any of the investments made by myself, and from time to time call up and vary the same."

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In June 1905 a special case was presented for determination of the question whether the trustees had power to sell the shares of the Great Central Railway Company mentioned in the third purpose of the settlement.

The first party was the truster's nephew, George William Galloway, mentioned in the third purpose, and the second parties were Andrew Graham and the said George William Galloway, the surviving trustees acting under the settlement.

The case set forth :—"The second parties, after the truster's death, ascertained that she held a certificate for £500 of 5 per cent Preference Stock 1894 of the Great Central Railway Company, referred to in her trust-disposition and settlement as 'my shares of the Great Central Railway Company.' She had acquired the stock in March 1898, and had received two half years' dividends of 5 per cent thereon, for the half years ending 30th June and 31st December 1898. . . . In the course of their administration, the said railway stock was transferred to the second parties, . . . and they have since continued to hold the same. . . . The said railway stock, although a preference stock, is postponed in competition with all the preference stocks of the company created previous to 22d June 1894, and since the death of the truster on 13th January 1899 the second parties have not received, and have not therefore been able to pay to the first party (the beneficiary entitled under the third purpose of the foresaid trust-disposition and settlement to receive the same) any dividend or annual income in respect of the said railway stock.

"The first party having thus received no benefit from the gift to him by the truster, has requested the second parties to realise the said railway stock, to hold and reinvest the proceeds, and to pay him the annual income thereof; and he maintains that the second parties have power to do this under the said trust-disposition and settlement. The second parties, while they consider that it would be proper now to realise the said stock, and have been so advised by the stockbrokers whom they have consulted, maintain that they have no power to realise the said railway stock during the lifetime of the first party."

The case further stated that George William Galloway, the first party, was unmarried.

The question of law was :—"Have the second parties power to realise the said stock of the Great Central Railway Company during the lifetime of the first party?"

The nature of the arguments sufficiently appears from the opinions of the Court.[1]

At advising,—

LORD KYLLACHY.—I am of opinion that we should answer in the affirmative the question that is put to us in this special case. The power of sale in the settlement is quite general. It applies in terms to "every part" of the trust-estate. In other words, it applies in terms not only to subjects or investments held by the trustees as part of the residue, or for payment of general legacies, but also, I apprehend, equally to subjects which are held for behoof of particular beneficiaries, or, as is the case here, for a particular beneficiary in liferent, and his children, if he has any, in fee. Such sub-

[1] *Cited by the First Party*:—Weir's Trustees, June 13, 1877, 4 R. 876; Downie, June 10, 1879, 6 R. 1013; Birkmyre, Feb. 5, 1881, 8 R. 477.

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jects are of course parts of the trust-estate, and I know of no rule to the effect that powers of sale generally expressed do not apply to them.

That being so, it appears to me that if it be proposed to except such subjects from the general power, it must be by reason of something deduced from the nature and object of the special bequest—something which makes it clear that the application to it of the general powers would be contrary to the truster's intention. And such truster's intention would have to be deduced from something more than the mere letter of the provision. It would have, I think, to be deduced upon a consideration of what appeared to be the truster's real purpose and object, and *in dubio* upon what appeared to be her main purpose and object.

The question therefore is, can it be fairly deduced from the terms and character of this special bequest that the truster's true purpose and object with regard to these Great Central Company's shares was really this: That having, for some reason, sanguine views as to the prospective value of these shares, she desired to commit her trustees and her nephew for, it may be, the next fifty years, to what was really a speculation? Is that to be held as her ruling intention? Or, on the other hand, should it not rather be held that the terms of the special bequest mean after all only this: That having assigned to her nephew and her nephew's children, as their share of her trust-estate, this particular investment, the truster desired that it should not be handed over at once, but held in trust—held as part of her trust-estate, and subject to all the powers of her trustees—for the purpose simply of securing in common form her nephew's liferent and his children's fee.

It appears to me that the latter is the true view. The question is not one as to an heirloom, or as to a family estate, or a family residence, or anything of that sort. There is no suggestion of any *delectus*, such as might be held in such cases. The case is, I think, just the same as if the subject of the bequest was a tenement of houses, or a range of shops, or some similar subject, which the truster had bought as an investment, and over which (as here) she desired to create and secure a liferent by a trust set up in the usual terms. I do, I confess, think that with respect to such a bequest and relative trust it is easier to read into the bequest such words as "or the proceeds thereof when sold," or such words as "subject always to the powers herein expressed," than to read into the subsequent "powers clause" words of exception—words excluding an important part of the trust-estate from the general power.

I may perhaps add, that although the cases cited to us under the Trusts Act may not be directly applicable, these cases, and particularly the case of *Birkmyre*,[1] appear to me to shew very distinctly that if there had been in this trust-deed no power of sale at all, the Court, if applied to, would have had no particular difficulty in granting the power of sale claimed. They certainly granted the power in the case of *Birkmyre*[1] although the properties proposed to be sold formed, as here, the subject of a special bequest, and were, as here, directed to be held during a liferent and sold at its termination. And they did so upon the ground that even in such a case (a case where there was no power of sale at all) an immediate sale was (if found

[1] 8 R. 477.

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expedient) not inconsistent with the truster's intention. It rather appears to me that if that could be affirmed there, where the question was as to the introduction into the deed of a power of sale, it may *a fortiori* be affirmed here, where the question is only as to the application of a particularly wide general power to a certain part of the trust-estate.

I should perhaps also add that we, of course, assume that the trustees, in proposing to sell the shares in question are acting fairly and honestly and in the general interest. They state that they have been advised by their stockbroker that a sale is expedient, and we are not called upon even to consider the matter.

LORD KINCAIRNEY.—I have found this a difficult case, as to which my opinion has wavered. I have ultimately come to think that the answer may be affirmative. No doubt the direction to hold during the life of the first party is definite and clear, and I do not suggest that it can be read as a power to realise. The general power to realise is also clear, and might no doubt cover the Great Central shares. Yet I do not consider that there is any inconsistency or repugnancy between the two parts of the deed. They are easily reconciled by holding that the general power of sale applies to the shares only after the first party's death. There would be no inconsistency if the general power to sell were so read.

But I think that is not the whole case, and that the special character of the shares requires consideration, and also the limited nature of the first party's professed intention.

The truster acquired the shares in March 1898, and she received two dividends on 30th June and on 31st December 1898. Her trust-deed was executed on 30th November 1898, so that when she bequeathed these shares she bequeathed them as a dividend-yielding subject, and she mentions the dividends specially. But her trustees inform us that the shares have never yielded a dividend since, so that it may be fairly concluded that they have proved a different kind of property than she intended and supposed. The testatrix died on 13th January 1899, before another term of paying dividend had arrived.

The first party does not venture on any prophecy as to the future of these shares. Had he been able to affirm that they were falling in the market, and would in all likelihood continue to fall, there might have been very plausible reasons for authorising a sale, on the principle of the case of *Downie*,[1] which was quoted at the debate, in which heritable property which from change of circumstances had lost its value was sold by trustees with the authority of the Court, although the trust-deed contained no power of sale. No statement to that effect has been made, but both parties have stated that they have been advised that it would be wise to sell.

The right and interest of the first party is really the only obstacle to the sale. If he were dead there would be no doubt about the power and the duty of the trustees. There seems no one else who has an interest to oppose a sale. There is no reason to suppose that the truster had any predilection for the shares, or looked on them otherwise than as an investment. It may be worthy of notice that the first party's professed object

[1] 6 R. 1013.

is not the conversion of the shares into cash, but only an alteration of the investment.

LORD STORMONTH-DARLING.—The first party to this special case is a nephew of the testatrix and a beneficiary under her will, the third purpose of which directs her trustees to hold in their own name her shares of the Great Central Railway Company, and pay the dividends or annual income thereof to him during his lifetime. The deed then goes on to direct that immediately after the decease of the said George William Galloway the trustees are "to realise the said shares and to pay the price or value thereof" to such child or children of the said George William Galloway at such ages or times, in such shares and in such manner and form as he may appoint, and failing such directions, to such child or children equally, and failing children to and in favour of his heirs, executors, or successors whomsoever. The testatrix died in January 1899 possessed of £500 5 per cent Preference Stock 1894 of the Great Central Railway Company, which she had acquired in March 1898, and on which she had received two half years' dividends at the rate of 5 per cent. Since her death the trustees have received no dividend on this stock, which is postponed in competition with all the preference stocks of the company created prior to June 1894. The first party having thus received no benefit from the gift in his favour has requested the trustees to realise the said stock, to hold and reinvest the proceeds, and to pay him the annual income thereof. And the question of law is, whether they have power to do so during the lifetime of the first party.

I am sorry to differ on this question, especially as the proposal to sell the stock would undoubtedly be for the immediate advantage of the liferenter, who for more than five years has received no benefit from the bequest. There may be reason to suppose that if the testatrix had contemplated that the stock would so soon cease to be an income-bearing subject (whatever its ultimate fate may be) she would have worded her bequest differently. But we must take the will as we find it, and it seems to me that it gives the trustees no power to do what they are here asked to do. The third purpose admittedly gives no such power, for it contains a positive direction to the trustees to hold the stock and pay the dividends or annual income thereof to the first party during his lifetime, and to realise immediately after his decease. Moreover, this bequest, being of a certain amount of stock in a particular undertaking, is a special legacy which has some well-known characteristics and consequences. Its efficacy depends on the continued existence of the thing bequeathed, so that, if (for example) it had been sold by the testatrix during her life, it would have been adeemed, and its proceeds or value could not have been recognised as a substitute. Further, a special legacy does not abate like general legacies in the event of there being a deficiency of funds to meet the testamentary provisions as a whole. In short, the special legatee has some advantages and some disadvantages, and the characteristic which pervades both is that he must follow the fortunes of the thing bequeathed.

But the first party finds a justification for his demand in the powers of sale and investment given to the trustees towards the end of the deed. The power of sale is expressed in very wide terms thus—"They may sell and

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realise either by public roup or private bargain the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion, and any of my trustees or beneficiaries may become purchasers." And later on, with regard to investment, it is declared that the trustees may invest the trust funds in a number of specified modes, including the power to "continue any of the investments made by myself, and from time to time to call up and vary the same."

Now, does this power of sale apply to the Great Central Railway stock at all? No power was required for the ultimate realisation of the stock at the death of the liferenter, because an absolute direction to sell is higher than a power, and involves it. It cannot therefore be said that this power answers the description of being "necessary," which is one of the qualifications under which it is granted. Neither can it be said to answer the other description of being "proper in the trustees' discretion," unless it can be held that it is a matter of discretion whether or not the trustees are to obey a positive direction of the testatrix. I confess that, with all the will to stretch this power to its utmost legitimate length, I cannot for my own part so hold. In other words, I cannot hold that this discretionary power, which of course must be construed as granted for the purpose of effectuating the other directions of the trust, is to be read as overriding one of these express and positive directions. It may be required to provide money for the payment of pecuniary legacies, just as the power of investment must certainly be required for the investment of pecuniary provisions which are to be held by the trustees, such as the sums of £1000 each which are given for the benefit of the first party's sisters in liferent and for their children or heirs in fee. But beyond carrying out these purposes, I cannot bring myself to think that either the power of sale or the power of investment was intended to go. I am therefore for answering the question in the negative.

I would only add that cases arising under the Trusts Acts do not seem to me to have any bearing. This is not an application of that nature, but brought simply to determine the powers of the trustees under the will, and if I am right in the view I have expressed as to the power of sale, the Court could not be asked to grant authority to sell, because it would be inconsistent with the intention of the trust.

The LORD JUSTICE-CLERK was absent.

THE COURT answered the question in the affirmative.

JAMES RORIE, W.S.—DOUGLAS & MILLER, W.S.—Agents.

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July 11, 1905. C D v. Incorporated Society of Law-Agents in Scotland.

C D, Petitioner.—*Party.*

INCORPORATED SOCIETY OF LAW-AGENTS IN SCOTLAND, Respondents.—*Hunter.*

*Administration of Justice—Law-Agents—Readmission to the Roll.*—In 1894 an enrolled law-agent was convicted of forging and uttering a pretended interlocutor of a Lord Ordinary, finding him entitled to £35, and was sentenced to fifteen months' imprisonment. In 1896 his name was, on his own application, removed from the Register of Enrolled Law-Agents. In 1901 he presented a petition for readmission, which was refused.

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In 1905 he presented another petition for readmission. The petition was opposed by the Incorporated Society of Law-Agents in Scotland, and it did not appear that, apart from the lapse of time, there was any change of circumstances since the refusal of the previous petition.

The Court *refused* the petition.

(See *C D* v. *Incorporated Society of Law-Agents in Scotland*, Oct. 18, 1901, 4 F. 4.)

On 20th July 1904 C D, an enrolled law-agent, pleaded guilty to a charge of forgery, in the following terms:—"(1) That he did utter as genuine a document, bearing to be a certified copy of a pretended interlocutor by the Honourable Lord Low, granting warrant upon the Bank of Scotland for payment to the panel of the several sums of money therein mentioned, amounting in all to the sum of £35, 19s. 11d., on which document the name of 'James D. Fraser' bore to be signed, as the party certifying said document to be a true copy, such signature being forged by the panel; by presenting said document to a clerk to the Accountant of Court, for the purpose of the panel receiving from him the deposit-receipt referred to in said pretended interlocutor, to enable the panel to draw said sums, which deposit-receipt the panel received; (2) in the head office of the Bank of Scotland, Bank Street, Edinburgh, the panel did utter as genuine another document, also bearing to be a certified copy of said pretended interlocutor, the signature 'James D. Fraser' thereon being forged by the panel, by presenting said document in said bank for the purpose of the panel receiving payment from said bank of the sum of £35, 19s. 11d."

He was convicted, and sentenced to fifteen months' imprisonment.

On 23d June 1896 his name was removed, on his own application, from the Register of Enrolled Law-Agents.

On 1st July 1901 he presented a petition to the Court for readmission to the Roll of Law-Agents. On 18th October 1901 the Court refused the petition—4 F. 4.

The present petition was presented by C D, praying the Court "to readmit the petitioner as a law-agent . . . and to decern and ordain the Registrar of Law-Agents to restore the name of the petitioner to the Register of Enrolled Law-Agents, kept in terms of the statute thereanent; and also to decern and ordain the Keeper of the Register of Law-Agents practising in the Court of Session, and the Keepers of the Registers of Law-Agents practising in the Sheriff Courts of the Lothians and Peebles, to restore the petitioner's name to the said Register . . ."

The petitioner produced and referred to his former petition, the answers thereto, and all the documents on which that petition was based. The petitioner stated that till May 1904 he occupied the same position he did at the date of the former petition.

The Incorporated Society of Law-Agents in Scotland, upon whom the petition was appointed to be served, lodged answers, stating that the Council of the Society at a meeting held on 1st June 1905, were unanimously of opinion that the prayer of the petition should be opposed. The respondents also stated that since the prayer of the petition formerly presented by the petitioner was refused, no change of circumstances had occurred to warrant the granting of the present petition; and that the Council of the Society of Procurators of Midlothian was unanimously of opinion that it would not be in

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the interests of the profession that the present application be granted, and disapproved thereof.

Argued for the petitioner;—It appeared from the opinion delivered by the Lord President on the occasion of the former petition that his Lordship was under the impression that the petitioner desired to be admitted a member of a particular society of law-agents. That was a misapprehension. The petitioner did not desire admission to any society, but craved to be restored to the Register of Enrolled Law-Agents. That was a matter for the Court in the exercise of its discretion, and not for the Societies of Law-Agents which had intervened to express an opinion on the application. The offence in the present case was not of greater gravity than had been the offences in several cases in which the Courts had restored the offenders to the Roll, and in the circumstances the prayer of the petition should be granted.[1]

Argued for the respondents;—In Scotland the only case of a law-agent being restored was the case of *A B* v. *Incorporated Society of Law-Agents*,[2] and the circumstances in that case were very special and of a kind which found no parallel in the present application. No new certificates had been produced with reference to the present application; the petitioner merely referred to the certificates produced with reference to the former application. On grounds of public policy the purity of the roll of law-agents should be carefully guarded. The offence of forging a document of Court was a very grave one, and the result of the investigation made by the respondents was that they decided to oppose the application. In a matter of this kind weight was to be attached to the opinion of such a Society as the respondents'. There was no case either in Scotland or England in which a solicitor who had been found guilty of forgery had been restored to the Roll.[3]

At advising,—

LORD PRESIDENT.—In this petition for readmission as a law-agent we are called upon to discharge what is always a delicate and sometimes a painful duty. The application is not the first made by the petitioner, because a similar application made by him was refused in 1901. I think I am stating no more than the fact when I say that since the date of that judgment there has been no change of circumstances even alleged except the change operated by the efflux of a certain portion of time. It is a fair consideration for your Lordships whether what may have been considered premature at that time is now any longer premature. Upon the general principles which should guide us I do not think there can be much room for doubt. On the one hand, we have to guard very carefully the purity of the roll of law-agents who are admitted to practise before the Courts of this country. On the other, no reason exists for the doctrine that persons once struck off that roll for having been convicted of crime cannot, under any circumstances, be readmitted. Obviously each case must be taken on its own merits, and there must be a distinction drawn between classes of crime. But I rather take the circumstances of the crime than the

[1] A B v. Incorporated Society of Law-Agents in Scotland, July 9, 1895, 22 R. 877; *Anonymous*, 1853, 17 Beavan's Rep. 475; *In re* Robins, 1865, 34 L. J. (Q. B.) 121; *Re* William Unwin, 1882, 72 L. T. (O. S.) 388.

[2] 22 R. 877.

[3] Garbett, 1856, 18 C. B. 403.

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mere name into consideration, and I am not prepared to adhere to the *dictum* of Mr Justice Manisty[1] which has been quoted to us that the crime of forgery by a solicitor is an unpardonable offence. At the same time it is a crime which is a very serious one for the public interest, quite apart from whatever may be one's personal view of the particular circumstances in which it is committed. I do not think the Court would ever repone a solicitor who had been convicted of that crime unless it was shewn affirmatively that by his subsequent conduct he had so far earned the respect of his professional brethren that he was in a position to come to the Court asking to be restored with a substantial amount of support from those with whom he would thereafter be qualified to practise. I rest this view upon general grounds, and not upon the technical view of the petitioner being a member of a certain society. There is no doubt a trifling error in the opinion delivered on the occasion of the previous application as to the petitioner having been a member of that society, but my judgment in this matter does not depend on any such technicality; it depends upon the general proposition of the necessary vigilance the Court must use in safeguarding the purity of the whole body of law-agents practising before it. I am not to be understood by that to say that it is a necessity that we should have on such an application the imprimatur of the Incorporated Society of Law-Agents, who on this occasion have lodged answers opposing the prayer of this petition. That would be putting in their hands a duty which has been already committed to the Court. They are a perfectly proper body to consult, as your Lordships have done by ordering intimation of the petition to them, but they do not, and could not, represent the whole body of law-agents; and in any case, quite apart from that, it is for the Court to exercise its discretion, and not for them. At the same time their opinion is one which I think we shall always respectfully consider, and when, as in the present case, we find them opposing the prayer of the petition, and when there is, to put it no higher, a dearth of affirmative support on the other side, I come reluctantly to the conclusion that it would not be proper in the circumstances to grant the prayer of the petition.

LORD M'LAREN concurred.

LORD KINNEAR.—I have come with regret to the same conclusion, for the reasons your Lordship has given.

LORD ADAM was absent.

THE COURT refused the prayer of the petition.

PARTY—CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

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July 11, 1905.
Crerar v. Clement's Trustee.

JOHN M'EWAN CRERAR, Appellant (Respondent).—*D. Anderson.*
WILLIAM JAMES WOOD (Clement's Trustee), Respondent (Appellant).—*Crabb Watt, K.C.—D. P. Fleming.*

*Bankruptcy—Ranking—Preference—Adjudication by Trustee—Rectification of Claim—Bankruptcy (Scotland) Act*, 1856 (19 *and* 20 *Vict. cap.* 79), *sec.* 51.—A creditor on a sequestrated estate, who was entitled to a preferential

[1] *Re* William Unwin, 1882, 72 L T. (O. S.) 388.

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ranking for arrears of wages, lodged a claim, which bore that the debt was for wages, but did not demand a preferential ranking. In a letter to the trustee on the sequestrated estate, accompanying the claim, the creditor stated, "As this is a preferable claim I shall be glad to have it settled at once." In acknowledging the claim the trustee wrote, "You need not, however, expect to get payment in full, as in any case the preference is limited." Eventually the trustee intimated to the creditor that he could not regard his debt as preferable, as it was not claimed as preferable in his affidavit and claim. The creditor thereupon offered to rectify his oath, and expressly state that he claimed a preference. The trustee refused to entertain this proposal and proceeded to adjudicate on the claim, treating it as a claim to an ordinary ranking. The creditor thereupon appealed to the Sheriff, who allowed him to lodge an amended affidavit and claim.

Against this interlocutor the trustee appealed and maintained that he was right in ranking the claim as an ordinary debt, and that it was incompetent to rectify a claim after it had been adjudicated on. *Held* that the creditor should have been allowed to rectify his claim.

*Opinion* by Lord M'Laren that, as a trustee is supposed to know, or to be able to ascertain, what debts are entitled in law to a preference, it is unnecessary in a claim for such a debt formally to demand a preference, if it be informally intimated to the trustee that the debt is entitled to a preferential ranking.

1ST DIVISION. Sheriff of Perthshire.

WILLIAM JAMES WOOD, accountant, Perth, was appointed trustee on the estates of David Thomas Clement, solicitor, Crieff, which had been sequestrated on 1st October 1902. John M'Ewan Crerar had been in the employment of the bankrupt as a law clerk, at a salary of £50 a year, and at the date of the sequestration the bankrupt was indebted to him for six months' salary. On 10th December 1902, Crerar lodged an affidavit and claim in the sequestration for £25, in which he stated that the sum claimed was due to him as wages, but did not ask for a preferential payment. He, however, enclosed the affidavit and claim in a letter addressed to the trustee, which was in these terms:—"Dear Sir,—I enclose affidavit and claim by me for salary. As this is a preferable claim I shall be glad to have it settled at once.—Yours faithfully," &c. To this the trustee replied on 11th December 1902:—"Dear Sir,—I am in receipt of affidavit and claim by you for wages, and requesting an immediate settlement. I have no funds in hand to pay any part of the claim meantime. You need not, however, expect to get payment in full, as in any case the preference is limited.—Yours faithfully," &c. And after further correspondence the trustee again wrote on 2d June 1903:—"Dear Sir,—Replying to yours of 30th ult., I write to inform you that I will not be in a position to make payment of any of the preferable claims until I know what other obligations I have to meet as trustee.—Yours faithfully," &c.

On 6th March 1905, Crerar had a meeting with the trustee, at which the trustee intimated to him that, as he had not claimed a preferential ranking in his affidavit, he could not obtain more than an ordinary ranking. Thereupon, on 9th March 1905, Crerar wrote to the trustee as follows:—"Dear Sir,—With reference to our conversation on Monday last regarding my claim I shall be glad to know if I am to receive payment of £15 which I offered to accept in full, if my claim was settled immediately. If not I will adhere to my original claim, p. £25 for six months, out of which I am justly entitled (under the Bankruptcy Act, 1875), to a preference for four months' wages, £16, 13s. 4d., and to rank as an ordinary creditor for the balance.

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Regarding your view that I am only entitled to an ordinary ranking, by omitting to mention that I claimed a preference, I think that on the face of it my affidavit, which distinctly stated that the debt was wages, will uphold my claim as preferable. If, however, you desire it, I shall be glad to rectify my oath on this point and expressly state that I claim a preference.—Yours faithfully," &c. To this the trustee replied on 15th March 1905:—"Dear Sir,—I was duly in receipt of your letter of 9th inst., but cannot entertain the proposal therein contained, and will leave the matter to be determined according to law. —Yours truly," &c.

The trustee proceeded to adjudicate on the claims, and intimated his deliverance to Crerar by a letter, dated 16th March 1905, which was in these terms:—"Dear Sir,—As trustee on the sequestrated estates of David Thomas Clement, solicitor, Crieff, I hereby intimate that a first and final dividend will be paid to those creditors whose claims have been admitted within our chambers here, on the 2d day of May next. The amount of your claim, as lodged, is £25. The proposed dividend on claims admitted is 3¼d. per £, but, in the event of my deliverances on claims rejected being appealed, the dividend will be 1d. per £, or thereby. . ."

Against this deliverance Crerar appealed to the Sheriff-substitute (Sym), who on 23d May 1905 pronounced this interlocutor:—"The Sheriff-substitute having heard the agent for the appellant, and the agent for the trustee, recalls *hoc statu* the deliverance appealed against: Allows the appellant to lodge with the trustee an amended affidavit and claim setting forth, if so advised, the nature and amount of the preference which he claims, and that within ten days from this date: Finds no expenses due to or by either party."

The trustee appealed, and argued;—It was incompetent for the Sheriff to allow the creditor to amend his claim at this stage. If a preference is desired it must be claimed in the affidavit.[1] That had not been done here, and therefore the claim was for an ordinary ranking only, and that the trustee had allowed.[2] The deliverance of the trustee was therefore in every way regular and unimpeachable, and it was incompetent for the creditor to appeal against it, for it had been pronounced on his own motion and gave him everything he had asked for.[3] A creditor could not amend his claim after it has been adjudicated upon and a deliverance pronounced upon it, and the amendment allowed here was therefore too late.[4] Section 51 of the Bankruptcy Act of 1856 * did not apply. That section provided for

[1] Bell's Com. (5th ed.), p. 337; Goudy on Bankruptcy, p. 341.

[2] Young v. Strathie, Sept. 8, 1896, 12 S. L. Rev. 366, Lord Trayner at p. 368.

[3] Watson v. Russell, Jan. 30, 1894, 21 R. 433.

[4] Commercial Bank of Scotland v. Speedie's Trustee, Nov. 27, 1885, 13 R. 257.

* The Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. c. 79), enacts, sec. 51,—"When it shall appear to the Sheriff or to the trustee that the oath or claim of any person produced with a view to voting or ranking, and drawing a dividend on the sequestration, is not framed in the manner required by this Act, the Sheriff or trustee, as the case may be, shall call upon such person, or his agent or mandatory, to rectify his oath and claim, pointing out to him wherein it is defective; and unless such person or his agent or mandatory shall thereupon make such alteration upon his oath and claim as may be necessary in order to rectify the same, the Sheriff or trustee,

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rectification of a claim only where it "is not framed in the manner required by this Act."[1] Here there was no such defect; it was quite competent for a creditor who might claim for a preferable debt to content himself by claiming for an ordinary ranking only. The proper course would have been for the creditor to withdraw his claim and lodge a new one, but the claims having been adjudicated on it was now too late to do so.[2]

Counsel for the respondent was not called on.

LORD PRESIDENT.—This is one of those cases where, if we had been forced to decide in favour of the appellant, we should have done so with regret, for it would have been a most inequitable result. But I have heard nothing in the argument that has been submitted to us to make me think that the Sheriff was not perfectly right in issuing the interlocutor that is here appealed against. The creditor in this case was a clerk in the employment of the bankrupt, and he put in a claim for wages due to him, enclosing it in a letter in these terms:—"I enclose affidavit and claim by me for salary. As this is a preferable claim I shall be glad to have it settled at once.' So far from disclaiming this as a preferential claim the trustee's answer shews that he accepts it as such, for he replies:—"I am in receipt of affidavit and claim by you for wages, and requesting an immediate settlement. I have no funds in hand to pay any part of the claims meantime. You need not, however, expect to get payment in full, as in any case the preference is limited." So that, under the trustee's own hand, we have perfectly clear evidence that he knew that the creditor was claiming a preference, though it was not one he was prepared to satisfy at once or in full. Afterwards the trustee took up the very technical objection that this was not a good claim to a preference, as there was no demand for preferential payment stated *in gremio* of the affidavit and claim. When informed of this the creditor writes in reply:—"Regarding your view that I am only entitled to an ordinary ranking, by omitting to mention that I claimed a preference, I think that on the face of it my affidavit, which distinctly stated that the debt was wages, will uphold my claim as preferable. If, however, you desire it, I shall be glad to rectify my oath on this point, and expressly state that I claim a preference." Upon that the trustee does nothing but adjudicate on the claim as it stands, treating it as a claim to an ordinary ranking; and when the Sheriff says that the creditor is to be given an opportunity of putting his claim into an unambiguous form, the trustee takes this appeal here, and maintains that that cannot be allowed, as he has already adjudicated on the claim. It appears to me that this is very like an attempt to catch the creditor in a trap. Of course we might have had to hold that the trustee was right in his contention if there had been any-

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as the case may be, shall disallow or reject such oath and claim: Provided always, that when the failure to comply with the provisions of this Act shall appear to have been made for some improper or fraudulent purposes, or where injury can be qualified by the other creditors or any of them in respect thereof, it shall not be incumbent upon the Sheriff or trustee to give such person an opportunity to rectify his oath and claim as aforesaid."

[1] Young v. Strathie, 12 S. L. Rev. 366.

[2] Commercial Bank of Scotland v. Speedie's Trustees, 13 R. 257.

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thing in the Bankruptcy Act to support it, but I can find nothing there to that effect. I agree that, in order to obtain preferential payment, creditors must claim a preference in a material if not a technical sense. But I see no objection to the course the Sheriff has taken in allowing the creditor to amend his affidavit so as to make a technical claim for a preference. I think this is a most unnecessary appeal, and that it ought to be dismissed with expenses.

LORD M'LAREN.—Where a preference is claimed on the ground that the debt is a privileged debt, there is nothing in the statute requiring that the demand for a preferential ranking should be set forth in the affidavit. If the creditor claims a preference over any particular property of the bankrupt, that must be stated in his affidavit in terms of section 22. But where it is only that the law has given a preference to certain debts the trustee is supposed to know or to be able to find that out for himself. Then surely it is enough if the creditor intimates by letter, or in any other informal way, that the debt for which he is claiming is entitled to a preferential ranking. But even if it were true that, under the statute, a claim to preferential payment must be stated in the affidavit, we have here the creditor informing the trustee by letter that he is willing to rectify his claim; and, if the creditor were in error in not stating it in his affidavit, the trustee ought to have allowed an amendment under section 51. So whether we hold that this claim ought to have been in the affidavit or that it ought not, the trustee was in a position to deal with the matter as a preferential claim. I think that the course proposed by the Sheriff is reasonable and equitable, and I agree that the appeal ought to be dismissed.

LORD KINNEAR.—I agree that the course proposed by the Sheriff is perfectly reasonable and equitable, while what the appellant says he ought to have done would have been most inequitable. I would only add that the argument that the claim cannot be amended because the trustee has already adjudicated seems to me to be rather a bold one, because it comes to this, that the trustee may deprive a creditor of his right of appeal by not allowing him to state his case. I agree that where a creditor has made a claim to a preference on an explicit footing, and the claim has been rejected it may be too late after the decision to seek to alter the basis of the claim. But that is no reason why he should not be allowed to amend his affidavit before a decision on the merits, when it has been pointed out to him that in form it fails to make the claim he means to bring forward. The creditor made it clear from the first that he meant to claim a preference. He lodged his claim, and intimated that he demanded a preferential ranking, and the trustee has acknowledged that intimation in two letters, though he stated that he was not in a position to give effect to it at the moment. Then when, in a subsequent letter, the trustee pointed out his technical objection to treating this as a claim to a preference, the creditor replied that he was willing to rectify his affidavit. The trustee would not entertain this suggestion, and proceeded to decide against the creditor without giving him an opportunity to rectify his claim, and has issued his deliverance accordingly. It is said that by so doing he has successfully

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deprived the creditor of his right of appeal to the Sheriff and to this Court. If that is so a creditor could have no right of appeal against the refusal of a trustee to allow him to amend his claim. I do not think this is at all the sort of restriction of appeal that is dealt with in the cases that were cited to us, and I think the appellant's contention on this point is untenable.

LORD ADAM was absent.

THE COURT pronounced this interlocutor:—"Affirm the interlocutor, dated 23d May 1905, appealed against: Refuse the appeal, and remit to the Sheriff-substitute to proceed as may be just, and decern."

A. CAMPBELL & SON, S.S.C.—WILLIAM C. MORRIS, Solicitor—Agents.

No. 170. July 11, 1905.* Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited.

THE MICA INSULATOR COMPANY, LIMITED, Pursuers (Respondents).—*Younger, K.C.—Macphail.*

BRUCE PEEBLES & COMPANY, LIMITED, Defenders (Reclaimers).—*Clyde, K.C.—Christie.*

*Patent — Infringement — Process — Particulars of Breach — Patents, Designs, and Trade-Marks Act*, 1883 (46 *and* 47 *Vict. cap.* 57), *secs.* 29 *and* 107.—The Patents, Designs, and Trade-Marks Acts, 1883, sec. 29, enacts,—"In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or the Judge, at any subsequent time, particulars of the breaches complained of"; and sec. 107, dealing with the application of the Act to Scotland, enacts, *inter alia*, that "nothing shall affect the jurisdiction and forms of process of the Courts in Scotland in such an action."

In an action for damages for infringement of two patents for the manufacture of electrical insulating sheets the pursuers averred that the defenders, in manufacturing micanite and extra flexible micanite cloth, "have used and employed the inventions protected by the said letters-patent, or one or other of them"; and they further averred that the defenders had purchased from other persons "micanite and extra flexible micanite cloth made in contravention and infringement of the said letters-patent, or one or other of them," and in particular, had purchased "micanite made in contravention of said letters-patent," and "machines insulated in infringement of said letters-patent."

*Held* (1) that sec. 29 of the Patents, Designs, and Trade-Marks Act, 1883, applied to Scotland, and that particulars of the breach must be set forth, but that they fell to be set forth, in accordance with the forms of process of the Courts in Scotland, in the condescendence, and not in a separate statement; and (2) that the particulars of breach set forth were not sufficient, in respect that they did not specify the manner in which the infringement had taken place, nor which of the two protected processes of manufacture had been infringed.

*Patent—Amended Patent—Infringement—Damages for Infringement before and after Amendment—Patents, Designs, and Trade-Marks Act*, 1883 (46 *and* 47 *Vict. cap.* 57), *sec.* 20.—The Patents, Designs, and Trade-Marks Act, 1883, sec. 20, enacts,—"When an amendment by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to

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the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

In an action of damages in respect of amended patents for infringement both before and after amendment, *held* that, although it was not necessary that separate sums should be claimed as damages in the summons, yet, owing to the heavier *onus* of proving actionable infringement for the period prior to the amendment, the amounts claimed for breach prior to and after the amendment must be distinguished in the condescendence.

1st Division. Ld Stormonth-Darling.

THE MICA INSULATOR COMPANY, LIMITED, who were manufacturers of and dealers in mica segments, cut mica, and micanite, were the registered proprietors of two patents; the first No. 10,430* of 1892, for "an improvement in electrical insulating sheet," was dated 28th January 1893, and was amended, in accordance with the decision of the chief examiner, on 2d August 1904; and the second No. 6048* of 1898, for "improvements in the manufacture of flexible sheets for electrical insulation," was dated 20th December 1895, and was amended in accordance with the decision of the chief examiner, on 27th August 1904. Bruce Peebles & Company, Limited, were engineers in Edinburgh, who used mica in the construction of machines.

On 3d December 1904 The Mica Insulator Company raised an action against Bruce Peebles & Company, in which they sought:—(first) for payment of £500 as damages for breach of a contract of sale, whereby the defenders bound themselves to purchase their whole supply of micanite segments, &c. for the year 1904 from the pursuers; (second) that the defenders should be interdicted from infringing the two patents of which the pursuers were the registered proprietors by making, vending, or using in whole or in part the inventions described in the specifications relative to the said patents, "and in particular from making, vending, or using any micanite or electrical insulating sheets or flexible sheets for electrical insulation, constructed or used in the manner described in the said amended specifications, or either of them, or in manner substantially the same, and from infringing the said letters-patent in any other manner of way"; and (third), that the defenders should be ordained "to exhibit and produce a full and particular account of the whole micanite, electrical insulating sheets, or flexible sheets for electrical insulation made, or which during the dependence of this action they may make, in infringement of the said letters-patent, or either of them, and of the whole micanite and others as aforesaid made in infringement of the said letters-patent, or either of them, bought by the defenders from persons other than the pursuers, and to pay to the pursuers the sum of £500 . . . as the damages sustained by the pursuers through the defenders' infringement of the said letters-patent, or either of them."

The pursuers, besides setting forth the contract of sale and the alleged breach thereof referred to in the first conclusion of the summons, averred;—(Cond. 1) "The pursuers manufacture in accordance with said patent of 1892 a substance which is sold by them and known in the trade as 'micanite,' and in accordance with said patent of 1895 a substance which is sold by them and known in the trade as 'extra flexible micanite cloth' or 'extra flexible micanite paper.' The pursuers have the sole right of making and selling the same."

Cond. 5 was as follows:—"The pursuers further believe and aver that the defenders have been manufacturing and continue to manufacture 'extra flexible micanite cloth.' In manufacturing the said

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micanite and extra flexible micanite cloth as aforesaid, the defenders have used and employed the inventions protected by the said letters-patent, or one or other of them, and described in the amended specifications relative thereto, and have infringed the said letters-patent, or one or other of them. The pursuers further believe and aver that since the beginning of 1902 the defenders have been purchasing from other persons micanite and extra flexible micanite cloth made in contravention and infringement of the said letters-patent, or one or other of them, and have thereby infringed the same. In particular they believe and aver that at various dates during the said period the defenders have bought from one Brandt in Hamburg and used in their machines in Scotland micanite made in contravention of said letters-patent, and have purchased from the Bergman Electricitäts Gesellschaft of Berlin machines insulated in infringement of said letters-patent, and sold them to various persons in England and Scotland."

The defenders, in Ans. 5, called upon the pursuers "to specify the points in which the defenders have infringed the pursuers' patents."

Cond. 6 was as follows:—"In consequence of and by the said infringement, the pursuers' business has been seriously interfered with and injured, and the pursuers have suffered loss and damage to an extent of not less than £500, which is the sum third above concluded for."

The pursuers pleaded;—(2) The defenders having infringed the pursuers' said letters-patent, or one or other of them, the pursuers are entitled to interdict, as concluded for in the second conclusion of the summons. (3) The pursuers having suffered loss and damage to the extent third above concluded for through the defenders' infringement of their said letters-patent, or one or other of them, they are entitled to decree in terms of the third conclusion of the summons.

The defenders pleaded, *inter alia;*—(1) The pursuers' averments are irrelevant and lacking in specification, and ought not to be remitted to probation.

On 27th March 1905 the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor repelling the first plea in law for the defenders, and allowing the parties a proof of their averments.*

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* "OPINION.—The defenders plead that the pursuers' averments are irrelevant, and lacking in specification, both as to their claim of £500 of damages for breach of the contract of sale, and their claim of £500 of damages for infringement of patent. As to the first claim, they say that a contract to purchase their whole supply of mica segments, and similar articles, during a particular year does not debar them from manufacturing the articles for themselves, which is the main part of the pursuers' complaint against them. Perhaps so, but the pursuers go on to say (cond. 4) that the 'defenders have also been buying mica and micanite from persons other than the pursuers, whose names are unknown to the pursuers.' I see no objection to the relevancy of this averment. If true, it would constitute a breach of contract, and the defenders can hardly complain of it as wanting in specification, because it is a fact within their own knowledge.

"As to the second claim of damages, it certainly comes to a very narrow point, because the two patents said to have been infringed were each made the subject of amendment (it is not said whether 'by way of disclaimer, correction, or explanation,' but it must have been by one or other) in August 1904. Now, this action was raised on 3d November of that year, and therefore there were only ten or twelve weeks during which damageable infringement can have taken place without the patentee undertaking an almost

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The defenders reclaimed, and admitted that the Lord Ordinary was right in allowing a proof with regard to the alleged breach of contract, but argued;—The averments of infringement of patent set forth here were not sufficiently specific to entitle the pursuers to go to proof on these points. Sec. 29 of the Patents, Designs, and Trade-Marks Act, 1883,* applied to Scotland, and therefore full particulars of the breach complained of must be set forth. Even at common law the averments of breach here stated would be insufficient to guard against surprise of the defenders.[1] Specific instances of infringement, identified by their dates, should be put on record,[2] and also the precise manner in which the system of manufacture complained of had infringed the letters-patent of the pursuers. There were also two patents here, covering different processes of manufacture, and there was nothing on record to shew whether both or only one, and if only one, which, had been infringed. Further, both these patents had been amended, and by sec. 20 of the Patents, Designs, and Trade-

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prohibitory *onus* of proof under the 20th section of the Act of 1883. I can hardly suppose that the pursuers, knowing this, seriously intend to undertake that *onus*, and, if not, the period of available infringement is so short that the defenders cannot be put to any real disadvantage in not being told more particularly the occasions when they are said to have used the pursuers' processes in manufacturing their own machines. But I cannot say that the pursuers are absolutely debarred by the statute from undertaking, if they please, the *onus* which section 20 lays upon them, and therefore it is formally open to them to prove infringement from 1895 downwards. The rather vague nature of the averments in cond. 5 is, I think, to be excused by the fact that the thing complained of is, not sale of this or that article, but use of the patented processes in the defenders' own works. The real question between the parties, so far as I see, will thus come to be whether the patents are good, and cover the sheets for electrical insulation used by the defenders.

"I will therefore repel the first plea for the defenders, and allow a proof on a day to be fixed."

* The Patents, Designs, and Trade-Marks Act, 1883 (46 and 47 Vict. cap. 57), enacts:—

Section 20. "Where an amendment by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

Section 29. "(1) In an action for infringement of a patent the plaintiff must deliver with his statement of claim, or by order of the Court or the Judge, at any subsequent time, particulars of the breaches complained of. . . . (4) At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any alleged infringement or objection of which particulars are not so delivered."

Section 107. "In any action for infringement of a patent in Scotland the provisions of this Act, with respect to calling in the aid of an assessor, shall apply, and the action shall be tried without a jury, unless the Court shall otherwise direct, but otherwise nothing shall affect the jurisdiction and forms of process of the Courts in Scotland in such an action or in any action or proceeding respecting a patent hitherto competent to those Courts."

[1] Kerr v. Clark & Co., Nov. 4, 1868, 7 Macph. 51, 41 Scot. Jur. 34; Hutchison, Main, & Co. v. Pattullo Brothers, May 24, 1888, 15 R. 644.

[2] Househill Coal and Iron Co. v. Neilson, Nov. 15, 1842, 5 D. 86, 14 Scot. Jur. 624, aff. March 6, 1843, 2 Bell's Appeals, 1, 15 Scot. Jur. 524.

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Marks Act, 1883, the pursuer in an action for infringement prior to amendment must prove that the original specification was framed in good faith, and with reasonable skill and knowledge. There were no averments to that effect here, and they were all the more necessary as one at least of these patents, in its original form, had been abandoned as void, by the pursuers' predecessors, in an action in the English Courts.[1] In view of the difference in the *onus* of proof with regard to the period prior to as compared with that after amendment, the statement of damage was not sufficiently specific. The sums claimed for breaches prior to and the sums claimed for breaches after amendment must be clearly distinguished.

Argued for the respondents;—The Lord Ordinary was right in holding that the averments of infringement of patent were sufficient to entitle the pursuers to a proof. With regard to the goods manufactured by the defenders the averments were of a continuous course of manufacture in breach of the letters-patent, and it was therefore unnecessary to specify particular occasions. Further, the breach was alleged to have taken place in the defenders' works, and as what happened there must be well within the defenders' own knowledge, they were not entitled to demand such precise particulars as might otherwise be necessary.[2] *Househill Coal and Iron Co.*[3] was not in point, as it dealt with objections to the patent, not with particulars of breach. As to the purchases from the German firms, the pursuers had set forth all that could be reasonably expected from them. They had set forth the articles purchased, and the parties from whom they were purchased; they could not be expected to know the actual dates of the purchases nor the specific processes of manufacture employed in these foreign works. With regard to the questions arising from the fact that these patents had been amended, it was unnecessary to put in a formal averment of reasonable skill and knowledge; that was entirely a matter for proof. So too was the amount of damage apportionable to the periods before and after amendment.[4] If, however, there were valid objections to the form of the record on this point, it would be obviated by allowing the amendments proposed in the minute of amendment lodged by the respondents.

The minute referred to (No. 30 of process), which had been tendered in the course of the discussion and had been allowed to be received, sought to amend the record by altering cond. 5 to make it read as follows:—(Cond. 5) "The pursuers further believe and aver that since 27th August 1904 the defenders have been manufacturing and continue to manufacture 'extra flexible micanite cloth.' In manufacturing the said micanite and extra flexible micanite cloth as aforesaid, the defenders have used and employed the inventions protected by the said letters-patent respectively, and described in the said amended specifications relative thereto, and have infringed the said letters-patent. The pursuers further believe and aver that since the said 27th August 1904 the defenders have been purchasing from other persons . . . ," &c., as above set forth in the original cond. 5.

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[1] Mica Insulator Co. v. Electrical Co., Limited, Aug. 10, 1898, 15 R. P. C. 489.

[2] Mandleburg v. Morley, June 21, 1893, 10 R. P. C. 256.

[3] *Sup. cit.*

[4] Hopkinson v. St James' and Pall Mall Electric Light Co., Limited, March 15, 1893, 10 R. P. C. 46, at p. 62.

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LORD PRESIDENT.—This is an action of damages at the instance of the Mica Insulator Company, who are manufacturers of electrical materials, against a firm of engineers, and damages are sought on two different grounds. They are sought on the ground of an alleged breach of contract, which the defenders are said to have committed by having bought certain materials from others than the pursuers, from whom alone by the terms of their contract they had undertaken to purchase. Damages are also sought on the ground that the defenders have sold goods which they themselves have manufactured, and by such manufacture have infringed the patent rights of the pursuers, or that these goods had been purchased from others who, in manufacturing them, had been in breach of these patent rights. There is no controversy between the parties that, in so far as regards the alleged breach of contract, the matters in dispute must be remitted to probation. But the defenders say that, as to the second claim for damages, the pursuers' averments are so wanting in specification as not to entitle them to a proof. The Lord Ordinary has, though, as appears to me from his opinion, only after considerable doubt, come to the conclusion that he cannot refuse a proof on the ground of want of specification, and it is against that decision that this reclaiming note is taken.

That makes it necessary to scan pretty closely the averments which the pursuers have made on this point, and they are set forth in cond. 5—(Here the Lord President read cond. 5 as originally framed). I ought to explain that the patents which are here said to have been infringed are patents of which the pursuers are owners, and they consist of a patent of 1892, amended on 2d August 1904, and a patent of 1895, which was also amended on 27th August 1904. Now, your Lordships are aware that it was long ago laid down by this Court that it was not necessary, under our forms of process, to have a separate statement of the particulars of the alleged breach of patent, such as is required in England, and that decision was based on the ground that by our forms the particulars must be set forth on record to prevent surprise, with the same distinctness as is required in the separate statement which is necessary in England. I think that that difference has been statutorily recognised in the Patents, Designs, and Trade-Marks Act, 1883, where, while section 29 provides that the plaintiff must deliver with his statement of claim, or subsequently, particulars of the breaches complained of, section 107, dealing with the application of the Act to Scotland, says that nothing is to affect the forms of process of the Courts in Scotland. I take that to mean that the requirements of the Act are to apply just as much to Scotland as to England, though the Courts in Scotland are not to depart from their own forms of process; so I think the provision for setting forth particulars of the breaches complained of is just as much a statutory requirement in Scotland as in England, though the form in which it is to be done may be different.

Now, it is very necessary in patent cases to have full particulars of what is complained of, and I do not think the averments in this record are sufficient. The pursuers have come here with two amended patents, and the 20th section of the Patents Act of 1883 provides that where an amend-

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ment by way of disclaimer, correction, or explanation has been allowed, no damages will be given unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith, and with reasonable skill and knowledge. Accordingly, the *onus* of clearly specifying the breach alleged to have taken place before disclaimer is much greater than with regard to a breach after disclaimer; and therefore I think it is necessary that a pursuer with a disclaimer should make this clear by splitting up the sum claimed as damages, so as to shew what amount is claimed for breaches before disclaimer, and what for breaches after it. I do not think it is necessary that separate sums should be claimed in the summons, but they must be clearly distinguished in the condescendence. That has not been done here; and the pursuers, feeling that difficulty, have lodged a minute of amendment, which would make cond. 5 read thus:—(His Lordship here read cond. 5 as amended). Now, that amendment would, of course, obviate the difficulty that I have hitherto been dealing with, and if there were no other difficulty in the case the course would be to allow this amendment to cond. 5, and send the case to proof.

But a further objection has been taken which is in my view a good one, and it is, that there are no averments to shew what is the nature of the breach complained of. The averments are that the defenders have made and sold a certain cloth, manufactured in breach of the pursuers' patents. Nothing is said but that it is an "extra flexible micanite cloth," and when we look at the pursuers' patents we see that they are for making extra flexible micanite cloth, but by different processes. I think the defenders are entitled to have a specification of the manner in which they are alleged to have infringed these patents, and as to which of the processes of manufacture the breach has occurred, whether it is the one or the other, or both of them, that are alleged to have been followed. There is also a want of specification as to the alleged purchases from the foreign firms. The pursuers must specify in what way Brandt and the Bergman Electricitäts Gesellschaft are in breach of their patents, and which process they have infringed, in manufacturing the articles which were purchased by the defenders. I think, therefore, the averments made here by the pursuers are not sufficient, and that with regard to the second ground on which damages are claimed, they are not entitled to a proof. I would propose, then, that the Lord Ordinary's interlocutor should be recalled, and that the pursuers should be given an opportunity to amend their record should they see fit; but whether they decide to amend or not, the case must go back to the Lord Ordinary.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

THE COURT pronounced an interlocutor recalling the interlocutor of the Lord Ordinary of 27th March 1905, allowing the pursuers, if so advised, to lodge a minute of amendment in supplement of that tendered at the Bar, No. 30 of process, and continuing the cause.

MACKENZIE & KERMACK, W.S.—E. I. FINDLAY, S.S.C.—Agents.

JEANIE CATHCART, Pursuer.—*Orr, K.C.—MacRobert.*
ALEXANDER BROWN, Defender.—*M'Clure, K.C.—A. Moncrieff.*

No. 171.

July 12, 1905.

*Reparation—Seduction—Issue.*—In an action of damages for seduction the method of seduction alleged to have been employed must be set forth in the issue.

Cathcart v. Brown.

Form of issue in *Forbes* v. *Wilson*, May 16, 1868, 6 Macph. 770, *followed.*

1ST DIVISION. Lord Low.

JEANIE CATHCART, domestic servant, raised an action against Alexander Brown, warehouseman, in which she sought for damages for breach of promise and seduction. The defender resided with his father, and the pursuer was a domestic servant in his father's employment.

The pursuer averred that shortly after she came to his father's house the defender began to pay her attention; that an intimacy sprang up between them; that the defender courted her and professed affection for her; that their meetings were of a more or less secret character, and that at these meetings he professed affection for her, and the subject of marriage was frequently alluded to. Cond. 4 was as follows:—"In or about the month of April 1904 the defender made a present of articles of dress to the pursuer, and then and there, as he had done on previous occasions, professed to the pursuer his warmest love for her, and asked her to marry him. The defender having succeeded in winning the affection and confidence of the pursuer, she agreed. The defender thereupon urged the pursuer to allow him to have carnal connection with her. The pursuer was at first unwilling, but was at last overcome, partly by the masterful ascendancy he had acquired over her in virtue of his position as the son of her employer, and partly by his solicitations and professions of love, and by his promise to marry her. The pursuer was then seduced by the defender." Cond. 5 was as follows:—"On or about the 20th day of May 1904 the defender came home from business from Glasgow by a late train. The pursuer had gone to bed. Her bedroom is above the kitchen and away from the rest of the household. The defender entered the pursuer's bedroom, and renewing his professions of love for her and his intention to marry her, again urged her to allow him to have connection with her. The pursuer being overcome by his solicitations, and relying on his promise to marry her, reluctantly yielded, and was again seduced by the defender."

In his answers the defender denied the allegation with regard to what happened in April 1904, but admitted that on 20th May 1904 he had carnal connection with the pursuer. He, however, explained that it was upon her invitation that connection took place between them. He further averred;—(Ans. 5) "The defender never professed love for the pursuer, and never expressed an intention of marrying her"; and (Ans. 9) "The defender never promised to marry the pursuer, and the sole act of connection between them did not take place on the faith of any such promise, nor was it preceded by courtship or proffers of affection."

The pursuer pleaded;—(2) The defender having seduced the pursuer, is liable in reparation therefor.

The defender pleaded;—(3) The only act of connection which took place between the pursuer and the defender having proceeded on the invitation of the pursuer, and without promise of marriage or proffer of affection, the defender should be assoilzied.

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July 12, 1905. Cathcart v. Brown.

On 6th June 1905 the Lord Ordinary (Low) approved two issues for the trial of the cause. The first was an issue of breach of promise of marriage, upon the form of which no question arose. The second, dealing with the alleged seduction, was as follows:—"Whether between the month of April and 20th May 1904 the defender seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage? Damages laid at £300."

The defender thereupon gave notice of a motion to vary this issue, and moved the Court to vary it by inserting between the words "defender" and "seduced," the words, "courted the pursuer, and proposed honourable intentions towards her, and promised to marry her, and whether, by means of such courtship and professions and promise, he."

Argued for the defender;—The popular significance of the word "seduce" was quite different from the legal significance, the latter requiring the existence of some arts or practices by means of which consent had been induced, and these must be clearly specified.[1] They ought also to be put in the issue to safeguard the defender by drawing the attention of the jury to the essentials in law of seduction. Though formerly that was not always considered necessary, the practice was now different, and it had been decided in *Gray* v. *Brown*[2] that the method of seduction must be stated in the issue.[3]

Argued for the pursuer;—The use of the word "seduce" alone was sufficient.[4] *Gray* v. *Brown*[2] dealt with the special circumstances of that case only, and did not apply here. The Lord Ordinary had had *Gray* v. *Brown*[2] before him, and had considered it in adjusting this issue. The form of issue approved in *Gray* v. *Brown*[2] had not been followed in the Outer-House of late years, where the practice was to allow the issue in this simple form. In the latest reported case, that of *Gray* v. *Miller*,[5] that was the issue approved. If the suggested variation was to be allowed, the word "or" should be substituted for the word "and," so as to make the methods alternative.

LORD PRESIDENT.—In this case the pursuer, who is a domestic servant, sues the son of her employer for damages on two grounds. No question arises as to the first ground, which is for breach of promise of marriage, and the first issue sets forth that breach in the usual form, and no objection is taken to it.

But she also sues for damages in respect of her alleged seduction, and the issue which the Lord Ordinary has allowed only uses the word "seduced": —Whether "the defender seduced the pursuer, and prevailed upon her to

[1] Fraser, Husband and Wife, i. 501; Linning v. Hamilton, 1748, M. 13,909; Stewart v. Menzies, June 27, 1837, 15 S. 1198; Gray v. Miller, Dec. 17, 1901, 39 S. L. R. 256.

[2] June 19, 1875, 5 R. 971.

[3] Juridical Styles, iii. 811; Walker v. M'Isaac, Jan. 29, 1857, 19 D. 340, 29 Scot. Jur. 156; Forbes v. Wilson, May 16, 1868, 6 Macph. 770, 40 Scot. Jur. 396, where the issue of seduction that was approved was in these terms:—"Whether, in or about the year 1864 and 1865 the defender courted the pursuer, and professed intention to marry her; and whether, by means of these professions, the defender, in or about November 1865, seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage?"

[4] Macfarlane on Issues, pp. 378, 381; Walker v. M'Isaac, 19 D. 340.

[5] 39 S. L. R. 256.

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permit him to have carnal connection with her, to her loss, injury, and damage?" The defender has tabled a motion to vary this issue, on the ground that it should have contained some specification of the method of seduction which is alleged to have been employed; the mere use of the word "seduced" being in itself misleading. I think the defender is right that the use of this word alone may be misleading, for the popular use of the word "seduce" is not the same as the legal significance; the popular use would include a case where there is the most complete consent on the part of the woman, and no arts or deceit have been employed in inducing that consent. But I do not think it necessary to go into this question in detail, for it has been already carefully considered in both Divisions of the Court; in the Second Division in the case of *Gray* v. *Brown*,[1] and in this Division in the case of *Forbes* v. *Wilson*.[2] The issues approved in the case of *Forbes*[2] had been carefully considered, and I do not think they could be bettered. That was a similar action to this, an action for breach of promise and seduction, and I think the issues approved in that case ought to be strictly followed here, only making the necessary alteration of dates. I especially approve of the form of issue allowed in *Forbes*,[2] because the second issue does not set forth an actual promise to marry, but only a proposed intention to marry, as the inducing cause of the seduction. I think, therefore, that we should not approve the second issue allowed by the Lord Ordinary, nor adopt the variations suggested by the defender, but that it would be better here to follow the exact form of issue approved in the case of *Forbes*.[2]

LORD ADAM.—I concur.

LORD M'LAREN.—I am of the same opinion. I think it was settled so far back as the case of *Linning*,[3] that an action for damages for seduction will only lie where some species of fraud or deceit has been practised; and while the precedents have varied as to the form of issue to be allowed, I think we have settled down to this, that there must be some specification of the kind of deceit that is alleged to have been practised. That is the principle that I think will be found to underly the decisions in the cases that have been quoted to us. I think that here we ought to follow the form of issue that was approved in the case of *Forbes*,[2] but in so doing we are not deciding that that is the only form of issue to be employed; the form must in general depend upon the special circumstances of the case to which it is to be applied.

LORD KINNEAR.—I also think that we ought to follow the form of issue that was approved in the case of *Forbes*.[2] We have been told that a practice has grown up in the Outer-House of preferring the simpler form of issue that has been allowed by the Lord Ordinary, and of withholding from the jury any indication of the specific method of seduction that is set forth on the record. If that be so it is a practice which has grown up in disregard of a decision which is binding upon the Court.

THE COURT varied the issue in terms as adjusted at the Bar, and approved of it in this form:—"Whether between the months

[1] 5 R. 971. [2] 6 Macph. 770. [3] 1748, M. 13,909.

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of January and May 1904 the defender courted the pursuer and professed intention to marry her, and whether by means of these professions the defender, in or about the month of April 1904, seduced the pursuer, and prevailed upon her to permit him to have carnal connection with her, to her loss, injury, and damage? Damages laid at £300."

Ross Smith & Dykes, S.S.C.—Simpson & Marwick, W.S.—Agents.

No. 172.
July 13, 1905.
Paterson v. Lockhart.

James Paterson, Appellant.—*W. Thomson.*
Sir Simon Macdonald Lockhart, Bart., Respondent.—*Campbell, K.C.—Chree.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 7, *subsec.* (2)—"*Workman*"—*Contractor*—"*Undertaker.*"—The Workmen's Compensation Act, 1897, sec. 7, subsec. (2), enacts, *inter alia*,—"'Workman' includes any person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship, or otherwise, and is expressed or implied, is oral or in writing."

An estate owner, through his factor, engaged a man to quarry from a quarry on the estate stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct. He was to be paid 5s. a day, though in fact he was not paid daily, and might employ assistants to be paid through him at the same rate. The estate forester visited the quarry, and kept a note of the days on which the quarryman worked. The tools were supplied partly by the quarryman and partly by the estate. He was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made. The quarryman having been injured by an explosion while engaged in his work, claimed compensation under the Workmen's Compensation Act, 1897, from the estate owner.

The Sheriff disallowed the claim on the ground that the claimant was a contractor and not a workman. The claimant appealed upon a stated case, in which the only question put was whether the claimant was a servant or workman in the sense of the Act.

*Held* that the claimant was a servant or workman in the sense of the Act.

*Opinions reserved* (*per* the Lord President and Lord M'Laren) whether a workman could at the same time be a contractor and a workman in the sense of the Act.

*Question* (*per* Lord M'Laren) whether a landed proprietor who works a quarry on his estate for estate purposes is an "undertaker" in the sense of the Act.

1st Division. Sheriff of Lanarkshire.

James Paterson, quarryman, Carluke, having claimed compensation under the Workmen's Compensation Act, 1897,* on account of personal injuries, from Sir Simon Macdonald Lockhart, Bart., of Lee, the matter was referred to the arbitration of the Sheriff-substitute at

* The Workmen's Compensation Act, 1897 (60 and 61 Vict. c. 37), enacts,—Sec. 7, subsec. (2), "In this Act . . . 'undertakers' in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. . . . 'Workman' includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship, or otherwise, and is expressed or implied, is oral or in writing."

The Factory and Workshop Act, 1895 (58 and 59 Vict. c. 37), enacts,

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Lanark (Scott-Moncrieff), who refused to award compensation, on the ground that the claimant was a contractor and not a workman, and, at the request of Paterson, stated a case for appeal.

The case set forth:—"This is an arbitration in which the appellant craved decree for 15s. weekly in respect of permanent disablement as a result of an accident which occurred to him on 9th May 1904, while in the employment of the respondent as a quarryman at Auchenglen, Fiddler's Bridge, Braidwood. The following are the facts proved:—That the appellant has done work for the respondent on various occasions in both quarrying and draining operations, and it was admitted that he, at so much the chain or rood, did the draining work by contract, employing at times other men, but denied that he ever contracted for the quarrying work. That in February 1904 he was engaged by the respondent's factor to quarry a certain number of stone blocks for wire fences, and thereafter stones for farm buildings, in such quantities as the said factor should direct; that for this work he was to be paid at the rate of 5s. per day; and that the appellant was not paid daily. That, if he desired it, he might employ assistants to be paid for through him at that rate, and that he so employed his son on the first eight days at 5s. per day, appellant's name alone appearing in the estate books; that for this work he got a pick, shovel, barrow, and four boring irons from the estate, otherwise he provided his own tools and materials, but charged and was paid for the sharpening of the tools, and for blasting powder. That the respondent's forester visited the quarry and kept a note of the days on which the appellant worked. That the appellant was entitled to exercise his own judgment as to where the excavation in the quarry was to be made. That the usual way quarrying is contracted for is so much per stone, or so much per cubic yard. That the place at which appellant worked was on the respondent's estate, and that the quarrying was done to meet estate requirements. That said place was of a crescent shape, the deepest part of the face or bank from which stone could be taken being over 20 feet in height, but that at either side of the deepest part the height was less, and at the spot where the accident to the appellant occurred it was only about 14 feet. That previous to working in the above place he was instructed to take stones from other places, the stones from which, on examination by the respondent, his factor, and forester, were condemned, and he was sent to the place before stated (where the accident happened). That he started work about the end of March 1904; that at the time of the accident, and for four weeks before, he was working alone. That the accident, which was caused by an explosion, severely injured the appellant. . . . I found in law (1) that the place in which the accident occurred was a quarry within the meaning of the Quarries Act of 1894, and the Workmen's Compensation Act; but (2) that at the time of said accident appellant was a contractor, and not a servant or workman of the respondent in the sense of the Act."

The question of law was:—"Was the appellant, at the time of the accident, a servant or workman of the respondent in the sense of the Workmen's Compensation Act?"

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sec. 23 (1) (*v.*) *b*,—" . . . the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof, . . . shall be deemed to be the occupier of a factory."

No. 172. The undernoted authorities were cited at the hearing.[1]

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LORD PRESIDENT.—The only question that has been submitted to us here is whether the appellant was a servant or workman of the respondent in the sense of the Workmen's Compensation Act. The Sheriff-substitute has decided that he was not, holding that he was in point of fact a contractor. Now, I had occasion to point out in the course of the argument, and I am still of the same opinion, that, although it may be convenient in the course of an argument to see whether the injured man was a contractor or not, still the only point that is material for the decision of the case is whether he was a workman in the sense of the Act. The question whether a man may be at the same time both a contractor and a workman in the sense of the Act is one no doubt of much difficulty, and it is just the point raised in the case of *M'Gregor* v. *Dansken*,[2] on which the Second Division were divided in opinion. On that point I desire to reserve my opinion. It does not arise for decision in a case where we find that the injured man was clearly a workman. On considering the facts stated here by the Sheriff-substitute I see nothing to make me doubt that this was an ordinary case of the employment of a servant. The appellant was employed as a quarryman, he was in receipt of a daily wage, and was subject to the behests of Sir Simon Lockhart's factor, who gave him orders as to where he was to quarry, and what stone was to be got, and who could, I have no doubt, dismiss him at any moment. I have come to the conclusion, without any difficulty, that he was a workman. It appears to me that it is just a case of the ordinary employment that would occur on any large estate where quarrying is to be done to meet the estate requirements, and a labourer is engaged to do it. It is true that there are no strict regulations as to the hours he is to work, but no doubt the ordinary working hours on the estate would be taken as the measure, and the employer had the remedy in his own hands, for he could dismiss him if he found he was not working long enough. I think the case ought to be sent back to the Sheriff with the opinion of the Court that the appellant here was a workman in the sense of the Workmen's Compensation Act.

LORD ADAM.—I am of the same opinion. The appellant here met with an accident while working at a quarry on the respondent's estate. He made a claim for compensation under the Workmen's Compensation Act, and the Sheriff-substitute has found (first) that the place where the accident happened was a quarry within the meaning of the Quarries Act of 1894, and the Workmen's Compensation Act, and (second) that at the time of the accident the appellant was a contractor, and not a servant or workman, in the sense of the Act.

There is no question as to the first finding. The second finding, how-

[1] *By the Appellant.*—M'Cready v. Dunlop & Co., June 16, 1900, 2 F. 1027; Evans v. Penwyllt Dinas Silica Brick Co., Nov. 13, 1901, 18 T. L. R. 58. *By the Respondent.*—M'Gregor v. Dansken, Feb. 3, 1899, 1 F. 536; Hayden v. Dick, Nov. 26, 1902, 5 F. 150; Vamplew v. Parkgate Iron and Steel Co., Ltd., [1903] 1 K. B. 851.

[2] 1899, 1 F. 536.

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ever, raises the point whether on the facts stated in the case the appellant was a contractor or a servant in the sense of the Act. I agree with your Lordship that the facts disclose a contract of service. The facts are these:—In February 1904 the appellant was engaged by the respondent's factor to quarry stone blocks for wire fences, and also stones for farm buildings; he was engaged at a daily wage; and he was bound to work where he was required, and to quarry such stones as the factor might direct. But we are told that he might employ assistants. No doubt he might, but even if he did, they were paid, not by him, but by the employer, who paid them, through him, at the rate of 5s. a day.

As far as I can see, the respondent's factor was not bound to find the appellant continuous employment. On the contrary, the appellant was bound to do only such work as the factor might think necessary, and in accordance with the requirements of the estate. On the facts stated, I am of opinion that the appellant was a workman in the sense of the Act.

LORD M'LAREN.—I agree with the conclusion to which your Lordships have come. At the same time I am not clear that this decision does complete justice between the parties, because I have a strong impression that the respondent is not an undertaker in the sense of the statute. I read the Act as intended to apply solely to commercial undertakers, and I do not wish to be understood to assent to what has been taken as common ground—namely, that a landed proprietor who works a quarry on his own estate for estate purposes is properly described as an undertaker in the sense of the Act. On this point I wish to reserve my opinion.

The only point that arises in this case for decision is, whether the appellant was a workman or a contractor. I agree that the important consideration here is that the Act by no means makes it a condition of a claim for compensation that a contract of service must be proved, because it is stated in the Act that the agreement may be one of "service, or apprenticeship, or otherwise." It is enough to satisfy the conception of "employment" under the Act of Parliament if work is being performed, which is ordinarily done under a contract of service. It would be a serious restriction of the scope of the Act if it were possible, by introducing some condition into the agreement, to take it out of the category of a pure contract of service, and so to avoid liability under the Act. These words "or otherwise" seem to have been put into the Act for the purpose of preventing this, and appear to me to cover every case where, for practical purposes, the work done was that of a workman, though not strictly under a contract of service. However, I am far from saying the employment in this case was not under a contract of service. I think the appellant was a servant. He was paid a daily wage, and was liable to dismissal, and though he had the right to employ assistants that did not prevent him being a servant himself. It is quite in accordance with custom for a superior workman to choose his assistants. An engineer may choose his fireman, or a mason his hodman, but that does not prevent their being servants paid by a common employer.

I also wish to reserve my opinion on the question in the case of *M'Gregor*,[1]

[1] 1899, 1 F. 536.

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as to whether a man can be a workman and a contractor at the same time. There is much force in Lord Young's remarks on that point, but I desire to keep an open mind on the question.

LORD KINNEAR was absent.

THE COURT recalled the decision of the arbiter *quoad* the second finding, answered the question of law stated in the case in the affirmative, and remitted to the arbiter to proceed in terms of the statute, and decerned.

MACPHERSON & MACKAY, S.S.C.—JOHN C. BRODIE & SONS, W.S.—Agents.

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Duncan v. Fife Coal Co., Limited.

JAMES DUNCAN, Pursuer.—*G. Watt, K.C.—Munro.*
THE FIFE COAL COMPANY, LIMITED, Defenders.—*Hunter—Horne.*

*Reparation—Master and Servant—Employers Liability Act*, 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice of Injury.*—The Employers Liability Act, 1880, sec. 7, enacts,—"Notice in respect of an injury under this Act . . . shall be served on the employer, or if there is more than one employer, upon one of such employers. The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served . . . Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body . . ."

In an action of damages under the Employers Liability Act against a limited company at the instance of a workman in its employment, *held* that a notice of injury addressed to the company, enclosed in an envelope directed to A B, who was the company's cashier, and was in charge at one of the offices of the company, and delivered at that office, was duly served on the company.

*Process—Employers Liability Act*, 1880 (43 *and* 44 *Vict. c.* 42), *secs.* 4 *and* 7—*Notice of Injury.—Per cur.*, after consultation with the Judges of the Second Division,—When a question of want of notice under the Employers Liability Act is raised, it should be dealt with by the Sheriff as a prejudicial plea, and a proof should be allowed on this prejudicial plea before a proof is allowed on the merits. If, on proof being allowed on the prejudicial plea, one of the parties appeals to the Court of Session for jury trial, the case will be sent back to the Sheriff to have this prejudicial plea disposed of.

1ST DIVISION. Jury Cause.

ON 15th January 1904 James Duncan, miner, Cowdenbeath, who was in the employment of the Fife Coal Company, Limited, was injured in the course of his employment.

In July 1904 Duncan raised an action in the Sheriff Court at Dunfermline against the Fife Coal Company, Limited, concluding for damages at common law and under the Employers Liability Act, 1880. The defenders' company was incorporated under the Companies Acts, 1862 to 1900, and had its registered office at Leven, and also had offices and works and carried on business at Cowdenbeath.

The pursuer averred that intimation of claim under the Employers Liability Act had been duly given to defenders on 21st January 1904 by written notice from the pursuer delivered by messenger at defenders' office at Lumphinnans, Cowdenbeath.

The defenders denied that notice of the injury had been given, and pleaded, *inter alia ;*—The pursuer having failed to give notice of his accident as required by the Employers Liability Act, 1880, he is barred from insisting in his claim under said Act, and the present action should therefore be dismissed, with expenses.

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The Sheriff-substitute having allowed a proof, the pursuers appealed to the Court of Session for jury trial, and proposed an issue at common law and under the Act.

The case was tried before Lord Kyllachy and a jury. At the close of the evidence at the trial Lord Kyllachy, having heard counsel for the defenders on the question of notice under the 7th section of the Employers Liability Act, 1880, put to the jury the following question: —"Was a notice in terms of the document No. 21 of process, addressed to the defenders' company, and enclosed in an envelope addressed to Mr Bogie, the defender's cashier, who had charge at their Lumphinnans office, delivered by the witness John Duncan on the morning of Thursday, the 21st January 1904?"*

To this question the jury replied in the affirmative. Lord Kyllachy, being himself also of the same opinion upon the evidence, directed the jury to find that there had been sufficient notice of the claim in terms of sec. 7 of the Employers Liability Act. To this finding and direction counsel for the defenders excepted, and asked Lord Kyllachy to direct the jury that as the notice was enclosed in an envelope addressed, not to the defenders, but to their cashier, and as there was no evidence that it had been received by the company, sufficient notice had not been given in terms of secs. 4 and 7 of the Act. This direction Lord Kyllachy refused to give. Thereupon counsel for the defenders excepted to this ruling and refusal.

The jury returned a verdict for the pursuer, and assessed the damages at £200.

The defenders presented a bill of exceptions, which set forth the issue and the exceptions proposed by the defenders' counsel as aforesaid.

Argued for the defenders;—The putting of the notice into an envelope, addressed, not to the defenders, but to their cashier, followed by a delivery of the envelope at the office, was not a sufficient or proper serving of notice on the company under secs. 4 and 7 of the Act. The company was not to be prejudiced by the envelope directed to their cashier not coming into their hands through his neglect or his absence at the time the envelope was delivered. There was no evidence that the defenders ever received the notice, and this differentiated the present case from *M'Govan* v. *Tancred, Arrol, & Company*.[1] Under the Companies Act, 1862, sec. 62, notices on a limited company had to be "addressed to the company at their registered office." There was no duty on the cashier at a branch office to receive or hand over to the company a communication in an envelope directed to him.

Argued for the pursuer;—The jury found for the pursuer on the issue, which was one at common law as well as under the Employers Liability Act. There was nothing to shew that the jury did not find the defenders liable at common law. The notice being itself addressed to the company and directed to the cashier who was in charge of the branch office, and delivered at that office, was properly served on the company. Sec. 7 of the Act expressly sanctioned delivery of the notice at any one of the offices of a company. There was some conflict of authority as to whether the question of the

* It was not disputed that No. 21 of process was a sufficient notice if it had been duly served.

[1] June 26, 1886, 13 R. 1033.

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sufficiency of a notice fell to be decided by the Judge presiding at the trial,[1] or by the jury.[2] In the present case both the presiding Judge and the jury had decided that the notice was good.

At advising,—

LORD PRESIDENT.—This is a bill of exceptions against a direction of Lord Kyllachy in a jury trial at the instance of James Duncan against the Fife Coal Company, and the question turns upon the matter of whether there was or was not a sufficient notice given in terms of the Employers Liability Act to allow the pursuer to maintain the action under that Act. Now, I am bound to say that I think Lord Kyllachy was put in a position of considerable difficulty owing to the state of the authorities in this matter, because there are two cases which deal with the disposal of the question of a notice which is not admitted by the other side. One is the case of *Trail*,[1] where, the question having been mooted at the time of the adjustment of the issues, the Court there postponed the decision—as the rubric says, and I think says correctly,—"for the decision of the presiding Judge at the trial." In this case, all the Judges treat this question as one to be decided by the Judge presiding at the trial. But then, on the other hand, there is a second case,—*M'Leod* v. *Pirie*,[2] where, though dealing with the case in the same way, the learned Judges do not express clearly the view that it is to be disposed of by the Judge at the trial, but rather indicate that it is in some way or other to be decided by the jury. Under these circumstances, I think Lord Kyllachy did very wisely in putting the question he did to the jury, namely,—"Was a notice in terms of the document No. 21 of process, addressed to the defenders' company, and enclosed in an envelope addressed to Mr Bogie, the defenders' cashier, who had charge at their Lumphinnans office, delivered at said office by the witness John Duncan on the morning of Thursday, the 21st January 1904?" That question the jury answered in the affirmative, and Lord Kyllachy, according to that, then directed the jury to find that there had been sufficient notice of the claim in terms of the said section of the Act.

Now, of course there is under these two cases, an alternative view, and for the purpose of disposing of this case I do not think it matters which view is correct. If the view was that Lord Kyllachy was to decide this matter as the Judge, then he did decide it, and being, I think, a decision on a question of fact, I do not think Lord Kyllachy's decision could be reviewed. At anyrate, if it could be reviewed it could only be reviewed in this way, that, proceeding on certain facts, he gave a direction in law which either side may say was wrong; but then they would have to raise the whole question on the merits, and persuade your Lordships that it was wrong. On the other hand, if the point was properly put to the jury, then, the jury having answered that question, in order to succeed in their bill of exceptions the defenders would have to shew that the direction that Lord Kyllachy thereupon gave to the jury was a misleading direction by directing them to find that there had been sufficient notice of the claim in terms of said section of the Act. Now, that is a misleading direction or not just

[1] Trail v. Kelman & Co., Oct. 22, 1887, 15 R. 4.
[2] M'Leod v. Pirie, Feb. 15, 1893, 20 R. 381.

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according as it is a good sequitur to the question which I have already read to your Lordships being answered in the affirmative. I think it is a perfectly good sequitur, because there is the familiar doctrine that everything that the person complaining—who are the defenders here—did not object to in Lord Kyllachy's charge must be held to be correct. Now, they did not complain of the statement that Bogie, the cashier, had charge at their Lumphinnans office; and that fact standing, it seems to me that it was a perfectly good direction that if the letter addressed to this gentleman who was in charge at the office was delivered, that was a good delivery to the Company. If there had been any doubt as to Bogie being in charge at the office, then the proposition would not have been a complete one,—viz., that delivery to anyone at the office was necessarily delivery to the Company. But when you have the fact, which is not gainsaid so far as we are concerned, that the person to whom it was delivered was the person in charge at the defenders' office, there is good delivery. Therefore I am for refusing the bill of exceptions.

But the consideration given to these cases, and the difficulties that can be or have been put, have been enough to make your Lordships reconsider this matter of what should be done with those questions of want of notice when they are raised, and we have consulted the other Division on the matter, so that the practice of the Court should be uniform. Undoubtedly the idea under which these questions were reserved was upon the ground that it would save trouble and expense. The ground on which it was done in the first of the cases I quoted, the case of *Trail*,[1] was, that as there was there a common law action as well as an employers' liability action, there must be an inquiry before a jury, and that therefore they would have to face two inquiries instead of one. But on more mature consideration it seems to us,—for I think here I am expressing what all your Lordships think,—that, after all, there are more considerations on the other side. In the first place, it is obvious that this want of notice is truly a prejudicial plea. An action ought not to go on at all under the Employers Liability Act if the notice was badly given. The party might come to trial with the whole of his witnesses prepared,—skilled witnesses and medical witnesses,—and all that expense would be thrown away if it was found that the notice was bad. Further, the question does not seem appropriate to be settled by a jury, for undoubtedly it is not within the issue, and could not be within the issue submitted to the jury. And it does not seem very appropriate either to leave it to a Judge, for there are great difficulties,—if the Judge goes wrong,—in reviewing that decision. Therefore we have come to the decision that in future it will be proper for Sheriffs before whom this plea is tabled,—for I need not remind your Lordships that these Employers' Liability cases are necessarily raised in the Sheriff Court,—to take it up as a prejudicial plea before allowing a proof on the merits. No doubt they will have to allow a proof on the prejudicial plea, but it will not take away the case from them; for though on that allowance of proof one of the parties may apply here for a jury trial I give it forth clearly so that there shall be no mistake,—if they do come up they will be sent

[1] 15 R. 4.

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back on the principle of *Sharples'* [1] case. So that I hope nobody will come here thinking they ought to have a jury trial on the facts which dispose of this prejudicial plea. If anyone does so they will be sent back to the Sheriff to have this prejudicial plea disposed of.

LORD ADAM.—The first question is as to the disposal of the bill of exceptions, and I agree that it ought to be refused.

The Act of Parliament requires a man to give notice of action within six weeks, and that the action be commenced within six months from the occurrence of the accident causing the injury. And then section 7 of the Act speaks as to the form of the notice and provides for serving it. Now, this section says that the notice shall contain "the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date on which it was sustained," and then it refers more particularly to the case now before us. It provides that it "shall be served on the employer, or if there is more than one employer upon one of such employers." Then it goes on to say that the notice may be served "by delivering the same to or at the residence or place of business of the person on whom it is to be served." Then a following clause is still more applicable to this case, —"Where the employer is a body of persons, corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body."

That is what the Act requires in regard to service. Now, in this case there is no question whatever of the notice that was given being in accordance with the requirements of section 7. It contains the particulars necessary, and it was addressed to the defenders; but the objection taken here is that it was not properly served. Now, the jury have found in point of fact that this notice was delivered at the office of the Company by the witness John Duncan on the morning of Thursday, 21st January 1904. That seems to me, so far as service is concerned, to satisfy everything in the Act of Parliament. The Act requires service, and nothing but service, and provides that it will be served on the Company by being delivered at their office. Now, that was done. But the objection taken was this, that it was put into an envelope addressed not to the defenders, but to the cashier, Bogie, and it was contended that the inference from that is that it was not actually delivered into the hands of the Company. Now, there is no substance in that objection at all. The jury has held that this notice was served at the Company's office as required by the Act. Had it been addressed to the office boy or something less, there might have been a question raised; but when it is addressed to a man Bogie, who is found by the jury to have been in charge of the Company's office at which it was received, I think it would be idle to say that there was a good objection to that being good service. And therefore I see no objection to the service.

I entirely agree with your Lordship as to the general question of future proceedings. We have profited by the experience we have had in this case to review the matter.

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[1] Sharples v. Walter Yuill & Co., May 23, 1905, *supra*, p. 657.

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LORD KINNEAR.—I entirely agree on both points,—that is to say, the grounds on which this bill of exceptions should be refused, and also on the general point.

I only add that I agree with what I understand to be your Lordship's opinion, that the statute itself, by providing that an action shall not be maintainable unless notice is given within six weeks, makes it clear that when a question of notice arises it is a prejudicial question which must be settled before anything else is done in the conduct of the process. The action cannot be maintained unless notice has been admitted or proved, and therefore if the fact of notice is disputed it should be settled by the Sheriff in the first place, before the pursuer is allowed to go to proof on the case he alleges against his employer.

LORD KYLLACHY.—I concur, and have nothing to add.

LORD M'LAREN was absent.

THE COURT disallowed the exceptions for the defenders, applied the verdict of the jury, and decerned against the defenders for payment to the pursuer of £115.

P. R. M'LAREN, Solicitor—W. & J. BURNESS, W.S.—Agents.

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Lord Advocate v. Henderson's Trustees.

THE LORD ADVOCATE, Pursuer (Reclaimer).—*Sol.-Gen. Salvesen—A. J. Young.*

WILLIAM BOYD ANDERSON AND OTHERS (Henderson's Trustees), Defenders (Respondents).—*Clyde, K.C.—T. B. Morison.*

*Revenue—Estate-duty—Property passing on death—Cesser of Annuity—Value of benefit accruing—Finance Act*, 1894 (57 *and* 58 *Vict. cap.* 30), *secs.* 1 2 (1), *b, and* 7 (7).—The Finance Act, 1894, enacts, sec. 7, subsec. (7), that, for the purpose of calculating estate-duty, "the value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

*Held*, in the case of the cesser of an annuity payable out of heritable property, that the value of the benefit accruing fell to be determined by capitalising the amount of the annuity on the basis of the number of years' purchase applicable to the class of property out of which it was paid, and without taking into consideration the amount of the bonds by which the heritable property might be affected.

1st DIVISION. Exchequer Cause. LdStormonth-Darling.

JAMES HENDERSON, timber merchant in Glasgow, died on 3d January 1882. By his trust-disposition and settlement he assigned and disponed to William Boyd Anderson and others, as trustees, his whole estate, heritable and moveable, for certain trust purposes. By the fourth purpose of his trust-disposition and settlement he, *inter alia*, directed his trustees to pay to his wife, should she survive him, a free yearly jointure or liferent annuity of £800, and to allow her during her viduity the liferent use and occupation of his furnished residence of Broomhall, Partick, or in lieu of that an annual payment of £150 out of his estate. By the last purpose it was provided that on the youngest of his children attaining the age of twenty-one the whole heritable properties and generally the whole rest and residue of his estate should be divided and apportioned amongst his surviving

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children and the issue of deceasing children; but should his wife be alive at that date the division of residue should be subject to retention by his trustees of such funds and property as might be necessary to secure payment of the liferent provisions conferred upon her, and on the lapse of these provisions, the funds and property thereby released were to form, and to be administered as, part of the residue of his estate.

James Henderson was survived by his wife, and his trustees accepted office and lodged an account for payment of legacy-duty. In that account the widow's liferent of £950 per annum, made up of the liferent annuity of £800, and the annual payment of £150 in lieu of the liferent use of Broomhall, was treated as falling to be paid, to the extent of £200 out of the moveable estate, and to the extent of £750 out of heritage. In ascertaining the dutiable value of the residue, an amount sufficient to provide for this annual payment of £750 was deducted from the value of the heritable estate, and legacy-duty was paid on the net value thus arrived at.

The testator's widow died on 6th March 1903, and on her death estate-duty became payable (in virtue of sections 1, 2 (1) (6), and 7 (7) of the Finance Act, 1894), on the value of the benefit accruing to the residuary legatees in respect of the cesser of her annuity of £750. In October 1903 the trustees lodged an estate-duty account in which the value of the benefit accruing from the cesser of this annuity was brought out at £4717, 4s. 6d., and upon that sum estate-duty, assessed at 3½ per cent, and amounting to £165, 2s. 1d., was duly paid by the trustees. The principle on which the value accruing from the cesser of such an annuity is to be estimated is defined in section 7, subsection (7), of the Finance Act, 1894.*

The Inland Revenue authorities being dissatisfied with this valuation by the trustees, on 27th January 1905, the Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, raised this action against James Henderson's trustees, seeking, *inter alia*, that the trustees should be decerned and ordained to deliver to the Commissioners of Inland Revenue a corrective account of the property which passed or was deemed to have passed on the death of the widow of James Henderson, for the purpose of ascertaining the estate-duty chargeable in respect of the benefit accruing from the cesser of an annuity of £750; and to pay to the pursuer the sum of £250 sterling, or such other sum as might be found to be still due as estate-duty in respect of the value of the benefit accruing as aforesaid.

In the estate-duty account lodged by the trustees in October 1903 the sum of £4717, 4s. 6d. there set forth as the value of the benefit accruing was arrived at as follows:—The gross principal value of the heritable properties, calculated as being fourteen years' purchase of the gross rental after the usual deductions, was set down as £120,630, 1s. 1d., and from that was deducted the amount of the bonds affecting the subjects, namely £80,173, 11s. 4d., leaving as the net principal value £40,456, 9s. 9d. The gross annual value was set down as

* The Finance Act, 1894 (57 and 58 Vict. cap. 30), enacts, section 7, subsection (7):—"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended."

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£11,686, and from that was deducted £3070, 11s. 2½d. in name of feu-duties and public burdens, and £2181, 15s. as interest on bonds for £62,950, leaving as the net annual value £6433, 13s. 9½d. (The difference between £80,173, 11s. 4d. and £62,950, viz. £17,223, 11s. 4d., represented the liquidation of bonds out of the testator's moveable estate.) The sum of £4717, 4s. 6d. was then arrived at as the figure bearing the same proportion to the net principal value as the amount of the annuity did to the net annual value. In other words it was arrived at as a sum in proportion, viz.:—as £6433, 13s. 9½d. is to £750, so is £40,456, 9s. 9d. to £4717, 4s. 6d.

The pursuer averred (Cond. 8) that in this account "the value upon which duty was paid was materially underestimated. The sum of £4717, 4s. 6d. did not represent even approximately the true principal value corresponding to the annuity of £750. Such an annuity meant a life interest in so much capital as was required to yield that amount of income. . . . The defenders also in valuing the whole heritable properties belonging to the trust, proceeded on the basis of a fourteen years' purchase of the net rental, after meeting feu-duties and such necessary outgoings, and on the same ratio an annual sum of £750 would mean a capital value of £10,500. It is accordingly claimed that the estate-duty payable in respect of the cesser of the widow's annuity should be assessed on the footing that the principal value proportionate to the annuity amounts to at least £10,500."

In answer the defenders explained (Ans. 8) "that the sum of £4717, 4s. 6d. represented the capital value of the annuity of £750, in terms of the Finance Act, 1894, sec. 7 (7) (*b*), that capital sum bearing the same proportion to the capital of the trust that the annuity of £750 bears to the income of the trust"; and (Ans. 9) "that in the valuation of the testator's heritable property the valuation thereof is taken at fourteen years' purchase of the rents, and as the said annuity is only charged on what remains after paying the incumbrances, the said duty cannot be charged on anything of a greater value than the amount of the said fourteen years' purchase, after deduction of the amount of said incumbrances."

The pursuer pleaded, *inter alia*;—(1) For the purpose of estate-duty, the value of the benefit arising on the cesser of the deceased's annuity is the principal value of an addition to the heritable trust-estate equal to the annuity. (2) The value of the heritable estate being taken at so many years' purchase, the principal value of an addition to it should be determined on the same basis. (3) Estate-duty being still due and payable as condescended on, decree therefor ought to be given, with interest.

The defenders pleaded;—(2) The defenders not being liable under the Finance Act, 1894, in the estate-duty claimed by the pursuer, they ought to be assoilzied. (3) The defenders having paid all estate-duty legally exigible, and same having been accepted, are entitled to absolvitor. (4) In respect that the benefit arising on the cesser of the deceased's annuity ought to be valued on the basis of taking into account, *inter alia*, the burdens affecting the heritable estate, the defenders should be assoilzied.

On 18th May 1905 the Lord Ordinary in Exchequer Causes (Stormonth-Darling) pronounced this interlocutor:—"Finds that in estimating, for the purposes of estate-duty, the value of the benefit arising from the cesser of the late Mrs Henderson's liferent annuity of £750, payable out of the heritable property forming part of the

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trust-estate, the principal value of an addition to the said property equal to the said annuity, must, under section 7 (7) (*b*) of the Finance Act, 1894, bear the same proportion to the market value of the said property at Mrs Henderson's death, after deducting the burdens thereon allowed by section 7 (1) of the said Act, as the amount of the said annuity bore to the whole free income of the said property at the same date; and *quoad ultra* continues the cause." *

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* "OPINION.—The only question which was here argued relates to the mode of valuing a liferent annuity of £750 which terminated on the death of Mrs Henderson on 6th March 1903. The annuity was created by the will of her husband, who died on 3d January 1882, leaving both heritable and moveable estate. The value of the annuity, as provided by the will, was £800, *plus* a right to the occupation of his furnished residence, or (in lieu of that) an annual payment of £150; and the testator directed that the net annual income from both the heritable and moveable parts of his estate should be applied in the first place in payment of the annuity. The reason why the amount of the annuity for the purposes of estate-duty comes to be reckoned at only £750 is this: In settling for the duties payable at the death of the testator, both parties treated the annuity of £800 as payable out of moveables and heritage respectively in the proportion of one to three, *i.e.* £200 as payable out of moveables and £600 out of heritage. Accordingly, when £150 a year, as representing the value of the liferent of the house, is added to this estimated sum of £600 a year, you have an annuity of £750 allocated to heritage, and nobody proposes to disturb that division. It is only in so far as payable out of heritage that the annuity has to be reckoned for purposes of estate-duty, because the moveable part of the estate is admittedly exempt from estate-duty, as having already borne inventory-duty.

"Now, the value of the benefit accruing or arising by the cesser of an interest in property is regulated by the Finance Act, 1894, sections 2 (1) (*b*) and 7 (7), and the question here raised turns chiefly on the construction of the latter section, which relates to the manner of estimating the benefit. The section first deals with the case where the interest extends to the whole income of the property, and provides that in that case the value of the benefit arising from the cesser of the interest shall be the principal value of the property. A previous subsection, viz., 7 (5), provides that 'the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.' When, therefore, an annuity consists of the whole income arising from a particular heritable subject the matter is plain enough, for the property is to be taken at its market value at the date when the annuity terminates by the death of the annuitant. Where, however, the interest ceasing at the death of the annuitant extends to less than the whole income of the property, the matter is not so plain, and the rule of valuation laid down by section 7 (7) (*b*) cannot be said to be a model of clearness. Indeed, if the words were taken literally, they would work out rather a nonsensical result, for the declaration that the value of the benefit is to be 'the principal value of an addition to the property equal to the income to which the interest extended' might be read as meaning, in the present case, an addition of only £750. This, however, is so manifestly not the real meaning of the subsection that the defenders do not contend for it. The parties are agreed that the hypothetical addition to be made to the property is to be something which will be capable of yielding the income to which the interest extended, and they differ only as to the mode in which the addition is to be calculated.

"I cannot say that the actual figures suggested by either party afford an

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The pursuer reclaimed, and argued;—The security here being ample, the benefit accruing to the residuary beneficiaries by the cesser of this annuity was simply an increase of income to the extent of the amount of the annuity. That amount was not made any greater or any less by the bonds affecting the property; and therefore, in estimating the principal value of such an increase, it was quite irrelevant to take into consideration the amount of the bonds. The Lord Ordinary's method of stating a sum in proportion was erroneous. All that had to be done was to ascertain the capital value of an annual payment of £750, payable out of heritable property of this class. On the defenders' own shewing, the capital value of income arising from this class of property fell to be calculated at fourteen years' purchase;

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altogether satisfactory basis for solving the question. The Crown suggests an addition of £10,500, which is just the annuity of £750 capitalised at fourteen years' purchase. The defenders, on the other hand, suggest an addition of £4717, 4s. 6d., as bearing the same proportion to the total capital of the trust that the annuity of £750 bears to the income of the trust. This latter suggestion is at first sight a little startling, for it implies that the heritable property on which the annuity is charged yields an annual return of nearly 16 per cent. I think it would have been more satisfactory if there had been a detailed statement of the total value of the heritable subjects on which the annuity was charged after deducting the other burdens thereon allowed by section 7 (1), and of the total income yielded thereby, all as at 6th March 1903. But, in the absence of such actual figures, it is perhaps enough for the decision of the case that I should state the principles on which, in my opinion, the hypothetical addition to the property prescribed by section 7 (7) (*b*) ought to be made.

"In the notes to this rather enigmatical subsection by the editors of the fourth edition of the late Mr Hanson's book, I find a suggestion in which I concur. They say—'In the case here provided for, the addition must, it is conceived, be of such a sum as will, at the average rate of income which the actual property is producing, return an income equivalent to the amount of income received in respect of the interest which has ceased.' Then they go on to figure a case where a property worth £20,000 is producing an actual income of £800, and the benefit which is being valued is the cesser of an annuity of £400, in which case, they say, the principal value upon which duty has to be paid would be just one-half of the value of the property, or £10,000. Now, all this recognises, rightly I think, that regard must be had to the market value of the actual property on which the annuity is charged as at the date of the annuitant's death, and to the actual free income yielded by it as at the same date. Thus, it is impossible to settle the question either by taking an arbitrary number of years' purchase of the annuity, or by taking a capital sum which would yield the annuity at any percentage which is merely customary. It is, to my mind, inconceivable that, where the annuity covers the whole income of a property, you should be relegated under section 7 (7) (*a*) to market value, of course after deducting burdens; and that, where the annuity covers something less than the whole income, you should be free, under section 7 (7) (*b*), to disregard the actual facts altogether. It is of no consequence, in my view, whether the income yielded by the property charged with the annuity be large or small, usual or unusual. What you want to get at is, the value of the benefit arising to the actual property by its being relieved of the actual burden. If the income yielded by the property be unusually large, the capital value of its relief from the fixed burden will be proportionally small; and in any case the value must be ascertained as at the death of the annuitant, and can take no note of events affecting value either before or after that event."

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and therefore the value of the benefit accruing here was fourteen years' purchase of £750.[1]

Argued for the respondents;—By the cesser of this annuity the net income from this heritable property had been increased by the amount of the annuity, and the capital value of this increase of income must depend on the nature of the property from which it was paid. The capital value of the increase was, therefore, such a sum as would, at the average rate of income which the property yielded, produce the amount of the annuity.[2] The average rate could only be determined by taking the net capital value of the property, and the net income arising from it; and these two figures could only be ascertained after deducting, in the one case the amount of the bonds, and in the other the interest on the bonds. The proportion sum stated by the Lord Ordinary, which gave effect to these considerations, was, therefore, the correct method of calculating the principal value of the benefit accruing in this case. To calculate it on the basis of the number of years' purchase applicable in general to this class of security, and to ignore the actual nature and value of the particular security from which it was paid, would produce a false and inequitable result.[3]

At advising,—

LORD PRESIDENT.—The late James Henderson died before the passing of the Finance Act of 1894, leaving, so far as the question in this case is concerned, heritable estate, consisting of house property in Glasgow, burdened with an annuity of £750 a year, payable to his widow. The widow died in 1903, and therefore estate-duty became due upon the principal value of property passing under sec. 1 of the Finance Act of 1894, such property being held to be property passing in respect of the provisions of sec. 2, subsec. (1), which is in these terms—"Property passing on the death of the deceased shall be deemed to include the property following, . . . That is to say (*b*) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent of which a benefit accrues or arises by the cesser of such interest." The dispute is as to how the principal value is to be calculated. The rules for determination of value are given in sec. 7, and the specific case is dealt with under subsec. 7 of that section, which is in these terms—"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." The facts about this heritable estate, over which the annuity of £750 is secured, are that the gross value of the estate is reckoned at £120,000 odd, which is just fourteen years' purchase of the rental, deducting feu-duty, ground-annuals, and public burdens. But further, there is the fact that the estate is presently bonded to the extent of about £63,000.

The Lord Ordinary sets forth the contention of parties thus—"The

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[1] Lord Advocate v. Maclachlan, June 13, 1899, 1 F. 917.
[2] Hanson's Death Duties, 4th ed., p. 162.
[3] Earl Cowley v. Inland Revenue Commissioners, [1899] A. C. 198.

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Crown suggests an addition of £10,500, which is just the annuity of £750 capitalised at fourteen years' purchase. The defenders, on the other hand, suggest an addition of £4717, 4s. 6d., as bearing the same proportion to the total capital of the trust that the annuity of £750 bears to the income of the trust." He then goes on, not to pronounce directly upon the figures of value suggested either by the Crown or by the defenders, but he states the principles on which the hypothetical addition, quoting the terms of subsec. 7, is to be made. His Lordship says—"In the notes to this rather enigmatical subsection by the editors of the fourth edition of the late Mr Hanson's book, I find a suggestion in which I concur. They say—'In the case here provided for, the addition must, it is conceived, be of such a sum as will, at the average rate of income which the actual property is producing, return an income equivalent to the amount of income received in respect of the interest which has ceased.' . . . Now, all this recognises, rightly I think, that regard must be had to the market value of the actual property on which the annuity is charged as at the date of the annuitant's death, and to the actual free income yielded by it as at the same date. Thus, it is impossible to settle the question either by taking an arbitrary number of years' purchase of the annuity, or by taking a capital sum which would yield the annuity at any percentage which is merely customary. It is, to my mind, inconceivable that, where the annuity covers the whole income of a property, you should be relegated under sec. 7 (7) (*a*), to market value, of course after deducting burdens; and that, where the annuity covers something less than the whole income, you should be free, under sec. 7 (7) (*b*), to disregard the actual facts altogether." Now, with all this I agree—only noting in passing that the Lord Ordinary is mistaken if he thinks, as he apparently does, although I am not quite sure—that the selection of the number fourteen by the Crown for the years of purchase is an arbitrary selection. But when he proceeds to put these general *dicta* into concrete form he seems to me to take a new and an altogether inadmissible departure. His interlocutor is—"Finds that in estimating, for the purposes of estate-duty, the value of the benefit arising from the cesser of the late Mrs Henderson's liferent annuity of £750, payable out of the heritable property forming part of the trust-estate, the principal value of an addition to the said property equal to the said annuity must, under sec. 7 (7) (*b*) of the Finance Act, 1894, bear the same proportion to the market value of the said property at Mrs Henderson's death, after deducting the burdens thereon allowed by sec. 7 (1) of the said Act, as the amount of the said annuity bore to the whole free income of the said property at the same date." Now, in the first place, there is no indication in the statute, and no necessity in the Lord Ordinary's general remarks that you should attack the question by means of a proportion sum at all, still less that one of the factors of that proportion sum should be the free income of the whole property over which the sum in question was secured. But perhaps the easiest way of demonstrating what is the fallacy of this method is to take it as it stands. If you take $x$ as the principal value of an addition to the said property equal to the annuity, then putting in the form of an equation the proportion stated by the Lord Ordinary, we get it that $x$ multiplied by the free income is equal to the market value of the property, *minus* the bonds,

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multiplied by £750. Now, as this equation must be true for all values, it follows that as you diminish the free income by, for example, supposing a higher rate of interest on the bonds, $x$ must increase. In other words, the less the free income the greater the value of the hypothetical addition corresponding to the annuity, which is absurd.

I therefore discard this proportional method, and revert to what the Lord Ordinary has said as to taking actual facts. The hypothetical addition must be an addition of the same class of property as the property in question. Therefore I think the Crown are right in taking the fourteen years' purchase, because admittedly that is the capital value of this class of property. The truth is that the bonds can never have any effect on the calculation unless they are so large as really to affect the annuity itself, that is, to render it insecure. That would be an answer in fact, because then the annuity of £750 would not truly be an annuity of £750, but only of some less sum. But here there is no such question, for all admit that there was ample margin to secure the £750 being regularly paid. But it was only secured on this class of property, not on consols or some other first-class security; and therefore I think the Crown are right in being content to calculate the hypothetical addition in the same way as they would have calculated the property itself if it had passed after the date of the Finance Act. I therefore propose to recall the Lord Ordinary's interlocutor, and find that the value in the circumstances is properly calculated at fourteen years' purchase of £750.

LORD ADAM.—The question arises in this case in consequence of the death of Mrs Henderson, who had an annuity of £750 a year from her husband's estate, and as I understand that annuity was not secured on any specific part of that estate, it cannot be held as applicable to the portion of the rent of that estate which otherwise would have gone to this annuity. When Mrs Henderson died of course her interests, which were life interests, ceased, and the question before us is raised under subsection 7 of section 7 of the Finance Act of 1894, which relates to the value of the benefit accruing from the cesser of an interest ceasing on the death of the deceased, and subsection (*b*) says,—"If the interest extended to less than the whole income of the property" (which is the case here), it shall "be the principal value of an addition to the property equal to the income to which the interest extended." Now, it is quite true that that is not very clearly expressed, but the meaning of it is plain, and, as the Lord Ordinary said in his note, "the parties are agreed that the hypothetical addition to be made to the property is to be something which will be capable of yielding the income to which the interest extended, and they differ only as to the mode in which the addition is to be calculated." The question therefore here is, what is the value of the addition to the estate at the death of Mrs Henderson. Now, I confess that I have not been able throughout this case to see or to understand how the value of the estate can be increased or diminished—how the estate to be added to another estate is to be enlarged or increased by the fact that the value of the estate to which it is added has been already fixed. Supposing the estate were worth £130,000, and the value after deducting bonds was £100,000, how would that affect

the value of the addition to be made to it? If the capital value of £750 annually is to be valued, how is that to be more or less because it is added to £130,000 or to £100,000? It is beyond my capacity to understand that, and accordingly I think that the view that the Lord Ordinary proceeded on is wrong, and that the simple question before the Court is to state what is the value, the capitalised value, of the £750.

Now, I agree with your Lordship also that the fourteen years taken by the Crown is by no means arbitrary. What we find is this—that the value of the whole estate is estimated at fourteen years' purchase of the rents of the property. That is so. Now, if that be so, and if this estate now becomes more valuable by £750 a year, that is just an addition to the estate of that portion of the rent of that estate which otherwise would have gone to provide this annuity. I think the Crown is right in estimating that the £750 would require fourteen years' purchase of that amount to meet the £750, and by so much the estate would be increased.

LORD M'LAREN.—I agree with your Lordships that the mode of valuing the estate suggested by the Lord Ordinary, although apparently plausible, yet does not lead to sound or equitable results. While in this case it leads to a favourable result to the private party, it is easy to see that if the conditions were reversed, the result might be to tax unfairly the person entitled to the reversion of the estate. But the real objection to the method is that it is not the method described by the Act of Parliament. I think that what we have to do is simply to value the addition of benefit to the estate resulting from an annuity falling in, and the only elements are the amount of the annuity and the number of years' purchase at which it has to be valued, having regard to the nature of the security out of which it is paid. I therefore agree with your Lordships that the sum claimed by the Crown is the true sum, and is arrived at in a fair way.

LORD KINNEAR.—I entirely agree with your Lordship. I think the main error of the interlocutor under review consists of the introduction of the words "after deducting the burdens thereon" into the Lord Ordinary's statement of the sum in proportion. But I agree with your Lordships that it is not necessary or convenient to set it out in the form of a sum in proportion at all. It appears to me that the meaning of the statute is plain enough, on careful consideration of the words employed.

In the first place, the particular subject of taxation for the purposes of the present question is to be found in section 2, subsection (1) (*b*),—"property in which the deceased or any other person had an interest ceasing on the death of the deceased." But then, in applying that provision to the particular case in hand, which is the taxation of the property arising from the termination of an annuity of £750 as a yearly charge on the estate, we must keep specially in view the next following words, "to the extent to which a benefit accrues or arises by the cesser of such interest." That seems to me to shew that the true subject of taxation is not the whole property of course, but that property to the extent to which it has ceased to be burdened by the annuity, because

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it has been relieved of an annuity of £750 a year, and to that extent it is made subject of taxation. But then, when we go to section 7, I think the true principle is brought out with perfectly sufficient clearness by subsection 7,—"The value of the benefit accruing or arising from the cesser of an interest ceasing on the death of the deceased shall . . . (*b*) if the interest extended to less than the whole income of the property, be the principal value of an addition to the property equal to the income to which the interest extended." Now, I cannot say that I have any doubt upon the construction which the Lord Ordinary and all your Lordships have put upon these words, which means that there is to be an addition of a value equal to producing £750 a year. Now, the question is whether, in searching for the value of this hypothetical addition, we are to take into account the encumbrances affecting the remainder of the estate, and it appears to me that, taking the Lord Ordinary's principle, which I think perfectly sound, we ought to look at the actual facts of the case. It is plain enough that there is no room for the consideration of the encumbrances on the rest of the property, in order to ascertain what the value of an unencumbered addition to the property would be. The whole question is what would be the value of an addition to the property that would produce an annuity of £750. That is the whole problem which is set for us by the statute, and inasmuch as it appears to be clear that the thing to be valued is the interest of the deceased in the estate, the interest which has ceased at her death is an interest of £750 exactly, unaffected by any burden. The deceased had no interest whatever in that part of the income which went to pay the debts, but had interest only in that part which went to pay her own annuity of £750. It appears to me, therefore, that the true method of ascertaining the subject of taxation is to see what would be the value of an addition to the estate which, at the average rate of income which the actual property is producing, would return an income equal to £750 a year. I take these words from the passage quoted by the Lord Ordinary from Mr Hanson's work, which I agree with the Lord Ordinary states the rule.

THE COURT pronounced this interlocutor:—" . . . Recall the said interlocutor: Find that the value of the benefit arising from the cesser of the late Mrs Henderson's liferent annuity of £750 payable out of the heritable property forming part of the trust-estate is, under section 7 (7) (*b*) of the Finance Act, 1894, the principal value of an addition to the said property equal to the said annuity, and is, in the circumstances, properly calculated at fourteen years' purchase of the said annuity."

THE SOLICITOR OF INLAND REVENUE—WEBSTER, WILL, & Co., S.S.C.—Agents.

No. 175. July 15, 1905.* Lord Advocate v. Corporation of Edinburgh.

THE LORD ADVOCATE (on behalf of the Commissioners of Inland Revenue), Pursuer (Respondent).—*Sol.-Gen. Salvesen, K.C.—A. J. Young.*

THE CORPORATION OF THE CITY OF EDINBURGH, Defenders (Reclaimers). —*Cooper, K.C.—Spens.*

*Revenue—Income-Tax—Deduction of Income-Tax from interest on loans —Liability for Income-Tax not deducted—Customs and Inland Revenue*

* Decided July 6, 1905.

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1st Division. LdStormonth-Darling.

*Act*, 1888 (51 *and* 52 *Vict. cap.* 8), *sec.* 24, *subsec.* (3).—*Held* that a municipal corporation, which was bound to deduct Income-tax from interest on loans but had failed to do so, was liable in payment to the Commissioners of Inland Revenue of the amount that should have been deducted.

(ANTE, Oct. 15, 1903, 6 F. 1.)

The Corporation of Edinburgh, in virtue of powers conferred upon them by various Acts of Parliament, borrowed money temporarily by the issue of bills and promissory-notes, and simple acknowledgments granted to lenders.

On 9th January 1903, the Lord Advocate, on behalf of the Commissioners of Inland Revenue, brought the present action, in which reference was made to section 24, subsection (3) of the Customs and Inland Revenue Act, 1888,* and in which the conclusions of the summons were, that the defenders should be ordained to render to the Commissioners "a full account of the sums retainable by the defenders in respect of income-tax during the period from 22d September 1901 to 5th April 1902, upon their payment of interest of moneys borrowed by them on temporary loan, by means of bill or promissory-note, or simple acknowledgment; and whether such an account be rendered or not the defenders ought and should be decerned and ordained, by decree of our said Lords, to pay to the pursuer the sum of £1200, or such other sum, more or less, as may be found to be due and payable in respect of income-tax retainable as aforesaid, with interest," &c.

The defenders pleaded, *inter alia*;—1. The pursuer's averments are irrelevant, and insufficient to support the conclusions of the summons. 3. The defenders should be assoilzied from the conclusions of the summons in respect that—(*a*) The defenders are not bound or entitled to deduct income-tax from discounts on bills or promissory-notes discounted with banks or financial traders, or from interest paid on short loans or overdrafts from bankers. (*b*) Income-tax on interest, not being annual interest, falls to be accounted for by the recipients of such interest under section 100 of the Act 5 and 6 Vict. cap. 35, second rule of third case of Schedule D, and the defenders are not bound to deduct the income-tax from such interest. (*c*) The income-tax sued for, in so far as the same was due or payable, has been already duly accounted for, and paid over to the Inland Revenue. (*e*) The defenders not being bound to retain or deduct, and not having in fact retained or deducted income-tax from the interest paid by them on temporary loans during the period embraced in the summons, are not liable for or bound to pay the sum sued for, or any part thereof.

On 7th July 1903, the Lord Ordinary (Stormonth-Darling) pronounced an interlocutor finding that the defenders were bound to

* Section 24, subsection (3), of the Customs and Inland Revenue Act, 1888 (51 and 52 Vict. cap. 8), enacts:—"Upon payment of any interest of money or annuities charged with income-tax under Schedule D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income-tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly. . . ."

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deduct the income-tax out of interest paid by them, and to render an account to the Commissioners of the amount so deducted; and appointing them within one calendar month to render such an account for the period from 22d September 1901 to 5th April 1902. The defenders reclaimed, and on 15th October 1903 the First Division adhered.[1]

Thereupon the Commissioners, on being furnished with information as to the recipients of interest from the defenders, instituted an inquiry as to what income-tax still remained payable on such interest, and eventually it was reported to the Lord Ordinary that there only remained a sum of £12, 19s. still due, for which sum the pursuer asked for decree. The defenders, though not impugning the accuracy of these figures, maintained that they were not liable in payment.

On 15th May 1905 the Lord Ordinary (Stormonth-Darling) pronounced this interlocutor:—"The Lord Ordinary in Exchequer Causes having heard parties and considered the cause, in respect of the report by Mr Edward Harris, No. 15 of process, decerns against the defenders for payment to the pursuer of the sum of £12, 19s. sterling in full of the principal sum sued for, together with interest thereon as concluded for."*

The defenders reclaimed, and argued;—The duty of deducting income-tax on interest was a statutory duty imposed by sec. 24, subsec. (3), of the Act of 1888, and that statute imposed no penalty for failure to do so. It only declared that the "amount," *i.e.*, the

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[1] Lord Advocate v. Corporation of Edinburgh, 6 F. 1.

* "OPINION.—The only remaining point in this case arises on the rendering of an account by the defenders for the period mentioned in the interlocutor of 7th July 1903, which was affirmed by the First Division. On adjustment of that account the matter came before my colleague, who was acting temporarily as Lord Ordinary in Exchequer, and I find in the report of what took place that the effective motion that was made by the defenders was that they should be allowed a proof of something or other, I do not exactly know what; but that did not meet with the approval of Lord Kyllachy, and accordingly parties were asked by his Lordship to endeavour to settle the matter and arrange figures for themselves. An attempt has now been made to do so by the Inland Revenue authorities, and I have before me a statement founded on particulars given by the defenders, and adopting these particulars, but bringing out the actual balance of income-tax which is said to be due as the result. It is a very small matter—it amounts only to £12, 19s.—and for that Crown counsel move me to grant decree. The only answer is, not that the sum is incorrect, but that there is no liability on the part of the defenders to account for any tax not deducted.

"Now, plainly that is a matter that ought to have been stated as a defence *in limine*. The action is one for an account, it is true, but it is also a petitory action for a large sum of income-tax due by the defenders, and due by them because the Crown regards them as having incurred liability through their failure to deduct income-tax from the persons to whom they were paying interest on these receipt-notes. I do not intend to decide the point whether the statutes make a person so acting liable to pay the income-tax at all. If that point is stateable, it ought to have been stated long ago, because it would have rendered unnecessary all the elaborate inquiries which apparently have taken place and which have resulted in bringing out this balance of £12, 19s. Accordingly I give decree for £12, 19s., and there ends the case so far as the Outer-House is concerned."

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amount deducted, should be a debt to Her Majesty, and here there being no amount deducted there was no statutory debt. The pursuer's only claim, therefore, was one at common law, and that must be based on damage. Here no such damage was alleged, nor could it be, for the pursuer had not been prejudiced in any way in his right to recover this sum from those to whom the interest had actually been paid.

Counsel for the respondent were not called upon.

LORD PRESIDENT.—I consider this a very preposterous contention. It really comes to this, that the Corporation of Edinburgh by not having done what the statute clearly tells them to do, viz., deduct the income-tax payable in respect of interest, have escaped a debt which otherwise would have been due by them to the Crown. It turns upon a section of the Customs and Inland Revenue Act, 1888, which imposes a duty to deduct income-tax and to keep an account, and it says that such amount, so deducted, shall be a debt to Her Majesty and recoverable as such. It seems to me that the whole matter must be taken together. The debt is the sum the retention of which is put as a duty along with the liability to render an account. But the idea that by not doing it they can get rid of a debt is a thing which seems to me, as I say, preposterous. I consider that to give any countenance to this attempt to escape a duty clearly imposed would be to throw confusion upon the administration of the Revenue law without the slightest reason for the Corporation or anyone else being allowed such a concession.

LORD ADAM.—I concur.

LORD M'LAREN.—I think this is a case to which the maxim applies, *quod fieri debet infectum valet*. The duty is laid upon the Corporation to collect income-tax by way of deduction from the interest payable on the borrowed money, to render an account of the amount of income-tax so deducted, and to pay it over to the Crown. That is a duty which consists of two parts, the collection, and the paying to the Crown. It is clear to my mind that the account must be a complete account. It is no defence to an action of accounting to say that the debtor had in fact neglected part of the duty cast upon him. In such a case the debtor must pay as on a complete account, but would probably have a claim against the creditor to whom he had paid the interest without making the deduction.

LORD KINNEAR.—I concur.

THE COURT adhered.

THE SOLICITOR OF INLAND REVENUE—THOMAS HUNTER, W.S.—Agents.

No. 176.

July 18, 1905.
Clelland v. Singer Manufacturing Co.

JOSEPH CLELLAND, Respondent.—*Campbell, K.C.—Gunn.*
SINGER MANUFACTURING COMPANY, Appellants.—*Younger, K.C.—Constable.*

*Master and Servant—Workmen's Compensation Act*, 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1, *Schedule I., secs.* 1 (*b*), 12, 13—*Compensation—Amount—Nominal award of a penny per week—Competency.*—In an application by

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an employer to have a weekly payment to an injured workman reviewed and ended, *held* that it is incompetent for the arbitrator under the Workmen's Compensation Act, 1897, if either party objects, to postpone the determination of the question of compensation by making an interim nominal award of one penny per week.

*Freeland* v. *Macfarlane, Lang, & Co.*, March 20, 1900, 2 F. 832, and *Ferrier* v. *Gourlay Brothers & Co.*, March 18, 1902, 4 F. 711, *reconsidered.*

*Opinion*, that while the Act requires an arbitrator in fixing the amount of a weekly payment to have regard to the amount of the average weekly earnings of the workman before the accident, and to the average amount he is earning after the accident, the latter is not conclusive as to the workman's wage-earning capacity.

1st Division. Sheriff of Stirling, Dumbarton, and Clackmannan.

In an arbitration brought at the instance of the Singer Manufacturing Company to review and end the weekly payment made by them to Joseph Clelland, sawyer, Clydebank, a workman who had been injured in their employment, the Sheriff-substitute at Dumbarton (Blair) reduced the compensation payable by them to the nominal sum of one penny per week.

The Sheriff-substitute, at the request of the employers, stated a case on appeal to the Court of Session, in which he set forth that, on the evidence, he "found in fact that the said Joseph Clelland, the workman in this case, is a sawyer by trade and is forty-three years of age; that previous to 22d September 1904 he was employed in the Singer Manufacturing Company at a weekly wage of 28s.; that previous to that date he had already lost the top joint of the thumb of his right hand; that on 22d September 1904, when in Singers' employment, he lost by accident the first and middle fingers of the right hand; that the said fingers were taken off down to and including part of the knuckles at the base of the fingers; that the wound caused thereby is now healed and well; that on 15th March 1905 he recorded in this Court a minute of agreement; that under said agreement Singers have paid to him a weekly sum of 14s. down to 14th January 1905; that on 16th January 1905 Singers took him back into their employment at a weekly wage of 28s.; that he is still in their employment at that wage; that they are under no obligation to employ him or continue to employ him; that he is able to do the work at present allotted to him, which is of the same nature as he did before. The Sheriff-substitute also found that Singers had failed to prove that he could earn 28s. per week as a sawyer if he was compelled to find employment elsewhere, and, in respect that supervening incapacity might occur, reduced the compensation payable by Singers to him to the nominal sum of one penny per week until further orders of Court, and found Messrs Singers liable to the defender in expenses."

The questions of law for the opinion of the Court were:—"Whether in the circumstances the appellants are entitled in law to have their liability in respect of the respondent's injuries ended as craved in the petition? or was the Sheriff-substitute right in making the award of one penny per week?" *

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* The Workmen's Compensation Act, 1897 (60 and 61 Vict. c. 37), enacts, Schedule I., sec. 12,—"Any weekly payment may be reviewed at the request either of the employer or the workman, and on such review may be ended, diminished, or increased, subject to the maximum above

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When the case was called in the Single Bills, counsel for the appellants moved for an order on the Sheriff-clerk to transmit the process in terms of sec. 9 (*f*) of the Act of Sederunt of 3d June 1898, on the ground that the Sheriff-substitute had appended a note to his interlocutor which it might be found necessary to refer to at the hearing.

The Court refused the motion. (Reported *supra*, p. 654.)

The appeal was subsequently heard on the merits.

Argued for the Singer Manufacturing Company, appellants;—The Act contained no provision for the suspension of the assessment of compensation either by a mere declaration of liability or by the device of making a nominal award of one penny per week. On the contrary, the Act provided definitely for the assessment of compensation, and it was the duty of the arbitrator, when an application was made to him to assess the amount payable, having regard to the condition of the workman at the time the application was made. The Act was intended to provide a summary remedy, and not to keep the assessment of compensation in suspense, and that was clearly evidenced by the provision in sec. 13 of the First Schedule, which provided that where a weekly payment had been continued for six months, the liability therefor might, on the application of the employer, be redeemed by payment of a lump sum.[1] The practice of making a nominal award was introduced into Scotland in the case of *Freeland* v. *Macfarlane, Lang, & Company*,[2] and followed in *Ferrier* v. *Gourlay Brothers & Company*,[3] but these cases admittedly followed on the decision in the English case of *Irons* v. *Davis & Timmins, Limited*,[4] which seemed to be the origin of the whole practice; but that case was a weak authority, for the award was made of consent. Here the appellants opposed such an award, and therefore the Court should reconsider these decisions. In the circumstances of this case the arbitrator should have ended the award of compensation. The criterion for assessing compensation provided in sec. 2 of the First Schedule must be strictly adhered to. The workman was earning the same wage as before the accident, and no circumstances relevant to modify the deduction from that fact were set forth in the stated case.[5]

Argued for respondent;—The competency of suspending an assessment of compensation was directly settled by authority, and could be effected either by awarding a nominal sum,[6] or by a mere declara-

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provided, and the amount of payment shall in default of agreement be settled by arbitration under this Act." Sec. 13. "Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled in default of agreement by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned."

[1] Castle Spinning Co. v. Atkinson, [1905] 1 K. B. 336.

[2] March 20, 1900, 2 F. 832.

[3] March 18, 1902, 4 F. 711.

[4] [1899] 2 Q. B. 330; Chandler v. Smith, [1899] 2 Q. B. 506.

[5] Pomphrey v. Southwark Press, [1901] 1 K. B. 86; Jamieson v. The Fife Coal Co., Limited, June 20, 1903, 5 F. 958; Geary v. Dixon, Limited, May 12, 1899, 4 F. 1143; Husband v. Campbell, July 15, 1903, 5 F. 1146.

[6] Freeland v. Macfarlane, Lang, & Co., 2 F. 832; Ferrier v. Gourlay Brothers & Co., 4 F. 711; Irons v. Davis & Timmins, Limited, [1899] 2 Q. B. 330.

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tion of liability.[1] Such a course was not repugnant to any provision of the Act, and was entirely in keeping with the spirit of it. The object of the Act was to provide, either by a continuing payment or by a commuted payment, for compensation for life to an injured workman for such incapacity as he might have suffered, and the Act contained provision for reviewing the award of compensation if the incapacity increased or diminished or proved intermittent.[2] If there was anything repugnant to this in the Schedule, that could not overrule the provisions and the purpose of the Act itself.[3] The arbitrator was right in keeping the question open by this nominal award, and was not bound to make an arbitrary award at once, still less in the circumstances of this case to end the compensation.

The case of *Fraser* v. *Great North of Scotland Railway Company*,[4] was also referred to.

At advising,—

LORD PRESIDENT.—This is a stated case in an appeal from the Sheriff Court of Stirlingshire, &c., at Dumbarton, and the question proposed in law for your Lordships' determination is whether the learned Sheriff-substitute was right in making an award of a penny per week.

The circumstances of the case were these: That the appellant, who was a sawyer by trade, was in the employment of the Singer Manufacturing Company at the weekly wage of 28s. While in that employment, on 22d September 1904, he lost by an accident the first and middle fingers of the right hand. The Singer Company, while he was laid up with this serious accident, paid under agreement a weekly sum of 14s., and this payment went on till 14th January 1905. By that date the wound was completely healed, by which I mean that it was no longer in the state of an open sore, and that his hand was restored to the complete use that any hand can have which is minus two fingers.

But the point that I ask your Lordships' attention to is that the injury was of a class which by this time had, so to speak, fully developed. There is no reason to suppose that his hand will ever be any worse, while on the other hand it is impossible to suppose that his hand will ever be any better. On 16th January the Singer Company took back this man into their employment at his old wage of 28s., and the Sheriff-substitute tells us that as a matter of fact he is able to do the work at present allotted to him, which is of the same nature as he did before. In these circumstances the Singer Company made this application to the Sheriff-substitute in order to have the payments ended. The Sheriff-substitute having taken evidence, in which he elicited the facts as I have detailed them to your Lordships, found that Singers had failed to prove that the appellant could earn 28s. per week as a sawyer if he were compelled to find employment elsewhere, and, in respect that supervening incapacity might occur, reduced the compensation payable by Singers to him to the nominal sum of a penny per week until further orders of Court; and that is the finding that is really submitted to your Lordships for review.

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[1] Chandler v. Smith, [1899] 2 Q. B. 506.
[2] Powell v. Main Colliery Co., [1900] App. Cas. 366.
[3] Lysons v. Andrew Knowles & Sons, [1901] App. Cas. 79.
[4] June 11, 1901, 3 F. 908.

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Now, as I shall presently have occasion to say, I do not in any degree wonder that the Sheriff-substitute should have made this finding, looking to the state of the authorities which I shall examine; but at the same time I must call attention at once to the fact that I rather think that the learned Sheriff-substitute has misunderstood the meaning of "supervening incapacity." When he uses the words "in respect that supervening incapacity might occur," he means not any change of circumstances in the man but a change of circumstances in respect of the employment he might secure. In other words, he really changes the use of the words "supervening incapacity" by failing to see that the case is not *in pari casu* with the other cases where that phrase has been used, where "supervening incapacity" meant incapacity arising from a different state of the man's health, the ordinary instance being the case of a possible development of disease in one eye quite well at the time, but where, the other eye being injured, it is quite possible to say that disease might supervene truly attributable to the accident which had occurred. Here, as I have pointed out to your Lordships, there can be no further development of this injury. We know now as well as we shall ever know how much the man has been injured.

But while I say so I do not wonder that the Sheriff-substitute has been led into the interlocutor he has pronounced by the state of the authorities, because undoubtedly there have been two cases in your Lordships' Court where this finding of a penny per week and continuing the case until further orders was sanctioned. The first is the case of *Freeland* v. *Macfarlane, Lang, & Company*.[1] Now, in that case undoubtedly the Lord President says that it would be right to adopt the course taken in *Irons* v. *Davis & Timmins, Limited*,[2] of making a nominal award of a penny per week, and then he goes on to point out what he thinks was also the course followed in the case of *Chandler* v. *Smith*,[3] and the interlocutor in that case declared "that the fact that the weekly wage which the appellant is at present earning is not less than the weekly wage which he earned before the accident would not necessarily or *per se* preclude any claim under the Act." And that view was followed in the case of *Ferrier* v. *Gourlay Brothers & Company*,[4] in which the other Division of the Court (but with the dissent of Lord Young) remitted the case to the Sheriff to reduce the compensation to a penny per week until further orders of Court.

But in this case the Singer Company, who are the appellants, object to that course, and your Lordships I think will find it necessary to reconsider whether this plan of granting a penny per week and continuing the case is a method that is really sanctioned by the statute.

I am bound to say that when I look into the supposed origin of the device—for it is nothing else—the basis on which it rests is very slight. In the case of *Irons* v. *Davis*[2] it was really a course that rested upon the agreement of the parties, and the Court, as very often is the case, did not make any objection to sanctioning what both parties were agreed should be done. And in the case of *Chandler* v. *Smith*,[3] so far from following the

[1] 2 F. 832.
[2] [1899] 2 Q. B. 330.
[3] [1899] 2 Q. B. 506.
[4] 4 F. 711.

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penny a-week procedure, Lord Justice Williams particularly pronounces against that, because he says that it would be much better to postpone the fixing of the amount of compensation until the facts are ascertained, and he concludes—"I prefer this course to that of awarding a weekly payment of a penny and then applying the provisions of clause 12 of Schedule 1." Accordingly, so far as the Lord President based his judgment in that first case of *Freeland*[1] on the English practice, I do not think it was a very firm substructure.

I therefore proceed to the Act itself. Now, compensation under the Act is due for personal injury by accident arising in the course of the employment. That is in section 1. When we go to the schedule which determines the scale and conditions of compensation, we find that under section 1 (*b*) the compensation under the Act shall be, where total or partial incapacity for working results from the injury, a weekly payment during the incapacity; and then in the same schedule, section 12, we find that "any weekly payments may be reviewed at the request either of the employer or the workman"; and in section 13 "where any weekly payment has been continued for not less than six months the liability" may be redeemed by a lump sum.

All that seems to me to point excessively clearly to the idea that this is a proceeding which has to take place at once and to be done with, and not to be prolonged after the period of six months. The six months' period, I think, is taken as a rough estimate of the time during which, if I may so use the expression, the result of the injury will have settled down, and it will become apparent whether it has been really only temporary or is permanent, and as soon as it has settled down then any liability may be got rid of by one payment.

All that seems straight in the teeth of any idea of making a sort of fictitious award—for it is nothing else—in order to prolong the period of suspense long beyond the period which is in the view of the statute. Indeed, if the matter were absurdly dealt with, it is quite clear that all cases might be hung up, because there is no injury of any serious character as to which medical men would not say that there was some chance at least of a supervening incapacity developing late in life. I am quite aware that presumably the Court would not use the device in that way, but that argument seems to go also against the idea of this procedure.

Accordingly, I come to be of opinion that this settling of the compensation at the sum of a penny, *contra renitentem*, is not a proceeding that is sanctioned under the Act. It seems to me that an injured workman is entitled to come to the Court and say,—"Assess me now my compensation and find out what I am the worse for the accident." The Act gives us some light on this inquiry, because article 2 of the same Schedule says,—"In fixing the amount of the weekly payment regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident." The amount is not to be absolutely conclusive,

[1] 2 F. 832.

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because it is only "regard is to be had." But still that, no doubt, always will be the leading consideration.

At the same time, therefore, a workman who has been injured in a permanent way has right to say,—"I shall now have my compensation assessed, and the figure at which I am entitled to have it assessed is the difference of the wage-earning capacity which I had before the accident and which I have now." The Court must arrive at that in the best way it can, always having in view the wages paid, but not taking the weekly wages payable at the present moment as synonymous with the wage-earning capacity, if it thinks that the present wages are due to the kindly consideration of an old employer.

I ought also to say that I think the principles of the valuation of compensation were exceedingly accurately stated by this Division of the Court in the case of *Freeland*,[1] and I entirely adhere to all that was there said.

The application of these views to the case in hand seems to me to be this, that we should tell the Sheriff-substitute that he had no right,—although, as I have already explained, it is not at all to be wondered at that he should have acted as he has done,—to fix the compensation at a penny per week, and that the case must go back to him in order that, in view of the principles I have laid down, he should consider how much this man has been injured in his wage-earning capacity by the loss of these two fingers. I do not think he has considered the case from that point of view, and therefore I do not think that we ought to try to spell out a result from the findings which he has given. The Sheriff will keep in view that the man can do certain work, and will not necessarily be bound down to the amount at present received. I am therefore of opinion that the question ought to be answered in the view that I have stated, and the case sent back to the Sheriff.

LORD ADAM.—On 22d September 1904 the respondent Clelland, when in the appellants' employment as a sawyer, met with an accident by which he lost the first and middle fingers of his right hand.

Previous to the accident Clelland had been earning a weekly wage of 28s., and after the accident the appellants, under an agreement, paid him a weekly sum of 14s. down to 14th January 1905. On the 16th January 1905 the appellants took him back into their employment at the same wage as he was earning before the accident. We are told that the wound caused by the accident is now healed and well, and that he is able to do the work at present allotted to him, which is of the same nature as he did before; that he is still in their employment at that wage, but that the appellants are under no obligation to employ him. The Sheriff further found that the appellants had failed to prove that Clelland could earn 28s. per week as a sawyer if he was compelled to find employment elsewhere.

The present proceedings originated in an application to the Sheriff under section 12 of the First Schedule of the Act, and on 29th March 1905 the

[1] 2 F. 832.

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Sheriff, in respect that supervening incapacity might occur, reduced the compensation payable by the appellants to him to the nominal sum of one penny per week until further orders of Court.

The question argued to us was whether such an award was competent under the Act.

Looking to the previous procedure which has taken place in such cases—for example in *Irons* v. *Davis*,[1] and *Freeland* v. *Macfarlane*[2]—I am not surprised that the Sheriff should have decided the case as he did—in fact I do not see how he could have done otherwise. But certainly this is the first time the competency of the course has been challenged before us, or as would rather appear in any previous case.

Now section 12 says that any weekly payment may be reviewed at the request of either party, and on such review may be ended, diminished. or increased, or I suppose the application may be refused. I think that means that the weekly payment is to be reviewed and dealt with according to the state of facts existing at the date of the application. In this case, however, the weekly payment has neither been ended, diminished, nor increased as the Act directs, but the consideration of the case has been suspended for an indefinite time in respect that some supervening incapacity might occur. It appears to me that the Act does not warrant the weekly payment being suspended for a time and then resumed. The 13th section of the First Schedule, for example, gives to the employer, where weekly payments have been continued for not less than six months, a right to have his liability therefor redeemed by payment of a lump sum. This clause appears to me clearly to indicate that it was not intended that an employer's liability under the Act should continue for an indefinite time, but that he should be able to get rid of it by payment of a lump sum at the end of six months. But it appears to me that the device of suspending the weekly payments and substituting therefor the payment of a nominal sum of a penny would render that clause practically inoperative. It was admitted on both sides that the payment of the nominal sum of a penny could not be treated as a weekly payment under the Act. If that be so, then in this case, for example, in which the weekly payments ceased at the end of four months, if the appellants were to apply to have their liability under the Act redeemed by payment of a lump sum they would be met by the plea that the weekly payments had not been continued for the necessary period of six months. I see no answer to that plea, with the result that the appellants' liability under the Act would be continued indefinitely. I think that the Act assumes that the weekly payments are to be continuous, and if at the end of six months an application is made by an employer to an arbiter for redemption of his liability by payment of a lump sum, the arbiter must apply his mind to the facts as then existing, and determine the amount of that sum to the best of his ability. So I think that when an application is made to an arbiter under the 12th section to review a weekly payment, he must apply his mind to the facts as they exist at the time, and either diminish, increase, or end the payment, or by refusing the application continue it, but that he has no power under the Act to suspend it.

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[1] L. R. [1899] 2 Q. B. 330.

[2] 2 F. 832.

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I am accordingly of opinion that the second alternative question should be answered in the negative.

The Sheriff seems to have thought that the only other alternative to following the course he did was to end the weekly payment, and no doubt he came to that conclusion because the wound caused by the accident was healed and well, and Clelland had been taken back into the appellants' employment, and was earning the same wages as before the accident. That, no doubt, might be quite sufficient evidence to have entitled the Sheriff to come to the conclusion, if he had done so, that Clelland's incapacity had ceased. It appears to me, however, that the true question under the Act is whether Clelland is able to earn in his maimed state as much in the open labour market as he was before the accident. It does not appear to me that the fact that Clelland had been taken back by his employers and is earning as much as formerly necessarily furnishes a conclusive answer on that point. I do not think the Sheriff has applied his mind to that view of the case, and I think the case should be remitted to him for his reconsideration.

LORD M'LAREN.—At the conclusion of the argument your Lordships were all of opinion that the question of a nominal award under the Workmen's Compensation Act ought to be reconsidered, and I agree with your Lordships in the result of that reconsideration. I may say for myself that, although in deference to the supposed authority of some English cases, and having regard to possible convenience, I assented to the previous decision of this Division for making a nominal award, I was never a convinced adherent of that method of applying the Act, and indeed never could find out for myself that there was any warrant for such a proceeding. It is, I may say, a perfectly futile proceeding for the purpose specified, because at the expiration of six months from the date of the accident the employer has an absolute right to capitalise his liability, or to insist upon a lump sum being substituted for a weekly payment. How the capital value of a penny a week is to do any good to the injured workman I am unable to see. But I think that it is not really necessary to make a nominal award. The cases in which that has been done have resulted, as I venture to think, from inattention to the provisions of the statute in this respect, that because a workman was receiving from his employer a sum equal to the wages that he earned before the accident it was assumed that this was the man's wage-earning capacity, and therefore that there was no ground for making a substantial award of compensation. Now, that is not the intention of the statute at all. What the arbiter has to consider is not what the man is receiving, whether under the name of wages or charity, from his employer, but what could the man earn in the open market after the accident had happened as distinguished from what he actually earned in the open market before the accident. If his wage-earning capacity—the wage that he could earn in the open market—is less than what he earned before, it is an absolutely irrelevant consideration to take into account that the master is paying full wages. The workman is then entitled to have an award of compensation. What the master is to do is for him to consider. He may or may not continue the payment which he had hitherto been making *ex gratia*. When the

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statute is applied according to my reading of it, by taking into account only the wage-earning capacity of the man at the time when the application to the Sheriff is made, whether for an original award or for variation of an award, all difficulty disappears. It is quite true that at the end of six months the result may be that the employer's liability comes to an end, but I have no conception that the Legislature intended that this liability should hang like a millstone round the employer's neck during the whole period of his life. Six months was the time fixed, because it was supposed that by that time the arbiter would be able to make a fair estimate of the probable loss to the workman and of the principle upon which compensation should be made. If unfortunately a man whose eye was injured and had apparently healed should suffer a relapse (it might be glaucoma, which could be proved to arise from the accident,) that cannot be helped. In so far as this is not foreseen and allowed for at the expiry of six months, that is just the workman's misfortune, for it was never intended that he should be put in the same position as before the accident, but only that he should receive compensation under the conditions and limitations prescribed by Act of Parliament.

LORD KINNEAR concurred.

THE COURT answered the second alternative of the question of law in the negative, and remitted to the Sheriff-substitute to proceed in accordance with their finding.

MACKAY & YOUNG, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

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July 18, 1905. Lord Advocate v. M'Laren.

THE LORD ADVOCATE, Pursuer (Reclaimer).—*Johnston, K.C.—Young.*
GEORGE M'LAREN, Defender (Respondent).—*Campbell, K.C.—W. Thomson.*

*Revenue—Income-Tax—Exemption and Abatement—Untruly declaring income—Penalties—Amount—Income-Tax Act,* 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 166.—The Income-Tax Act, 1842, sec. 166, enacts, that "if any person shall," in making a claim of exemption, "untruly declare any income or amount of income," he "shall forfeit the sum of £20, and treble the duty chargeable in respect of all the sources of his income, and as if such claim had not been allowed."

*Held* (1) that a person found guilty under this section of untruly declaring his income was liable in the forfeiture, although no exemption or abatement had in fact been allowed, and (2) that the amount upon which the treble duty was to be calculated was his whole income, including income upon which duty had been already deducted or paid.

*Observed, per* Lord Kinnear, that, to involve liability for the penalties under the section, the declaration must be not merely inaccurate but false and untruthful.

*Revenue—Court of Exchequer—Jurisdiction—Penalties—Modification—Income-Tax Act,* 1842 (5 *and* 6 *Vict. cap.* 35), *sec.* 166—*Exchequer Court (Scotland) Act,* 1707 (6 *Anne, cap.* 53), *sec.* 23 (*or cap.* 26, *sec.* 15)—*Public Revenue (Scotland) Act,* 1833 (3 *and* 4 *Will. IV. cap.* 13), *secs.* 1, 4, *and* 8—*Exchequer Court (Scotland) Act,* 1856 (19 *and* 20 *Vict. cap.* 56), *sec.* 1.—*Held* on a construction of the above statutes that the Court of Session as the Court of Exchequer in Scotland has no jurisdiction to modify the penalties exigible under sec. 166 of the Income-Tax Act, 1842.

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Lord Advocate v. M'Laren.

1ST DIVISION. Exchequer Cause. LdStormonth-Darling.

THE LORD ADVOCATE, on behalf of His Majesty, brought an information against George M'Laren, plumber, Edinburgh, claiming penalties in respect of two income-tax returns made by him.*

There were two counts in the information. The first count set forth that the defender "being liable to income-tax under the Acts 2 Edward VII. cap. 7, section 10, and 16 and 17 Victoria, cap. 34, did, by notice and declaration, dated 30th June 1902, and delivered or caused to be delivered by him to John Hamilton Fordie and William Bryce

* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), enacts, sec. 166, with regard to claims to exemption:—"If any person shall be guilty of any fraud or contrivance in making any such claim or in obtaining any such exemption or any such certificate as aforesaid, or shall fraudulently conceal or untruly declare any income or amount of income, . . . or if any such person shall fraudulently make a second claim for the same cause, every such person so offending in any of the cases aforesaid shall forfeit the sum of £20, and treble the duty chargeable in respect of all the sources of his income, and as if such claim had not been allowed; . . ."

The Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), enacts, sec. 28, that the provisions, rules, and regulations contained in the Income-Tax Act, 1842, in relation to exemption, shall apply to claims for relief.

The Finance Act, 1894 (57 and 58 Vict. cap. 30), sec. 34, grants exemption from income-tax where the income does not exceed £160; and the Finance Act, 1898 (61 and 62 Vict. cap. 10), sec. 8, grants relief from income-tax equal, if the total income does not exceed £500, to the amount of the income-tax upon £150.

The Exchequer Court (Scotland) Act, 1707 (6 Anne, c. 26, otherwise c. 53), which established a Court of Exchequer in Scotland after the English model to take the place of the former Court of Exchequer in Scotland, enacts, sec. 15 (or 23):—"Provided nevertheless that in case any person or persons, bodies politic or corporate, his, her, or their heirs, successors, executors, or administrators, shall allege, plead, declare, or shew in the said Court of Exchequer in Scotland good perfect sufficient cause and matter in law, reason, or good conscience in bar or discharge of any fines, issues, amerciaments, forfeited recognisances, or any other forfeitures, debts, or duties due or payable to the Crown, or why such person or persons ought not to be charged or chargeable to or with the same, and the same cause and matter so alleged, pleaded, declared, or shewed sufficiently proved in the said Court of Exchequer in Scotland, that then the said Court shall have full power and authority to accept, adjudge, and allow the same, and wholly and clearly to acquit and discharge all and every the said persons which shall be impleaded or sued for the same, or to make and take any fitting and reasonable composition for the same as in the judgments and discretions of the Barons of the said Court of Exchequer upon hearing of the attorney or advocate-general or other learned counsel of Her Majesty, her heirs and successors, shall be found and thought just and reasonable, and to proceed and act therein and give discharges thereupon in such sort and manner as hath been and is used and practised in the like cases in and by the Court of Exchequer in England, anything herein contained to the contrary notwithstanding."

The Public Revenue (Scotland) Act, 1833 (3 and 4 Will. IV. cap. 13), transferred the administrative functions of the Barons of Exchequer in Scotland to the Treasury and the Commissioners of Taxes, reserving their judicial powers.

The Exchequer Court (Scotland) Act, 1856 (19 and 20 Vict. cap. 56), sec. 1, transferred "the whole power, authority, and jurisdiction" then "belonging to the Court of Exchequer in Scotland" to the Court of Session, and enacted that the Court of Session should be also the Court of Exchequer in Scotland.

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Beveridge, joint assessors, Edinburgh, untruly declare that the whole of his income from every source whatsoever for the year ending 5th April 1903 amounted to the sum of £150, and this he did in making a claim for exemption or the relief to which he was entitled in respect of his income as so declared, contrary to the statutes in that case made and provided, and in particular to the provisions of sections 164 and 166 of the Act 5 and 6 Victoria, cap. 35, and section 28 of the Act 16 and 17 Victoria, cap. 34, whereby, and by force of the statutes in that case made and provided, the said George M'Laren so offending as aforesaid has forfeited the sum of £20, and also a sum of £187, 3s. 3d., or such other sum as may be found to be treble the duty chargeable in respect of all the sources of his income."

The second count was in similar terms, the differences being (1) that it related to the return made by the defender for the year ending 5th April 1904, (2) that the sum at which the defender was alleged to have untruly declared his whole income was £230, and (3) that the sum claimed as treble duty was £137, 12s. 3d.

The sum claimed as treble duty in the first count was three times the duty payable on an income of £1000, 17s. 9d., at 1s. 3d. in the pound, being the rate in force for the year 1902-3. The sum claimed as treble duty in the second count was three times the duty payable on the same income at 11d. per pound, being the rate in force for the year 1903-4. The sum of £1000, 17s. 9d. was arrived at as follows:—It was admitted that the incomes of the defender and his wife, derived from sources other than his business (viz., rents and interests), amounted to £650. To this sum was added £350, being the amount at which the profits of the defender's business were assessed in each of the years in question. In this assessment of his profits the defender had acquiesced. Income-tax on the £650 was deducted at the source. The defender had in each year paid income-tax on £200, and in each year he had been allowed an abatement on £150.

The defender pleaded not guilty.

Proof was allowed, and led. The facts of the case, and the nature of the defender's defence, sufficiently appear from the opinion of the Lord Ordinary (Stormonth-Darling).

On 21st December 1904 the Lord Ordinary pronounced this interlocutor:—"Finds for the pursuer on both counts of the information, No. 2 of process, to the extent that the defender has forfeited the sum of £20 sterling under each count, but finds that the defender has not forfeited any other sum under said counts: Adjudges the defender to pay to the pursuer the said two sums of £20 sterling, and decerns against the defender accordingly." *

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* "OPINION.—This is an information at the instance of the Lord Advocate on behalf of the Crown, claiming penalties against the defender, a plumber in Edinburgh, in respect of two income-tax returns which he made for the years ending 5th April 1903 and 1904 respectively. The allegation is that, by the first of these returns, in making a claim of exemption for the financial year 1902-1903, the defender 'untruly declared' that the whole of his income from every source was £150. That is the first count of the information. The second count is that, in making a claim of abatement for the year 1903-1904, the defender untruly declared that the whole of his income from every source amounted to £230. The information is founded on sec. 166 of the Income-Tax Act of 1842, which relates to claims for exemption, and is made applicable to claims for abatement by sec. 28 of the Act of 1853.

"It is not disputed by the defender that in each of these years his total

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The pursuer reclaimed, and argued;—(1) The sum upon which the treble duty was to be calculated was the whole income, not merely the part of the income upon which tax had not been paid or deducted at the source.[1] The terms of sec. 178 of the Income-Tax Act, 1842, did not assist the pursuer. Where the treble duty was to be calculated on the difference only, as under sec. 178, the statute expressly said so. (2) The Court had no jurisdiction to modify the penalties. A Court had in general no discretionary power to remit or modify statutory penalties imposed for a statutory offence if it was proved that the offence had been committed.[2] No such power was conferred upon the Court of Exchequer by the Exchequer Court (Scotland) Act, 1707.[3] "Penalties" were not mentioned in sec. 23 of that Act. "Fines" and penalties were to be distinguished. A "fine" was uncertain in amount, and was an alternative to imprisonment. The

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income from all sources was much larger than what he returned, and, indeed, that it was larger that any figure up to which abatement is allowed. Nor can it be disputed that he signed the declaration on the fourth page of the familiar return on yellow paper, which is headed 'Notice and Declaration of Claim of Exemption or Abatement,' or that thereby, having filled in £150 in the one year and £230 in the other as the total amount of his income from all sources, he claimed the relief to which he was entitled in respect of such income. That was the only part of the yellow paper which he did fill in, and, in particular, he made no return of the profits of his trade. But he says that all this was a blunder; that he intended to return £150 in the one case and £230 in the other as the profits of his trade; that he thought he was doing so; and that he had no intention to claim either exemption or abatement.

"When the return came into the hands of the Surveyor of Taxes, that officer happened to know that the defender had heritable property worth £130 a year. He also knew that for a number of years the defender had been assessed on £350 as the profits of his business, without appeal. Being thus satisfied that neither £150 nor £230 could possibly be the whole of the defender's income from every source, he thought it probable that the defender had intended the return to represent the profits of his business; but, even on that assumption, he discarded the return altogether, and treated the defender as having an income of £480, which entitled him to an abatement of £150. Accordingly, he sent the defender assessment notices in each year, shewing the amount of assessment as £350, and the deduction as £150, and bringing out the net amount chargeable as £200. In these assessment notices the defender acquiesced, and paid duty accordingly. It now appears from the defender's admissions, to which I have referred, that he was not entitled to any abatement for either year, and that he ought to have paid tax on the full amount of his business profits, whatever these were.

"That the defender's conduct in making the returns as he did was careless in the extreme he admits; indeed, that is the gist of his defence. For his defence is that he failed to fill in his business profits at the right place, and that he returned what he intended to represent business profits at the wrong place and under a wrong description, signing at the same time a claim for relief, which he never meant to make. If he had no intention of claiming abatement, it is rather remarkable that he should have accepted and

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[1] Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 166, *cf.* secs. 164 and 165.

[2] Pendreigh's Trustee v. M'Laren & Co., May 9, 1871, 9 Macph. (H. L.) 49.

[3] 6 Anne, cap. 53, sec. 15 (otherwise cap. 26, sec. 23); Lord M'Laren's Procedure Acts, p. 17.

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amount to be imposed was a matter for judicial discretion. A "penalty" was a pecuniary mulct, certain in amount, and fixed by statute.[1] Upon inquiry it had been ascertained that no such power of modification was "used and practised" in "the Court of Exchequer in England."[2] Power to modify was formerly granted by writ of Privy Seal.[3] This power lay now with the Commissioners of Inland Revenue and the Treasury.[4] The terms in which the power was conferred upon them shewed by implication that there was no such power in the Court. Jurisdiction in regard to taxes and penalties was not conferred upon the Court of Exchequer by the Exchequer Court (Scotland) Act, 1707,[2] but by sec. 54 of the Act 43 Geo. III. cap. 150, being the enactment referred to in sec. 185 of the Income-Tax Act, 1842. Under sec. 54 there was no discretionary power conferred upon the Court to modify penalties in such cases. Even assuming that power to modify such penalties as those here in question was conferred on the Court of Exchequer by the Exchequer Court (Scotland) Act, 1707, sec. 23, such power was a ministerial and not a

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paid on a return which set out that he was receiving an abatement of £150. But, according to the view which I take of the statute, I think I am relieved from the duty of considering whether the defender's conduct was morally culpable or not. Section 166 no doubt contains the word 'fraudulently' as qualifying some of the acts which it strikes at. Thus, concealment of any income in making a claim for exemption must be fraudulent if it is to incur a penalty. But when the statute speaks of 'declaring' the amount of any income, it merely uses the adverb 'untruly.' The difference in language is, I think, intelligible. At all events, I find it there; and therefore if a positive statement as to the amount of a man's income is untrue in the sense of being contrary to fact (of course, in some material respect), although it may not be fraudulent, but only inexcusably careless, I think the statute intends to make it, and does make it, an offence to which a penalty is attached. I quite admit that each penal section of a statute must be construed according to its own terms; but when I turn to sec. 178, which deals with the case of a false return of income as distinguished from a false claim for abatement, I find that the section strikes at 'wilful neglect' as well as at falsehood and fraud; and I see in that an instructive guide to the general policy of the statute.

"Next comes the question of the amount of the penalty. £20 for each count is clearly due. But when the advisers of the Crown ask in addition for the sum of £187, 3s. 3d. under the first count, and £137, 12s. 5d. under the second, it seems to me that they have not well considered the meaning of the section, for these sums are brought out by taking the defender's whole income, irrespective of whether it has already paid duty or not, and multiplying the duty by three. The words are 'treble the duty chargeable in respect of all the sources of his income, and as if such claim had not been allowed.' That can never mean that you are to take any part of the offender's income which has paid duty already and charge the duty over again, because the duty in that case would not be 'chargeable.' Clearly the meaning is that you are only to take the man's whole income on which duty is still chargeable, and to charge treble duty upon it, notwithstanding that it would have been otherwise (owing to its amount) entitled to exemption or abate-

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[1] Price on Law of Exchequer, (1830), p. 358.

[2] 6 Anne, cap. 53, sec. 23.

[3] Clerk and Scrope, Court of Exchequer, p. 251; Manning's Practice of Court of Exchequer, Revenue Branch, (1827), p. 319.

[4] Inland Revenue Regulation Act, 1890 (53 and 54 Vict. cap. 21), sec. 35.

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judicial power. It was therefore, in any view, taken away from the Court of Exchequer by the Public Revenue (Scotland) Act, 1833, and did not pass to the Court of Session under the Exchequer Court (Scotland) Act, 1856. Under sec. 6 of that Act the Court was bound to give decree according to law if the defender was found guilty. The decision of the Lord Ordinary in *Lord Advocate* v. *Stewart*[1] was erroneous.

Argued for the defender and respondent;—(1) The sum upon which the treble duty was to be calculated under sec. 166 of the Income-Tax Act, 1842, was the sum upon which the defender ought to have paid duty, but had not paid it. "Chargeable" could not refer to what had already paid duty. The provisions of sec. 178 of the Act shewed that this must be the meaning of sec. 166, because under sec. 178, which dealt with a more heinous offence than sec. 166, the treble duty was only to be charged on the difference between the sum on which the person had been charged and the sum on which he ought to have been charged. This was a penal enactment, and the

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ment. Again, let me refer to sec. 178 as containing a fuller exposition of what is briefly expressed in sec. 166 as 'treble the duty chargeable.' *

"In this case the defender's income from every source is made up for the most part of items from which tax has been deducted or paid, and the only part of his income on which duty is still chargeable is business profits. The *onus* of proving the amount of these business profits is on the Crown if they are to demand that part of the penalty which consists of treble the duty chargeable. They have led no proof on that point, except by shewing that the defender for several years acquiesced in an assessment of £350 as representing his trade profits. He has already paid tax on £200 of that sum, so that treble the duty on a balance of £150 would be a mere bagatelle compared with the large sums concluded for in the information. But, in my view, it is a sufficient answer to this part of the Crown's demand that the defender's claim for exemption or abatement was not 'allowed.' An abatement, no doubt, was allowed, but at the hand of the revenue officers, and not in terms of the defender's claim. Even if I thought otherwise on the construction of the statute, I should be of opinion that £20 under each of the two counts was a sufficient penalty for the defender's offence; and I have always held it quite within the competence of the Court of Exchequer to modify a penalty where it thought proper to do so in the interests of justice. I considered and discussed that question in *Stewart's* case, 30th March 1899, 6 S. L. T., p. 405, and I respectfully refer to my opinion as there reported.

"I shall therefore find that the defender did, by notice and declaration dated 30th June 1902, untruly declare that the whole of his income from every source whatsoever for the year ending 5th April 1903 amounted to the sum of £150, and that the defender did, by notice and declaration dated 3d July 1903, untruly declare that the whole of his income from every source whatsoever for the year ending 5th April 1904 amounted to the sum of £230, and that he has thereby forfeited the sum of £20 for each of the said offences, but that he has not forfeited any other sum for either of the said offences; and I shall find him liable in the expenses of process."

[1] March 30, 1899, 6 S. L. T. 405 (O.-H.).

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* 5 and 6 Vict. c. 35, sec. 178, enacts that every person liable to a penalty under that section shall "be charged and assessed treble the amount of the charge which ought to have been made on such person if no such charge shall have been made; and if any such charge shall have been made which shall be less than the charge which ought to have been made on such person, then such person shall be assessed and charged over and above such former charge treble the amount of the difference."

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less severe interpretation, if possible, must be adopted. (2) The Court had power to modify the penalties. Such power was conferred by sec. 23 of the Exchequer Court (Scotland) Act, 1707.[1] The power so conferred was a judicial power which passed to the Court of Session under sec. 1 of the Exchequer Court (Scotland) Act, 1856.[2] If the absence of the word "penalties" was of any importance, it was to be noted that the word used in sec. 166 of the Income-Tax Act, 1842,[3] was "forfeit," and "forfeitures" were specially mentioned in sec. 23 of the Act of 1707.[1] In Revenue prosecutions brought in the inferior Courts these Courts had power to modify penalties.[4] It would therefore be very strange if the Supreme Court had no such power. (3) It was also maintained that the defender should have been found not guilty.

At advising,—

LORD ADAM.—The Lord Ordinary is of opinion that "the defender did, by notice and declaration, dated 30th June 1902, untruly declare that the whole of his income from every source whatsoever for the year ending 5th April 1903 amounted to the sum of £150, and that the defender did, by notice and declaration, dated 3d July 1903, untruly declare that the whole of his income from every source whatsoever for the year ending 5th April 1904 amounted to the sum of £230, and that he has thereby forfeited the sum of £20 for each of the said offences; but that he has not forfeited any other sum for either of the said offences."

I entirely agree with the Lord Ordinary in so far as he is of opinion that the defender has forfeited the sum of £20 for each of the said offences, and on the grounds on which he has arrived at that conclusion, and desire to add nothing to what he has said; but I differ from him in so far as he is of opinion that the defender has not forfeited any other sum for either of said offences.

The case depends on the construction principally of the 166th section of the Income-Tax Act of 1842.

That section, which relates to the making of claims of exemption, enacts that if any person shall be guilty of any fraud or contrivance in making such claim, or, *inter alia*, shall fraudulently conceal or untruly declare any income or amount of income, every such person so offending shall forfeit the sum of £20, and treble the duty chargeable in respect of all the sources of his income, and as if such claim had not been allowed.

It will be observed, accordingly, that the Lord Ordinary, while finding the defender guilty of the offences charged, and forfeiting the sum of £20 for each offence, has stopped short there, and has not forfeited treble the duty chargeable in respect of all the sources of his income—as the Act directs.

The Lord Ordinary, before stating the grounds on which he exempts the defender from this part of the penalty, proceeds to consider the amount of

[1] 6 Anne, cap. 53; Lord M'Laren's Procedure Acts, Index, *sub voce* Jurisdiction, p. 627; Lord Advocate v. Stewart, 6 S. L. T. 405 (O.-H.).

[2] 19 and 20 Vict. cap. 56.

[3] 5 and 6 Vict. cap. 35.

[4] Summary Jurisdiction (Scotland) Act, 1881 (44 and 45 Vict. cap. 33), secs. 6 (*a*) and 11.

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the penalty contemplated by the Act, which depends on the construction of the words "chargeable in respect of all the sources of his income." His Lordship thinks that that can never mean that you are to take any part of the offender's income which has paid duty already, and charge the duty over again, because the duty in that case would not be chargeable; and he construes the clause as if it had read treble the duty "still" chargeable—that is, still chargeable at the date I suppose of the judgment. I do not agree with that construction of the clause. I think the words "treble the duty chargeable in respect of all the sources of the defender's income," mean treble the duty chargeable on the defender's whole income for the year of the assessment in question.

But the Lord Ordinary further thinks that no treble duty at all is exigible by the Crown, because the defender's claim for abatement or exemption was not allowed,—that is to say, that the penalties are not exigible unless the offending person's fraud or offence shall have been successful. But if this be so, I do not see why it should not as much apply to the £20 penalties, which have been forfeited, as to the treble duty. The two penalties seem to be in exactly the same position. But it is clear that the offence is committed and the penalties incurred when the untrue declaration of income is made, irrespective of its result. The Act says that if any person shall be guilty of any fraud or contrivance in making any such claim, or in obtaining any such exemption (that is to say, whether the claim shall be successful or not), or shall fraudulently conceal or untruly declare any income, the penalties shall be incurred.

But, further, the Lord Ordinary holds that it is within the competence of the Court of Exchequer to modify a penalty, when it is thought proper to do so in the interests of justice, and he has done so in this case by remitting the treble duty penalty altogether—if it should be legally exigible—and he refers to the case of *Stewart*[1] for his opinion on that question. I confess that it appears to me that when a statute says that an offender shall forfeit a particular sum (as in this case treble the duty chargeable) the Court must obey the direction, and pronounce an order accordingly. It may be, nevertheless, that the Court of Exchequer has power to modify such a penalty, but if so I think it must be made very clear that the Court has the power.

This claim, as I understand, is founded on the 23d section of the 6th of Queen Anne, cap. 53, which established the Court of Exchequer in Scotland. That section enacts that if any person shall plead or shew in the Court of Exchequer in Scotland good and sufficient cause and matter in law, reason or good conscience, in bar or discharge of any fines, issues, amercements, forfeited recognisances, or any other forfeitures, debts, or duties due or payable to the Crown, or why such person ought not to be charged or chargeable to or with the same, that the said Court shall have power to allow the same, and to acquit or discharge all persons sued for the same, or to make any reasonable composition for the same, as in the judgment and discretion of the Barons shall be found and thought just and reasonable, and to proceed and act therein as hath been and is used and

[1] 6 S. L. T., p. 405.

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practised in the like cases in and by the Court of Exchequer in England. It is on this power of "making reasonable composition" that the respondent founds as conferring on the Court the power of modifying the penalty in question. It appears to me, however, that this does not refer to penalties such as this at all. The Court may remit or modify a penalty, but it does not make reasonable compositions with the offenders in such cases. No evidence was laid before us that the Court of Exchequer in England is, or had been, in use to remit or modify a penalty as has been done in this case. No authority was quoted to us except the case of *Stewart*[1] aforesaid, that it had ever been the practice in Scotland so to do, and on the whole matter I am of opinion that the Lord Ordinary should have enforced the penalty of treble duty as directed by the statute.

LORD KINNEAR.—I also think that the interlocutor is right in so far as it finds the offence charged against the defender proved, but not in so far as it modifies the statutory penalty. I cannot agree with all that the Lord Ordinary has said as to the construction of the statute. The offence charged in terms of the 166th section is not, in my opinion, an inaccurate but a false or untruthful declaration. I should be slow to adopt a construction which should place innocent error in the same category and punish it with the same severity as the other offences defined in this section, namely, fraud or contrivance in making a claim or obtaining an exemption, and I do not think that this is within the ordinary meaning of the words of the enactment. A charge of untruly declaring seems to me to imply the intention to deceive, and the adverbial form of the phrase confirms this implication, because it directs attention to the action and intent of the declarant, and not merely to the contents of the declaration itself. When a man is said to make a declaration untruly, that means in ordinary language that the man himself is untrue, and not merely that his declaration is inaccurate. It makes no difficulty in my mind that the corresponding offence is described as fraudulently concealing, because non-disclosure does not necessarily imply wrongful intention; and it was therefore necessary, or at all events natural, to add the qualification "fraudulently," in order to bring the concealment into line with the other offences with which it is associated,—fraud, contrivance, and untrue declaration. But taking that to be the meaning of the enactment, I think the charge is proved, because the excuse put forward by the defender cannot in my judgment be accepted, and I rather think that the Lord Ordinary was of the same opinion. The words of the declaration have a perfectly plain meaning, and the defender must be held to have intended that meaning, unless he can displace the unfavourable inference by some much more convincing explanation than that which he has given.

The offence being proved, I agree with all that Lord Adam has said as to the penalty. I cannot say I have any doubt as to the meaning of the words "treble the duty chargeable in respect of all the sources of his income," and I cannot assent to the argument that the Crown's demand is excluded because the claim for abatement was not allowed. There are two offences

[1] 6 S. L. T., p. 405.

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of quite different kinds described in the section. One is obtaining an exemption or abatement by fraud, and the other is fraudulently concealing or untruly declaring income, and the latter offence is complete in my judgment when a false declaration is made, whether the declarant succeeds in obtaining the exemption or abatement which he asks for or not. The words "as if such claim had not been allowed" appear to me to be entirely in accordance with this reading of the section. The statute includes a variety of offences, some of which may have been successful, so that a claim may have been allowed, and others may have been completed without the allowance of the claim; and when it goes on to say that the penalty is to be "treble the duty chargeable, and as if such claim had not been allowed," that only shews more clearly to my mind that the penalty is not to be measured by any gain which the taxpayer may have made by making a false return, but by his actual income, the total income for the year of charge.

As to the only remaining point, I also agree with Lord Adam that the Lord Ordinary's view cannot be sustained, and that it is not competent to modify the penalty. It is not left to the discretion of the Court, but is fixed absolutely by statute, and the Court can have no power to alter what is so fixed unless the statute confers it. The ground on which the Lord Ordinary has held the modification competent, as I understand his Lordship's exposition of it in the case to which he refers, is that a general and apparently arbitrary power to mitigate penalties has been conferred by the Act of Queen Anne. As I read the section in question, the jurisdiction which it confers arises only in the case of persons who have shewn good cause in bar or discharge of fines and duties; and if I had to read it for myself as a statute presented for construction for the first time I should find nothing in the language to support the Lord Ordinary's view that it gave the Court an absolute power of modification or mitigation of penalties "whenever," as the Lord Ordinary puts it, "the Court thinks proper to do so." The only ground of modification which is suggested in the present case is his Lordship's opinion that £20 is sufficient, but then the Legislature has determined that nothing shall be sufficient short of treble duty; and I cannot find any ground in the statute to enable us to override that conclusion of the Legislature. But then I do not think we are to construe this Act of Queen Anne as if it were a new Act, and as if we had to find out for ourselves for the first time what it means, because it gives us a guide for the exercise of the jurisdiction which it confers, by saying that we are to follow the use and practice of the Court of Exchequer in England. Now, we cannot tell of our own knowledge what the use and practice of that Court was, as if it were our own use and practice, except upon such evidence as we are accustomed to receive as to the use and practice of English Courts. It appears to me, therefore, that the party maintaining that this statute gives us the power to modify a penalty, was required to shew us that according to the use and practice referred to by the statute, such penalties were in practice modified. Nothing of the kind has been shewn, and on the contrary counsel for the Crown stated quite distinctly and positively that the practice of the Court of Exchequer in England is against the notion that the Court has any power

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to modify penalties of this kind, and I accept a statement of that kind, made by Crown counsel, as a statement made on the authority of the department which he represents in the case. I therefore agree with Lord Adam that, in so far as it modifies the penalty, the Lord Ordinary's judgment must be recalled, and the statutory penalty must be enforced.

LORD PRESIDENT.—I agree with your Lordships. The first question is after all a question of fact, and I should be slow to come to a different conclusion from that come to by the Lord Ordinary.

The second question is as to the true meaning of the word "chargeable." Now, if you were to adopt the Lord Ordinary's reading of the word "chargeable," the result would be that there would never be any charge in respect of income of such a character as lends itself to deduction at the source. But the heinousness of the crime or fault that is struck at by the penalty is the concealment of the true state of the man's income apart from tax, and a man who conceals £1000 of income which has tax deducted at the source conceals it just as wrongly when claiming total or partial exemption as he who conceals £1000 of income which is directly charged upon profits. I therefore agree with your Lordships in holding that the Legislature fixed that the penalty here should be treble the duty chargeable upon the whole income. Upon the third point, the Lord Ordinary's judgment in that other case to which his Lordship referred really turns, as his Lordship has said, upon the provisions of the Act of Queen Anne. I agree with what your Lordship who has last spoken says, but apart from that I find this—there is no doubt that the body dealt with in that Act had functions both administrative and judicial. There is also no doubt that we, sitting here as the Court of Exchequer, are, so to speak, the heirs of the judicial functions, not of the administrative, and I think this power of modifying the penalty, if it existed, was certainly part of the administrative functions, and is represented now by the undoubted power which the Commissioners of Inland Revenue have to modify any penalty they please. Further, with your Lordship I am greatly strengthened in this view by finding what I take to be proved by the authoritative statement at the Bar, namely, that the Court of Exchequer in England have never conceived that they had this general power of modifying any penalty. The interlocutor will be therefore to recall the Lord Ordinary's interlocutor and to give decree in terms of the information, with expenses.

LORD M'LAREN was absent at the hearing.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor [the interlocutor reclaimed against]: Find for the pursuer on both counts of the information No. 2 of process that the defender has forfeited the sum of £20, and also a sum of £187, 3s. 3d. of treble duty under the first count, and the sum of £20, and also a sum of £137, 12s. 5d. of treble duty under the second count: Decern against the defender for payment to the pursuer of the said sums, amounting *in cumulo* to £364, 15s. 8d.," &c.

SOLICITOR OF INLAND REVENUE—LISTER SHAND & LINDSAY, S.S.C.—Agents.

GOODWINS, JARDINE, & COMPANY, LIMITED, AND LIQUIDATOR, Pursuers (Reclaimers).—*Clyde, K.C.—Hunter.*
CHARLES BRAND & SON, Defenders (Respondents).—*Campbell, K.C.—Murray.*

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*Contract—Arbitration Clause—Arbitration Clause in Principal Contract incorporated in Subcontract.*—A contractor, who had contracted with a railway company for the construction of certain works, entered into a subcontract for the execution of part of the work. In the contract between the principal contractor and the subcontractor it was stipulated that the work was to be executed "according to plans and specifications," which included a "general specification," forming part of the contract between the principal contractor and the railway company. This "general specification," contained a clause providing that disputes were to be submitted to arbitration.

In an action by the subcontractor against the principal contractor for certain sums alleged to be due under the subcontract, the principal contractor pleaded that the claims made in the action fell within the arbitration clause of the "general specification," which he maintained was imported into the subcontract.

*Held* that the arbitration clause of the general specification—while it was incorporated in the subcontract to the effect of making the decisions of an arbiter in questions between the railway company and the principal contractor binding upon the subcontractor—was not incorporated in the subcontract *quoad* matters which concerned only the rights *inter se* of the principal contractor and the subcontractor.

1ST DIVISION. Lord Kincairney.

GOODWINS, JARDINE, & COMPANY, LIMITED, in liquidation, having its registered office at 18 St Swithin's Lane, London, and James Watson Stewart, chartered accountant, Glasgow, the liquidator thereof, brought an action against Charles Brand & Son, contractors, 172 Buchanan Street, Glasgow, concluding for payment of (1) £10,915, under deduction of £5800 paid to account, and (2) £7002, under deduction of £1200 paid to account, being the balances alleged to be due by the defenders to the pursuers under a contract.

The defenders were contractors with the Caledonian Railway Company for the formation of portions of the Glasgow Central Railway, under two contracts, called the Bridgeton contract and the Trongate contract, and the pursuers contracted with the defenders for the supply of the girder work required for these contracts.

The contract between the pursuers and the defenders was constituted by an offer by the pursuers to execute the work at certain prices, and an acceptance by the defenders. The original schedule, containing a specification of the work, and the pursuers' tender with reference to the two contracts, was amissing, but a copy was produced. The copy shewed, at the end of the portion of it relative to the "Trongate contract," a docquet in the following terms:—"Fifty-three thousand one hundred and sixty-eight pounds two shillings and ninepence sterling net, erected complete, in conformity with drawings, specifications, and general conditions," and a docquet in similar terms appended at the end of the portion of the schedule relative to the Bridgeton contract.

The acceptance was contained in a letter, dated 20th June 1890, written by the defenders to the pursuers:—"Glasgow Central Railway —Contracts Nos. 1 and 2.—We hereby accept your tender for all the girder work on these contracts, as per schedule sent by you, and at the prices therein stated, less 2½ (say, two and a half) per cent.

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"Should we elect to take delivery of any portion of these girders at the station, and erect the same, a reduction is to be made by you of 20s. (say, twenty shillings) per ton.

"The whole work to be executed to the satisfaction of the engineers of the railway company, and according to plans and specifications, and to be finished within the period mentioned in the specification.

"We shall furnish you within four weeks with copies of all the contract drawings of iron work, and will from time to time give you drawings or instructions of any alterations that may be ordered, and also instructions with reference to our requirements from time to time, it being understood that you will supply us with the iron as the works proceed.

"A formal minute of agreement to be entered into containing all usual and necessary clauses."

The defenders denied that the balances sued for were due, and in a statement of facts stated (Stat. 6):—"In their tenders, dated 11th June 1890, attached to the schedules filled up by them, the pursuers offered to complete the works 'in conformity with drawings, specifications, and general conditions.' The defenders accepted said tenders by letter dated 20th June 1890, and in said letter stipulated that the work should be executed 'according to plans and specifications.' The drawings, specifications, and conditions so referred to were those applicable to the contracts between the defenders and the Caledonian Railway Company. Previous to the pursuers tendering to the defenders for said work, they had before them the said drawings specifications, and conditions of said railway contracts, including the general specification of works. Said conditions and others were intended to and did form part of the contract made as aforesaid between the pursuers and defenders, and the pursuers' tender and the defenders' acceptance was made and given on the footing that said conditions and others were incorporated in the contract between them." The defenders set forth art. 180 of the said "general specification," * and averred that in terms of the clause of submission in

* Article 180 of the general specification was as follows:—"Should any disputes arise as to the true intent and meaning of this specification, and the relative plans, sections, drawings, detailed estimate and special specification, and the contract to follow thereon, or as to the extent of the works intended to be performed thereunder, as to the works having been duly and properly completed, or as to the expense of any additional work, or deduction from that specified, or any alteration which may be more or less expensive than the work specified, or as to the measurements of the works as executed, or as to any extension of time for the completion of the works beyond the date or dates mentioned in the special specification, or as to the liquidated and ascertained compensation payable by the contractor, in the event of delay in completing the works, or as to any claim of damages at the instance of the contractors against the Company, or as to any notice or plans requiring to be served or delivered by the Company, . . . or as to any other matter, claim, demand, or obligation whatever, arising out of or in connection with the contract, or as to any other matter specially referred to the arbiter in this, or in the special specification, the same shall . . . be referred to . . . and the decision, interim or final, of the said arbiter shall be finally binding and conclusive upon both parties; and the arbiter is hereby authorised and empowered to decern for such sum or sums, interim or final, as he may find to be due by the contractor to the Company, or by the Company to the contractor. . . ."

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art. 180 all disputes and differences between the pursuers and defenders arising out of the contract between them fell to be determined by the arbiters named therein, and that the defenders were willing to refer the pursuers' claims accordingly.

The defenders pleaded, *inter alia;*—(1) In respect that the pursuers' claims in the present action fall within the clause of submission which forms part of the contract between the said pursuers and defenders, the action should be sisted until the arbiter therein named has given his decision thereon.

On 30th January 1904 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that the clause of arbitration in the 180th section of the general specification of the works undertaken by the defenders in their contract with the Caledonian Railway Company, No. 27 of process, has been incorporated in the contract between the pursuers and the defenders; (2) that the questions between the pursuers and defenders in this action fall within the said clause of arbitration: Therefore sustains the first plea in law for the defenders, and sists the cause that the record may be submitted to one of the arbiters nominated in said general specification. . . ."*

The pursuers reclaimed.

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* "OPINION.—This is an action on a subcontract by which the pursuers undertook to perform a part of the work for which the defenders had contracted with the Caledonian Railway Company. It is a contract carved, so to speak, out of that larger contract . . . I have now been asked to decide the question raised by the defenders' first plea, which is that the pursuers' claims fall under a clause of reference. The contract with the Railway Company contains a very wide and careful clause of reference, and, indeed, it seems clear that neither that original contract nor the contract between the pursuers and defenders to which this action relates could be worked out without great inconvenience and expense without the aid of a clause of reference. Now, there is no clause of reference in the contract between the pursuers and defenders. But the defenders contend that the clause of reference in the contract between the defenders and the Railway Company must be held to be incorporated in the contract between the present parties. There are certainly difficulties, but I think that that contention should be supported.

"There is in the process a letter by the defenders to the pursuers, dated 20th June 1890, which bears to be an acceptance by the defenders of the pursuers' tender, about which acceptance no difficulty has been raised. It bears—'The whole work to be executed to the satisfaction of the engineers of the Railway Company, and according to plans and specifications, and to be finished within the period mentioned in the specification.'

"There is no mention in this letter of a clause of reference nor even of conditions in the specification. The reference is to the specification generally, but I think that that reference to the whole specification is, in the circumstances, sufficient to incorporate its clauses regarding the contract under consideration as truly a part of the general contract.

"The defenders aver that 'in their tenders, dated 11th June 1890, attached to the schedules filled up by them, the pursuers offered to complete the works in conformity with drawings, specifications, and general conditions.' The reference here to the general specification is closer than in the defenders' letter, but the difficulty seems to be that the tenders or tender cannot be found, and nothing but alleged copies are produced. These are not very satisfactory copies, and I could not act on them without some inquiry, but I have come to think that that would be an unnecessary expense, and that I may proceed on the letter of the defenders, and may hold that the reference in that letter to the specification is, in the circum-

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On 2d July 1904 the First Division, on the motion of the defenders, and it having been admitted by counsel for the pursuers that the principal document, containing the tenders made by the pursuers, referred to in the defenders' letter of acceptance, had been lost and could not be found, before answer, allowed the defenders a proof of their averments as to the terms of the pursuers' tenders, mentioned in statement 6 of the statement of facts, and to the pursuers a conjunct probation.

The proof shewed that the copy of the pursuers' tender was correct.

Argued for the pursuers and reclaimers;—The defenders had made an independent contract with the pursuers, and the stipulation in the letter of acceptance of 20th June 1890, that the work was to be executed "according to plans and specifications," did not incorporate into the contract all the clauses, including the clause of arbitration, in the general specification. The pursuers were not parties to the general specification, and the terms of the clause of arbitration shewed that it referred only to questions arising between "the contractor" and the railway company, and did not cover questions arising between the contractor and a subcontractor. The case was similar to the class of cases in which it had been held that a reference in a bill of lading to the terms and conditions in the charter-party did not have the effect of making a clause of arbitration in the charter-party applicable to disputes under the bill of lading.[1] The case of *Weir & Company* v. *Pirie & Company*,[2] referred to by the Lord Ordinary, was inapplicable, since in that case it was clear from the form of the clause of arbitration that it was intended to operate between all the parties. At the most the only provisions of the general specification which could be held imported into the subcontract were those which dealt with the sufficiency of the materials supplied and kindred matters. But the questions at issue between the pursuers and defenders related merely to the prices and alleged overcharges in the separate contract between them under which the defenders made their own profit and paid the pursuers at agreed-upon rates.

Argued for the defenders and respondents;—The effect of the words "according to plans and specifications," in the letter of acceptance, and of the words "in conformity with drawings, specifications, and general conditions" in the docquet written by the pursuers' manager on the schedules, was clearly to incorporate into the subcontract all the clauses of the general specification. The arbitration clause in the specification could not be separated from the other clauses of the specification. It was said that the pursuers were not parties to the specification. That was true, but they had entered into a subcontract which incorporated the specification. There was no ground for the contention that the clause of arbitration was in any respect less applicable to the pursuers than any other clause in the specification, and it could scarcely be disputed that the clauses as to the quality and quantity of materials, &c. were binding on the

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stances, sufficient to incorporate the clause of arbitration. I suppose that the difficulty about the production of the tenders may yet be overcome.

"Counsel for the defenders quoted the case of *Weir* v. *Pirie & Company* (No. 1), 24th May 1898, 3 Com. Cases, 263, which appears to give very important support to his argument."

[1] Hamilton & Co. v. Mackie & Sons, 1889, 5 Times L. R. 677; Runciman & Co. v. Smyth & Co., 1904, 20 Times L. R. 625.

[2] 1898, 3 Comm. Cases, 263.

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pursuers. The words of the clause of arbitration, "any disputes," &c., were of the most general character. The case of *Weir & Company* v. *Pirie & Company*,[1] was precisely similar to the present case, and proceeded on the simple ground that where one business contract incorporated another, it must incorporate the whole of it, not excluding an arbitration clause.

At advising,—

LORD PRESIDENT.—In this case Goodwins, Jardine, & Company sue Charles Brand & Son for the balance of prices under a contract which was entered into between them for the construction of some bridge work incidental to the formation of the Central Railway, Glasgow. Messrs Brand were the general contractors with the Caledonian Railway for the execution of the railway works, and not being persons who did bridge work themselves, they entered into a subcontract with the pursuers for the making of the bridge work. The bridge work was made, part of the price was paid, and this is an action for the balance.

The contract between the pursuers and the defenders was constituted by an offer and acceptance. The offer has been lost, but the acceptance is contained in a letter written by Messrs Brand to Goodwins, Jardine, & Company, which is in these terms:—"We hereby accept your tender for all the girder work on these contracts, as per schedule sent by you, and at the prices therein stated, less 2½ (say, two and a half) per cent. . . . The whole work to be executed to the satisfaction of the engineers of the Railway Company, and according to plans and specifications, and to be finished within the period mentioned in the specification." Now, "the plans and specifications," parties are agreed, were the plans and specifications which formed part of the general contract between the Caledonian Railway Company and the Messrs Brand. The defenders plead that they are not due the sum which the pursuers conclude for, but before answering further and going into inquiry on these matters they tabled a special plea that the inquiry must not be in Court, because such matters have been remitted to arbitration, in respect that the arbitration clause, which is one of the clauses of the general contract between Messrs Brand and the Caledonian Railway Company, has by the terms of this contract been incorporated into the contract between the pursuers and the defenders, and rules all matters between them. The Lord Ordinary upon these pleadings pronounced this interlocutor:—"Finds (1) that the clause of arbitration in the 180th section of the general specification of the works undertaken by the defenders in their contract with the Caledonian Railway Company, No. 27 of process, has been incorporated in the contract between the pursuers and the defenders; (2) that the questions between the pursuers and defenders in this action fall within the said clause of arbitration," and therefore he sists the action in order that the matters may be submitted to one of the arbiters named. Against that interlocutor the reclaiming note was taken, and your Lordships on 2d July 1904 allowed the defenders a proof as to the terms of the pursuers' tenders mentioned in article 6 of the defenders' statement of facts. (His Lordship, after dealing with the proof, proceeded)—

There is no question but that the pursuers accepted this contract with

[1] 1898, 3 Comm. Cases, 263.

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reference not only to the special specification, but to the general specification. The whole question, of course, remains, upon the merits, what was the effect of that acceptance. I am therefore of opinion that your Lordships should proceed to consider the Lord Ordinary's interlocutor upon its merits.

Now, the Lord Ordinary in his note says,—"I think that that reference to the whole specification is in the circumstances sufficient to incorporate its clauses regarding the contract under consideration as truly a part of the general contract." It does not appear to me that that way of stating the question is really completely accurate. For some purposes there is no doubt that the arbitration clause is incorporated. It is, I think, quite clear that for anything in dispute between the Brands and the Caledonian Railway Company the arbitration clause has effect, and the result arrived at under that arbitration clause is binding on the pursuers. In that respect it is just like all the other clauses in the specification. But the point is not whether it is incorporated at all, but whether it is incorporated in regard to another matter altogether, namely, the dispute about prices between the pursuers and the defenders. That is a matter outside the relations of the defenders and the Caledonian Railway Company. What is binding on the one is not binding on the other. Accordingly on this part of the case I do not agree with the Lord Ordinary. I think the contract incorporated was the contract so far as it existed between the principal contractor and the employer—that is to say, the Brands and the Railway Company—but that you cannot over and above cut out of the provisions of that contract one clause and make it apply *mutatis mutandis* to the rights *inter se* of the principal contractor and the subcontractor—that is, the pursuers and the defenders—in a matter in which the employer never had and never can have any concern.

I am therefore for recalling the Lord Ordinary's interlocutor, and remitting the case to him for proof.

LORD ADAM concurred.

LORD M'LAREN.—I think it is clear enough that no principal contractor for a railway company would ever enter into a contract with a subcontractor except on the condition that whatever the engineer or the referee decided as to the fulfilment of the contract between the principals should be binding on the subcontractor. If it were not binding on him, it would probably be a losing concern on the part of the principal contractor. The relations between the principal contractor and the Company are such that the Railway Company's engineer, if dissatisfied with any of the materials supplied either as to quality or dimensions, might require them to be altered, leaving for future consideration whether any allowance was to be made in respect of such alterations. It would be impossible to work a subcontract unless an order of this kind was binding on the subcontractor, as he alone supplies the materials. But then, I think it follows that, with regard to allowances to be made for extra work or for variations which in the course of the work have been found to be necessary, the decision of the arbiter upon such a point must always be binding on the subcontractor who supplies the materials, the sufficiency of which is under consideration. For these pur-

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poses I should hold that the clause of arbitration was incorporated as one of the conditions that are necessarily binding in such cases. But then there may be other questions which concern only the relations between the principal contractor and the subcontractor. As for instance, the rate of payment as between them, or the commission or discount; and again, where delay has occurred and there has been responsibility for delay, whether that delay is to be charged against the subcontractor. I only mention these as examples of possible questions between the principal contractor and the subcontractor which are in no way covered by the clause of arbitration, because they affect only these two, and do not cover the relations between them and the Railway Company.

I therefore agree with your Lordship that it is necessary to distinguish between these things, and while we do not hold the clause of arbitration universally binding, if proof is to be allowed it will no doubt shew that there are many things that are substantially covered by the clause of arbitration, because whatever was to be decided as to working material between the Caledonian Railway Company and the principal contractor would also affect the question of the calculation of prices with the subcontractor.

LORD KINNEAR concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, allowed the parties a proof of their respective averments on record, and remitted to the Lord Ordinary to take the proof.

WEBSTER, WILL, & Co., S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

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JAMES BUCHANAN, Pursuer (Respondent).—*Orr, K.C.*—*Anderson.*

THE CORPORATION OF THE CITY OF GLASGOW, Defenders (Reclaimers).—*Mackenzie, K.C.*—*Macmillan.*

*Reparation—Malicious Prosecution—Facts and circumstances inferring malice.*—In an action of damages against the Corporation of Glasgow, proprietors of the tramways, the pursuer made the following averments:—On 14th April two of the tramway inspectors employed by the defenders charged the pursuer, then a passenger in one of their cars, with having on 10th April contravened one of the statutory bye-laws by spitting on a car. On 21st April the inspectors reported the matter to the police, and on 22d April a complaint was served on the pursuer. The case was called in the Police Court on 26th April, when the pursuer was in attendance with his witnesses. The prosecutor then deserted the diet *pro loco et tempore*. The pursuer further averred that the charge and the report by the inspectors to the police were made falsely, maliciously, and without probable cause.

*Held* (1) that, the inspectors having been appointed to carry out the provisions of an Act of Parliament, it was necessary for the pursuer to aver facts and circumstances inferring malice; and (2) that the action was irrelevant in respect that no such facts and circumstances were averred.

1ST DIVISION. Lord Dundas.

THIS was an action at the instance of James Buchanan, 7 West George Street, Glasgow, against the Corporation of the City of Glasgow, concluding for £250 as damages.

The pursuer averred that the defenders were the owners of the tramway system in the city of Glasgow; that they were the employers of the officials engaged in connection with that system; and that they made bye-laws under the powers conferred by their Tramways Acts

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prohibiting, *inter alia*, passengers on tramcars from spitting in or upon said cars, and enacting that persons guilty of said acts shall be liable to fine or imprisonment, and they have in their employment inspectors charged with the duty, *inter alia*, of seeing that said bye-laws are not infringed, and that persons contravening them are proceeded against. (Cond. 2) "On Friday, 14th April 1905, the pursuer was travelling on a tramway car belonging to the defenders. . . . While he was on said car two tramcar inspectors in plain clothes . . . who were in the employment of the defenders, and entrusted by them with the duty above described in connection with said bye-laws, entered the said car and falsely and calumniously charged the pursuer with having committed the said offence of spitting in or upon a tramway car belonging to the defenders . . . on 10th April 1905, and further stated that he had been then charged with doing so, and that when so charged he had given a false name and address. Said charge was false and calumnious and illegal, and said statements were made openly in said car, in the presence and hearing of the pursuer and of William Gibb, Houston Street, Glasgow, and were uttered maliciously and without probable cause. The said inspectors before making said charge had called a policeman and brought him on to said car for the purpose of arresting the pursuer. They made the said charge and the said statements against the pursuer in the presence of said policeman, and then at once requested the policeman to arrest pursuer for said pretended offence said to have been committed on 10th April. The said action on the part of the inspectors was entirely unwarranted, and was wrongful and illegal. In making said charge against pursuer, and said statements in regard to him, and in ordering pursuer's arrest, said inspectors were acting within the scope of their employment as defenders' servants, and in the interest of the defenders. The pursuer assured the said inspectors and policeman, and it is the fact, that he was entirely innocent, and that the inspectors had made a mistake, but notwithstanding pursuer's explanations, the inspectors persisted in the said charge and the said assertions against him. Ultimately, when pursuer exhibited his diary and season ticket . . . the pursuer was allowed to go."

The pursuer further averred (Cond. 3) that notwithstanding the said explanation given on 14th April 1905 to the inspectors by the pursuer, the inspectors thereafter on 21st April 1905 unwarrantably, wrongfully, and illegally reported to the police that the pursuer had been guilty of the said offence on 10th April, with a view to the pursuer being prosecuted and fined or imprisoned; that said charge and report to the police was made maliciously and without probable cause; that in consequence of said charge and report to the police, a complaint that the pursuer had been guilty of said offence was served upon him; that the case was called at the Police Court on 26th April, when the pursuer was present along with witnesses to prove his innocence, but that the case did not go to trial, the diet having been deserted *pro loco et tempore* on the motion of the prosecutor.

The defenders in their answers explained that the inspectors had reasonable and probable cause to make the charge against the pursuer, and that, in making the charge, the inspectors were acting in the discharge of their duty to the public as well as to the defenders, and were privileged in so acting.

The defenders pleaded, *inter alia*;—(1) No relevant case. (3) Privilege.

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The pursuer proposed two issues.

On 24th June 1905 the Lord Ordinary (Dundas) disallowed the first issue proposed by the pursuer, and approved of the second issue proposed by him as amended.*

The amended issue, approved by the Lord Ordinary, was as follows:—"Whether, on or about 21st April 1905, two tramcar inspectors, servants of the defenders, acting within the scope of their employment as defenders' servants, falsely, calumniously, maliciously, and without probable cause, informed or caused information to be given to the police accusing the pursuer of having on 10th April 1905 committed the offence of spitting in or upon a tramcar belonging to the defenders in New City Road, Glasgow, to the pursuer's loss, injury, and damage?"

The defenders reclaimed, and argued;—In the case of an action based, as this action was, on the acts of public officials, it was not enough to make a bare averment of malice and insert the word "maliciously" in the issue; it was necessary, in addition, to aver facts and circumstances from which, if proved, malice could be inferred. The kind of facts and circumstances which it was necessary to aver was illustrated in *Young* v. *Magistrates of Glasgow*[1] and *Douglas* v.

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* "OPINION.— . . . The second issue proposed by the pursuer seems to stand in a somewhat different position. The averments in support of it are contained in the 3d article of the condescendence, which sets forth that, notwithstanding what took place, as above stated, upon 14th April 1905, the said inspectors on or about 21st April reported, or caused to be reported, to the police that the pursuer had been guilty of the said contravention of the statutory bye-law, with a view to his being prosecuted, and fined or imprisoned; that, in consequence, a complaint was served upon the pursuer on 22d April; that the case was called on 26th April at the Northern Police Court in Glasgow, when the pursuer was in attendance with his agent and seven witnesses to prove his innocence; and that the case did not go to trial, the diet having been deserted *pro loco et tempore* by the prosecutor. The pursuer alleges that the report to the police was not only falsely made, but also maliciously and without probable cause. The defenders' counsel argued that all these allegations, assuming them to be correct, were merely the natural and necessary sequel of what had occurred on 14th April, and, as before, that the mere insertion of the adverb 'maliciously' would not suffice unless relevant averments from which malice might be reasonably inferred were forthcoming, which he contended were entirely absent from the record. He referred to the well-known case of *Ivory*, 14 R. 1057, and also to *Young*, 18 R. 825, where an issue against police constables was only allowed upon pretty strong and specific averments from which malice might reasonably be inferred. The present case seems to me to be rather a narrow one, but, upon the whole, I think that I ought to grant the pursuer an issue upon this head. I am not prepared to say that a jury might not reasonably infer something amounting to malice from the facts, if proved, that the inspectors, after hearing the pursuer's explanation on 14th April, saw fit to report the matter to the police a week later, and set quasi-criminal proceedings afoot, which, after he had incurred trouble and expense for his defence, were departed from, and have, so far as appears, not since been resuscitated. I shall therefore approve, as the issue for the trial of the cause, the second of the issues proposed by the pursuer, with such verbal alterations as are necessary, owing to the disallowance of the first issue, and with the insertion, to which the pursuer's counsel admitted that he must submit, of the words 'maliciously, and without probable cause.'"

[1] May 16, 1891, 18 R. 825.

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*Main.*[1] Here there were no facts averred from which it might legitimately be inferred that the inspectors had not acted in the discharge of their duty.[2] It was in the public interest that inspectors appointed to see to the enforcement of statutory bye-laws should be protected in order that they might be able to perform their duties fearlessly.

Argued for the pursuer;—A distinction fell to be made between cases founded on defamation proper and cases founded on malicious prosecution. The present case fell under the latter category, and in cases under this category a bare averment of malice was enough.[3] The giving of false information to the police without probable cause with a view to a prosecution was a valid ground for an action of damages against the person giving the information.[4] In the cases cited by the defenders, the public officials were all in a higher and more responsible position than the tramway inspectors, whose conduct was here in question, so that the degree of privilege was greater. In the record circumstances were averred sufficient to infer malice. The fact that the inspectors acted recklessly and without inquiry might be equivalent to, or indicate, malice.[5]

LORD PRESIDENT.—The case argued here is whether there is really any issuable matter on record, in respect that no special facts and circumstances inferring malice are averred. I have looked in vain for such special facts and circumstances. On the authorities it is clear that this is a case where such facts and circumstances require to be averred, because the inspectors, though not high officials, were nevertheless appointed to carry out the provisions of an Act of Parliament. The Corporation of Glasgow have an excellent bye-law prohibiting spitting in their cars, which could not be enforced unless such inspectors were appointed.

The pursuer's averments are that on 14th April, while he was travelling on a car, two inspectors accused him of having committed the offence of spitting on a car on the 10th of April, and of having, when charged with doing so, given a false name and address. The inspectors called up a policeman and requested him to take the pursuer in charge. The pursuer assured the inspectors he was innocent of the charge, and produced his diary and a season ticket as a proof of his identity.

On that the inspectors behaved in a perfectly sensible way, and did not arrest the pursuer, and afterwards reported the whole matter to the police. I do not see what else they could have done.

The pursuer now brings this action against the inspectors, and avers that they acted maliciously. But there was nothing in either their manner or method of acting from which one could extort any idea of malice at all.

The Lord Ordinary has already disallowed the first issue, and I propose that we should also disallow the second.

LORD ADAM.—It is not disputed that this is a case of privilege. Cases

[1] June 13, 1893, 20 R. 793.

[2] Beaton v. Ivory, July 19, 1887, 14 R. 1057; Macdonald v. M'Coll, July 18, 1901, 3 F. 1082.

[3] Innes v. Adamson, Oct. 25, 1889, 17 R. 11; Reid v. Moore, May 18, 1893, 20 R. 712; Beaton v. Ivory, *cit. sup.*

[4] Lightbody v. Gordon, June 15, 1882, 9 R. 934.

[5] Lee v. Ritchie, May 14, 1904, 6 F. 642.

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of privilege vary from a high degree of privilege to a low degree; and the present case is not one of a very high degree of privilege. But being a case of privilege, it is not disputed that there must be an averment of malice.

The facts are that two tramcar inspectors—appointed by the Magistrates of Glasgow to see that the bye-laws, made by them under the powers conferred by their Tramways Acts, are not infringed—charged a person with committing an offence against these bye-laws by spitting in or upon a tramcar. He gave a name and address, which turned out to be false, and they allowed him to go. Four days afterwards they saw the present pursuer on a tramcar, and, supposing, rightly or wrongly, that he was the man who had been guilty of the offence, they summoned a policeman and charged him with the offence. The pursuer asserted his innocence, gave his name, and produced evidence of his identity. What were they doing wrong? Were they not doing just what it was their duty to do? Seven days afterwards they reported the offence to the police, who took apparently the usual proceedings in such cases. Where is there anything in all this from which we could presume malice? I do not know what a jury might do, but I do know what a jury ought to do. Accordingly I am clearly of opinion that there is no issuable matter in this record.

LORD M'LAREN.—I concur, and I have little to add. I had some doubts as to the case of *Macdonald*[1]—whether the Court had not gone too far in extending a special privilege to persons in authority, so that to found an action of damages against them it was necessary not only to aver malice but to aver special facts and circumstances from which the Court would judge whether there was issuable matter for a case of malicious injury. It is carrying that principle very far to apply it to police constables and tramway inspectors, but in the present state of the authorities there can be no doubt as to what our decision should be. I am reconciled to the principle of the case of *Macdonald*[1] by the consideration that without this extension of the privilege it would not be easy to protect the humbler classes of officials and their employers from groundless actions of damages. There is in England the great protection of "probable cause," which is there determined by the Judge. In our practice it is not, however, of much avail, since it goes to a jury who may or may not understand its effect, however clearly it is put to them by the presiding Judge. I agree with your Lordships and the Lord Ordinary that upon the facts stated on the record we should not hold that there was issuable matter for a case of malicious injury.

LORD KINNEAR.—I am unable to find any issuable matter in this record, and I concur in your Lordships' judgment.

THE COURT disallowed both issues, and dismissed the action.

CLARK & MACDONALD, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

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[1] 3 F. 1082.

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Lumsden v. West Lothian Printing and Publishing Co., Limited.

ALEXANDER LUMSDEN, Pursuer (Reclaimer).—*Watt, K.C.*—*Spens.*
WEST LOTHIAN PRINTING AND PUBLISHING COMPANY, LIMITED, Defenders (Respondents).—*T. B. Morison.*

*Reparation—Slander—Innuendo—Newspaper—Shebeening.*—A newspaper contained a letter to the editor in which the writer, after criticising the action of the licensing authorities of the district in taking away a licence in B., a small town, on account of supplying liquor to an intoxicated person, continued—"Again, I should like to ask, if authorities are determined to be so rigorous, why, after convicting another licence-holder in B. of shebeening and fining him £10, they did not think it necessary to withdraw his licence? Surely shebeening was more heinous in the sight of the law; and I should like to ask if this was the first conviction against the same party."

A publican in B. brought an action of damages for slander against the publishers of the newspaper. The pursuer averred that he had once been convicted of shebeening, that he was the only person in B. who had ever been convicted of shebeening, and that the letter falsely represented that he had been more than once convicted of shebeening.

*Held* (*rev.* the judgment of Lord Johnston) that the pursuer was entitled to an issue whether the letter falsely represented that the pursuer had been more than once convicted of shebeening.

2D DIVISION. Ld. Johnston.

IN the issue of the *West Lothian Courier* for 10th February 1905 there appeared a letter to the editor in the following terms:—

"*Forfeiture of the Gothenburg Licence.*—Sir,—The forfeiture of this licence has aroused great surprise in the district, and little wonder, when we consider that the conviction took place without a defence. It is all the more surprising that the prosecution did not, as a matter of courtesy (outside of duty), notify the licencee that the case was to proceed, especially after the defence agreeing to a postponement on the 29th December last pending the recovery of their principal witness. And here I would like to know how it was possible to settle a date for the case being taken up when the man was lying ill. . . . Again, I should like to ask if authorities are determined to be so rigorous, why, after convicting another licence-holder in Broxburn of shebeening and fining him £10, they did not think it necessary to withdraw his licence? Surely shebeening was more heinous in the sight of the law; and I should like to ask if this was the first conviction against the same party. And, again, why did the same Court dismiss the Winchburgh case after the evidence led? These are matters people can't help taking notice of. The only parties who appear to be satisfied with the verdict are the publicans of the town, who are all smiles just now. You would think the same law did not apply to them, and perhaps it doesn't.—I am, &c., FAIRPLAY."

In March 1905 Alexander Lumsden, publican, residing at Clifton Buildings, Station Road, Broxburn, brought an action against the West Lothian Printing and Publishing Company, Limited, Bathgate, concluding for decree for £500 as damages for slander alleged to be contained in the letter above quoted.

The pursuer averred;—(Cond. 1) "The pursuer was, until recently, a wine and spirit merchant at Broxburn, and was licencee of the Central Bar there from 1900 to 1904. The defenders are the printers and publishers of the *West Lothian Courier*, which is published, *inter alia*, in the Broxburn district." (Cond. 2) "The pursuer had been in the licensed trade for some thirteen or fourteen years prior to 1904,

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and during that time was never either convicted of, or charged with, any offence under the Licensing Acts." (Cond. 3) "In or about June 1904 the pursuer was convicted of shebeening by the Justice of Peace Court at Linlithgow, and fined £10. The offence which the pursuer committed was supplying a regular customer with whisky from his house on a Sunday, and was not of a serious character, and was not so regarded by the Justices of the Peace. Thereafter the pursuer sold his business in Broxburn." The purchaser duly obtained a transfer of the licence. "The pursuer has not since been convicted of, or charged with, any offence against the Licensing Laws." (Cond. 4) "Early in February 1905 the Justice of Peace Court found it necessary to forfeit the licence of the Broxburn Gothenburg Public-House. Shortly thereafter, on 10th February 1905, the *West Lothian Courier* contained the following letter to the editor"—The pursuer then set forth the letter above quoted. "The defenders have been asked to disclose the name of the writer of this letter, and have refused." (Cond. 5) "The passage in the above letter relative to shebeening is written of and concerning the pursuer. It is made quite irrelevantly to the subject under discussion, and is false, calumnious, and malicious. In particular, the passage represents falsely that the pursuer—who is the only person ever convicted of shebeening at Broxburn—has been more than once convicted of shebeening and other offences, and that the offence of which he was convicted was a very grave one, and it was so understood by those who read it."

The defenders (Ans. 4) admitted that they had not disclosed the name of the writer of the letter. "Explained that the decision of the Licensing Authority in forfeiting said [Gothenburg] licence created much local indignation. . . . Accordingly when the defenders received from a respectable member of the public the letter of 10th February 1905, they had no hesitation in inserting it in their newspaper as an expression of the local feeling caused by the conduct of the Licensing Justices. They had no intention whatever of attacking the pursuer, and the purpose of the publication was fully achieved subsequently by the restoration of the Gothenburg licence by the Court of Appeal."

The pursuer pleaded;—(1) The pursuer having suffered loss, injury, and damage through the wrongful actings of the defenders in printing and publishing the false, calumnious, and malicious statements condescended on, is entitled to decree as craved. (2) The defenders having slandered the pursuer as condescended on, the pursuer is entitled to decree as concluded for, with expenses.

The defenders pleaded, *inter alia*;—(1) The statements of the pursuer being irrelevant, the action should be dismissed. (2) The defenders not having slandered the pursuer, should be assoilzied.

The pursuer proposed the following issue for the trial of the cause:—"Whether the statements in the letter printed in the schedule annexed hereto are of and concerning the pursuer, and falsely and calumniously represent that the pursuer had been more than once convicted of shebeening,—to the loss, injury, and damage of the pursuer? Damages laid at £500 sterling."

On 23d May 1905 the Lord Ordinary (Johnston) pronounced this interlocutor:—"Finds that the summons does not disclose any issuable matter; therefore disallows the issue proposed by the pursuer, sustains the defences, dismisses the action, and decerns: Finds the defenders entitled to expenses, allows," &c.

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The undernoted authorities were cited at the hearing.[1]

At advising,—

LORD JUSTICE-CLERK.—I have had considerable difficulty in making up my mind in this case. It is most undesirable that issues should be too readily allowed on statements made in newspaper letters, containing nothing in themselves libellous, and which can only be brought into the category of malicious slander by innuendo. But having had the advantage of consultation with your Lordships, I have come to the conclusion that in this case the Lord Ordinary has erred in refusing to allow an issue as in a relevant case.

The pursuer complains of a letter which appeared in the *West Lothian Courier*, in which a conviction against the pursuer for shebeening is referred to, and comparisons are made between the way in which the Licensing Court dealt with another case which came before them and that of the pursuer. The writer then proceeds thus:—"And I should like to ask whether this was the first conviction against the same party?" This phrase the pursuer proposes to innuendo as meaning that there was a previous conviction against him, which thus aggravated his offence. It appears to me that such an innuendo might fairly be deduced from the words used, and that the pursuer has stated a relevant case to entitle him to an issue, it being for the jury to say whether on the evidence the innuendo has been established, and what damage, nominal or substantial, has been incurred.

I am therefore in favour of recalling the interlocutor of the Lord Ordinary and allowing the issue.

LORD KYLLACHY.—I should myself have been quite prepared to concur with the Lord Ordinary's judgment, but I feel the force of the view which your Lordships take, that the innuendo is not absolutely inadmissible, and that therefore the question is one rather for the jury than for the Court. I do not therefore dissent from the judgment proposed.

LORD KINCAIRNEY concurred.

LORD STORMONTH-DARLING.—The Lord Ordinary has disallowed this issue on the ground that the summons does not disclose any issuable matter. The anonymous letter to the defenders' newspaper on which the issue is founded is evidently not written in any spirit hostile to the liquor trade as a whole, for its purport is to complain of the forfeiture of a particular licence in the village of Broxburn. And I do not wonder if his Lordship regarded the pursuer's complaint of a charge that he had been more than once convicted of shebeening, when he admits having been convicted once, as rather unsubstantial. The charge is spelled out of a passage in the letter which asks if the admitted conviction was "the first conviction against the same party," and the question is asked for the purpose of shewing that, inasmuch as it was not followed by forfeiture, the punishment meted out to the other licence-holder was unduly severe.

Still, whatever may have been the writer's motive, it was undoubtedly,

[1] Carmichael v. Cowan, Dec. 19, 1862, 1 Macph. 204, 35 Scot. Jur. 95; M'Kerchar v. Cameron, Jan. 19, 1892, 19 R. 383.

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though not perhaps very grossly, libellous to say or imply that the pursuer had been more than once convicted of shebeening if such was not the fact. And I cannot say that the words used, though used in the form of putting a question, were not capable of the meaning that the pursuer had been convicted more than once.

That being so, I think the pursuer is entitled to have the verdict of a jury on the question whether the words were used in that sense or not. The innuendo is not an unreasonable or forced one, and it is only when an innuendo is unreasonable or forced that a Court is entitled to reject it.

I am therefore for recalling the Lord Ordinary's interlocutor and allowing the issue.

THE COURT recalled the interlocutor of the Lord Ordinary, and approved of the issue proposed by the pursuer.

BRYSON & GRANT, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

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Walsh v. Magistrates of Pollokshaws.

MRS AGNES BOYLE OR WALSH, Pursuer (Reclaimer).—*Clyde, K.C.*—*Hunter.*

PROVOST AND MAGISTRATES OF POLLOKSHAWS AND OTHERS, Defenders (Respondents).—*C. N. Johnston, K.C.*—*Orr.*

*Public-House—Licensing Court—Certificate—Refusal to renew certificate—Discretion of Licensing Authority—Grounds on which reduction of the deliverance of a Licensing Court will be granted—Licensing (Scotland) Act*, 1903 (3 *Edw. VII. c.* 25), *sec.* 11.—A licence-holder, who had been refused a renewal of her certificate, raised an action for the reduction of the deliverance of the Licensing Court on the ground that their proceedings had been illegal, unjudicial, and oppressive. She averred that she had received no notice of any objection to the renewal of her certificate, and that no complaint had been made as to the conduct of her business or the sanitary condition of her premises; that at the Licensing Court formal objection having been taken to the renewal on the ground that the premises were insanitary and the district congested, she was heard through her agent, and offered to carry out any recommendations the Court might make in regard to the sanitary arrangements of the premises; that thereupon the Court, without hearing evidence in support of the objections, refused to renew the certificate on the ground that the premises were insanitary and the district congested. She further averred that the Magistrates who formed the Court had prejudged the question by having come to a resolution prior to the sitting of the Court to reduce the number of licensed premises in the district.

*Held* (1) that the Court cannot interfere with the discretion of the licensing authority exercised within the limits of its statutory jurisdiction, unless it has failed to give a judicial consideration to the application before it; (2) that the averments set forth disclosed no case of the licensing authority having exceeded their statutory jurisdiction or having failed to give a judicial consideration to the pursuer's application.

*Lundie* v. *Magistrates of Falkirk*, Oct. 31, 1890, 18 R. 60, *commented on*; *Evans* v. *Conway Justices*, [1900] 2 Q. B. 224, and *Raven* v. *Southampton Justices*, [1904] 1 K. B. 430, *distinguished.*

1st DIVISION. with three consulted Judges. Ld. Kyllachy.

MRS AGNES BOYLE OR WALSH, recently spirit merchant, 81 King Street, Pollokshaws, raised an action against (first) the Provost and Magistrates of Pollokshaws, as the licensing authority of the burgh, and (second) the members of the Licensing Appeal Court for the burgh that sat on 5th May 1904, in which she sought for reduction

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of (1) a deliverance of the Licensing Court of Pollokshaws, dated 12th April 1904, refusing her application for a renewal of her public-house certificate, and (2) a deliverance of the Licensing Appeal Court refusing her appeal against the foresaid deliverance. The summons also concluded for declaratory findings as to the defenders' duty "to hear and determine judicially the cause or matter raised by the pursuer's application for renewal," and of their failure to do so; and asked for decree ordaining them to hold a Court to do so, or otherwise to grant her a public-house certificate for the current year.

The pursuer set forth that she was the widow of a spirit merchant, and that, on her husband's death in February 1902, she had obtained a transfer of his certificate for licensed premises at 81 King Street, Pollokshaws, that that was her sole means of subsistence, and that the certificate had been renewed in 1902 and 1903. She stated that her husband had purchased the business in 1900, and that for fifty years previously the premises had been licensed in favour of her husband's predecessor and his father. She further averred;—(Cond. 4) "At the Licensing Court on 12th April 1904 applications were made for the renewal of thirty-five public-house certificates in the burgh. The Magistrates dealt with various of these applications in four groups. The first group consisted of six applications, the second group consisted of ten, the third of five, and the fourth of eight applications. The remainder of the thirty-five were treated separately. The pursuer's application was in the third group of five. These were first all called together. Each of the applicants was then heard separately. When pursuer's agent moved for the renewal, Inspector Alexander Geddes, of the Renfrewshire County Police, verbally objected to the renewal on the ground that the premises were insanitary and the district congested. He did not in stating the objections give any explanation as to the alleged insanitary condition, and as to in what respect it consisted, but merely stated the *pro forma* objection, nor did he give any explanation as to the alleged congested condition of the district, and no questions were asked on these points by the Magistrates. The Procurator-fiscal for the burgh was present, but did not object. The said Alexander Geddes was not put on oath, and did not farther explain in what respect the premises were insanitary, and no evidence was led in support of either of said objections. After Inspector Geddes had verbally intimated his said objections, the pursuer's agent, in respect of the powers of the Licensing Court under the Act of 1903, sec. 42, subsec. 3, informed the Court that the pursuer would undertake, if her application were granted, to carry out any recommendation the Court might make in regard to the sanitary arrangements of the premises, but his offer was disregarded. In point of fact, as the Court knew nothing about the sanitary condition of the premises, and made no inquiry, they could make no recommendation. After hearing the agent for the pursuer, the members of the Court, without calling for evidence, retired to consider the pursuer's application along with the four applications in the same group by other persons for renewal of certificates for other premises, and on returning to the Court-Hall the said Provost Robert Wilson, as chairman, intimated that the Court refused two of the applications, including the pursuer's, on the ground that the premises were insanitary and the district congested, and her application was accordingly refused by the said Court. No indica-

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tion whatever was given, or has yet been given, in what respect pursuer's premises were insanitary." (Cond. 6) "Said refusal to renew pursuer's licence was in pursuance of a preconceived determination of the Magistrates of Pollokshaws adopted prior to the said Licensing Court. On 1st April 1904 the Town-clerk, acting on behalf of the Magistrates, sent a letter to the pursuer and each of the other licence-holders in the following terms:—'After full consideration of all circumstances, the Magistrates, at a meeting last night, were unanimously of opinion that the number of licensed premises in the burgh of Pollokshaws is greatly in excess of the reasonable requirements of the inhabitants.

'In view of this they have instructed me to write to all certificate-holders in the burgh and inquire whether they have any scheme to propose or any suggestion to make whereby the number of licences may be reduced for the ensuing year.

'You are requested to let me have a reply to this communication not later than 7th inst.—Yours truly,

'ROBERT BRYCE WALKER, Town-clerk.'

The Magistrates in so acting and arriving at their unanimous opinion, and that before the statutory Licensing Court, exceeded their statutory powers and duties, acted illegally, and to the pursuer's serious loss and prejudice. To this circular letter the Magistrates received a reply from the licence-holders collectively and from individual licence-holders personally. As their replies did not satisfy them they arranged that Inspector Geddes should take objections to certain of the renewals in order to give them the opportunity of making the reduction on which they had determined. And at the said Licensing Court the Magistrates dealt with the applications without having any evidence before them that the district was over-supplied or which would enable them to discriminate among the various premises for the suppression of any of them, and in particular, having no evidence before them that the pursuer's premises were insanitary, but disposed of the applications entirely on their own preconceived determination." In Cond. 8 the pursuer averred that the members of the Licensing Court, before calling the applicants before them, received deputations from certain bodies hostile to the granting of public-house certificates. That the hearing of those deputations, who had no *locus standi* to object, was irregular, and had biassed the Court against renewing the pursuer's certificate.

Cond. 9 was as follows:—(Cond. 9) "The refusal to renew the pursuer's certificate was unwarranted, and the grounds given by the Magistrates were not such as they were entitled in law to proceed upon. Her premises were in the same condition, so far as sanitary arrangements are concerned, as they had been in for many years without any objection being taken thereto. The said defenders were bound, before proceeding upon such a ground to refuse a renewal of the pursuer's premises, to give her an opportunity of altering said premises to meet the requirements of the Magistrates. The action of the defenders was oppressive. Further, the defenders were not entitled to single out the pursuer's licence as they did and arbitrarily to refuse it on the ground that the district in which the pursuer's public-house was situated was congested."

In Cond. 10 the pursuer set forth that she had appealed to the Licensing Appeal Court, and that the Appeal Court "actuated by the same motives and in pursuance of the same preconceived determina-

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tion" refused to reverse the deliverance appealed against. That no objector appeared in this appeal, and no evidence in support of any objection was heard, and that she had therefore a *prima facie* right to have her appeal sustained.

The pursuer also averred that the Licensing Court were not entitled to entertain the objection stated by Inspector Geddes, as the superintendent of police was alone entitled, under sections 19 and 20 of the Licensing Act of 1903, to state objections without notice.

In their answers the defenders, while admitting the general accuracy of the pursuer's account of the procedure followed at the Licensing Court, stated that "the Magistrates had visited before the date in question all the licensed premises in the burgh, and were acquainted with the sanitary condition of the pursuer's premises." They also stated (Ans. 4), that Inspector Geddes was authorised in writing by the chief constable to state his (the chief constable's) objections to the renewal of the pursuer's certificate.

The pursuer pleaded;—(1) The refusal of the pursuer's application, and the affirmance thereof by the Court of Appeal, should be reduced or declared of no effect in respect the proceedings complained of were outwith the statutes and unlawful. (2) The deliverance of the Magistrates refusing the pursuer a renewal of her certificate ought to be reduced on one or other of the following grounds:—(*a*) Because the Magistrates had previously to the Licensing Court prejudged the application, by forming a policy to reduce the number of certificates, and *separatim*, had acted thereon without judicially discriminating. (*b*) Because of the hearing of deputations adverse to the granting of the pursuer's certificate. (*c*) Because the said Alexander Geddes (he not being a chief constable or superintendent of police), was heard by the Magistrates without his having given notice of objection to the renewal of the pursuer's certificate. (*d*) Because the Magistrates had no evidence before them on the subject of the objections in respect of which they refused the pursuer's application for renewal. (*e*) Because the grounds stated by the Magistrates for the refusal to renew the pursuer's certificate were not grounds upon which they were entitled to proceed. (3) The pursuer, under the Licensing Acts and at common law, is, in respect of the special circumstances condescended on by her, entitled to decree or decrees in terms of the conclusions of the summons.

The defenders pleaded;—(2) No relevant case. (3) The whole actings of the said Magistrates in the matter libelled being lawful and regular, and being within their powers and discretion, the action is groundless, and these defenders should be assoilzied, with expenses. (4) The objections stated in the Licensing Court against pursuer's application being lawful and competent, the deliverance of the Magistrates is not open to reduction on the ground that said objections were heard by the Magistrates.

The Lord Ordinary (Kyllachy), on 24th December 1904, pronounced this interlocutor:—"The Lord Ordinary, having heard counsel in the Procedure-roll, finds that, apart from the pursuer's averments in condescendence 4 relating to the alleged departure by the Magistrates from the statutory enactments on receiving and entertaining an objection to the renewal of the pursuer's licence stated by Alexander Geddes therein designed, the pursuer has stated no relevant case for the interference of the Court: Therefore repels the pursuer's pleas except so far as founded on said alleged illegal procedure; and in respect

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that the parties are at issue as to the facts regarding the said procedure, and are agreed that the same must be ascertained by a proof before further answer, allows to both parties a proof of their respective averments as to said matter as contained in condescendence 4 and the defenders' answer thereto, and to the pursuer a conjunct probation. . . ."

The pursuer reclaimed, and, after the hearing, the Court ordered the case to be re-argued before a Court of seven Judges.

At the hearing before the seven Judges the pursuer argued;—The whole averments of the pursuer were relevant, and should have been admitted to probation. It was no doubt the case that the discretion of the licensing authority was absolute, and their refusal to renew a licence could not be reviewed on its merits, but their decision must be arrived at in a judicial manner or it would be subject to reduction. Here the pursuer's averments clearly set forth a non-judicial exercise of this discretion. The Magistrates had acted oppressively with regard to the alleged insanitary state of the premises. No notice of this objection had been given; the pursuer had been afforded no opportunity of remedying it; and her offer to do so had been ignored. By section 42, subsection (2), of the Licensing (Scotland) Act, 1903,* she could not remedy it herself, but could only do so with the consent of the Licensing Court; that consent had been refused, and this provision had thus been oppressively used to deprive the pursuer of her licence. The case of *Lundie*[1] was not conclusive of the matter, for that case dealt with illegal proceedings rather than with want of judicial consideration. In any event the law had been carried much further since that time by a series of English decisions following on *Sharp* v. *Wakefield*.[2] In these cases it was established that the Court must not proceed on a preconceived determination, and must have evidence on which to base its decisions. Although the English Licensing Acts differed in some particulars from the Scotch Acts, the principles underlying these decisions were equally applicable to Scotland. Here there were averments of preconceived determination and of absence of evidence sufficient to justify reduction. Even if congestion of the district were a sufficient reason for reducing the licences, there must be evidence to shew why the pursuer's licence should be selected for

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* The Licensing (Scotland) Act, 1903 (3 Edw. VII. c. 25), enacts, sec. 11 (dealing with meetings at the Licensing Court at which certificates to keep public-houses are granted),—". . . Provided always that all such meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open Court, if such party shall think fit to attend, and any certificate granted otherwise than at such meetings shall be void and of no effect. . . ."

Sec. 42, subsec. (2), "Any reconstruction of or alteration in any licensed premises for the sale by retail of exciseable liquors to be consumed thereon, shall not be made without the consent of the Licensing Court . . . ; and if any such reconstruction or alteration is made, save under the order of some lawful authority, without such consent as aforesaid, the Sheriff . . . may by order declare the certificate to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition."

[1] Lundie v. Magistrates of Falkirk, Oct. 31, 1890, 18 R. 60.

[2] Sharp v. Wakefield, [1891] A. C. 173; Evans v. Conway Justices, [1900] 2 Q. B. 224; Rex v. Howard, [1902] 2 K. B. 363; Raven v. Southampton Justices, [1904] 1 K. B. 430.

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The pursuer also averred that the Licensing Court were not entitled to entertain the objection stated by Inspector Geddes, as the superintendent of police was alone entitled, under sections 19 and 20 of the Licensing Act of 1903, to state objections without notice.

In their answers the defenders, while admitting the general accuracy of the pursuer's account of the procedure followed at the Licensing Court, stated that "the Magistrates had visited before the date in question all the licensed premises in the burgh, and were acquainted with the sanitary condition of the pursuer's premises." They also stated (Ans. 4), that Inspector Geddes was authorised in writing by the chief constable to state his (the chief constable's) objections to the renewal of the pursuer's certificate.

The pursuer pleaded;—(1) The refusal of the pursuer's application, and the affirmance thereof by the Court of Appeal, should be reduced or declared of no effect in respect the proceedings complained of were outwith the statutes and unlawful. (2) The deliverance of the Magistrates refusing the pursuer a renewal of her certificate ought to be reduced on one or other of the following grounds:—(*a*) Because the Magistrates had previously to the Licensing Court prejudged the application, by forming a policy to reduce the number of certificates, and *separatim*, had acted thereon without judicially discriminating. (*b*) Because of the hearing of deputations adverse to the granting of the pursuer's certificate. (*c*) Because the said Alexander Geddes (he not being a chief constable or superintendent of police), was heard by the Magistrates without his having given notice of objection to the renewal of the pursuer's certificate. (*d*) Because the Magistrates had no evidence before them on the subject of the objections in respect of which they refused the pursuer's application for renewal. (*e*) Because the grounds stated by the Magistrates for the refusal to renew the pursuer's certificate were not grounds upon which they were entitled to proceed. (3) The pursuer, under the Licensing Acts and at common law, is, in respect of the special circumstances condescended on by her, entitled to decree or decrees in terms of the conclusions of the summons.

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The Lord Ordinary (Kyllachy), on 24th December 1904, pronounced this interlocutor:—"The Lord Ordinary, having heard counsel in the Procedure-roll, finds that, apart from the pursuer's averments in condescendence 4 relating to the alleged departure by the Magistrates from the statutory enactments on receiving and entertaining an objection to the renewal of the pursuer's licence stated by Alexander Geddes therein designed, the pursuer has stated no relevant case for the interference of the Court: Therefore repels the pursuer's pleas except so far as founded on said alleged illegal procedure; and in respect

that the parties are at issue as to the facts regarding the said procedure, and are agreed that the same must be ascertained by a proof before further answer, allows to both parties a proof of their respective averments as to said matter as contained in condescendence 4 and the defenders' answer thereto, and to the pursuer a conjunct probation. . . ."

The pursuer reclaimed, and, after the hearing, the Court ordered the case to be re-argued before a Court of seven Judges.

At the hearing before the seven Judges the pursuer argued;—The whole averments of the pursuer were relevant, and should have been admitted to probation. It was no doubt the case that the discretion of the licensing authority was absolute, and their refusal to renew a licence could not be reviewed on its merits, but their decision must be arrived at in a judicial manner or it would be subject to reduction. Here the pursuer's averments clearly set forth a non-judicial exercise of this discretion. The Magistrates had acted oppressively with regard to the alleged insanitary state of the premises. No notice of this objection had been given; the pursuer had been afforded no opportunity of remedying it; and her offer to do so had been ignored. By section 42, subsection (2), of the Licensing (Scotland) Act, 1903,* she could not remedy it herself, but could only do so with the consent of the Licensing Court; that consent had been refused, and this provision had thus been oppressively used to deprive the pursuer of her licence. The case of *Lundie*[1] was not conclusive of the matter, for that case dealt with illegal proceedings rather than with want of judicial consideration. In any event the law had been carried much further since that time by a series of English decisions following on *Sharp* v. *Wakefield*.[2] In these cases it was established that the Court must not proceed on a preconceived determination, and must have evidence on which to base its decisions. Although the English Licensing Acts differed in some particulars from the Scotch Acts, the principles underlying these decisions were equally applicable to Scotland. Here there were averments of preconceived determination and of absence of evidence sufficient to justify reduction. Even if congestion of the district were a sufficient reason for reducing the licences, there must be evidence to shew why the pursuer's licence should be selected for

* The Licensing (Scotland) Act, 1903 (3 Edw. VII. c. 25), enacts, sec. 11 (dealing with meetings at the Licensing Court at which certificates to keep public-houses are granted),—". . . Provided always that all such meetings shall be held with open doors, and that it shall not be competent to refuse the renewal of any certificate without hearing the party in support of the application for renewal in open Court, if such party shall think fit to attend, and any certificate granted otherwise than at such meetings shall be void and of no effect. . . ."

Sec. 42, subsec. (2), "Any reconstruction of or alteration in any licensed premises for the sale by retail of exciseable liquors to be consumed thereon, shall not be made without the consent of the Licensing Court . . . ; and if any such reconstruction or alteration is made, save under the order of some lawful authority, without such consent as aforesaid, the Sheriff . . . may by order declare the certificate to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition."

[1] Lundie v. Magistrates of Falkirk, Oct. 31, 1890, 18 R. 60.

[2] Sharp v. Wakefield, [1891] A. C. 173; Evans v. Conway Justices, [1900] 2 Q. B. 224; Rex v. Howard, [1902] 2 K. B. 363; Raven v. Southampton Justices, [1904] 1 K. B. 430.

No. 181. refusal. The decision of the Licensing Appeal Court was not decisive, for the same principles were applicable to its decisions also.[1]

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The respondents, while not objecting to the limited allowance of proof that the Lord Ordinary had allowed, argued;—In Scotland the licensing authority had absolute discretion to refuse renewal of a licence merely because they were of opinion that the district was congested. They were under no obligation to state the reasons for their refusal. Even if a reason for determination were necessary they had one here in the fact that these premises were the least satisfactory from a sanitary point of view. They were under no obligation to allow the pursuer to reconstruct her premises, and even had they allowed it, it did not follow that she would of right have been entitled to a renewal. As far as Scotch authority went the Magistrates' discretion could not be interfered with so long as they had not exceeded their statutory jurisdiction.[2] The English authorities cited were inapplicable, as they all turned on the procedure enactments of the English Acts, which were different from those in the Scotch Acts. The corresponding provisions in the Scotch Act of 1903 were in section 11, which provided for the hearing of the applicant in open Court, and that had been done here. Subject to that provision the Licensing Court had absolute discretion, and it was incompetent to inquire into the reasons or methods of its decisions.[3]

At advising,—

LORD PRESIDENT.—In this case the pursuer is a Mrs Walsh, who until recently was a licence-holder in a shop in Pollokshaws. The defenders are the licensing authorities of Pollokshaws, constituted under the recent Act, and the Appeal Court of the burgh of Pollokshaws and county of Renfrew, who are the appeal authority under the same Act. The pursuer got a renewal of the licence in the premises which she recently occupied in the years 1902 and 1903. She succeeded her husband, deceased, who had acquired the business about two years before, the business being at that time an old one, and having, as we are told, had a licence for a period of about fifty years. At the Licensing Court in April 1904 the pursuer was refused a renewal of her licence, and the present action is brought by her, and directed against the licensing authority, and seeks for reduction of the proceedings then carried through, upon various grounds which are set forth in her condescendence.

Now, the averments in the condescendence are contained specially in cond. 4 and following articles. I shall not read them at length to your Lordships, but for practical purposes they may be summarised thus—the pursuer says that before her appearance at the Court, where I need not remind you she was about to seek renewal of the licence, no objection had ever been taken to the way in which she conducted her business in any respect, but that, when she got to the Court, she heard for the first time an objection stated, which was stated by a certain inspector, Alexander Geddes, of the Renfrewshire County Police. The objection stated by him was

[1] Evans v. Conway Justices, *supra*.

[2] Lundie v. Magistrates of Falkirk, 18 R. 60; Millar v. Campbell, Jan. 17, 1849, 11 D. 355; Cameron v. Magistrates of Glasgow, Feb. 20, 1903, 5 F. 490.

[3] Boulter v. Kent Justices, [1897] A. C. 556.

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twofold, and was that the pursuer's premises were insanitary, and the district congested.

Now, I ought to explain that Alexander Geddes was, as I have said, an inspector; but he was not the chief constable. Your Lordships will remember that under the provisions of the Act it is laid down that no objection shall be dealt with of which due notice, as prescribed by the Act, has not been given, except that there are certain privileged persons who may state objections on the spot, of whom the chief constable is one. Alexander Geddes, we are told, affected to act on behalf of the chief constable, but was not the chief constable himself. In that state of the averments Lord Kyllachy, before whom the case depended, pronounced this interlocutor—"Finds that apart from the pursuer's averments in cond. 4 relating to the alleged departure by the Magistrates from the statutory enactments on receiving and entertaining an objection to the renewal of the pursuer's licence stated by Alexander Geddes therein designed, the pursuer has stated no relevant case for the interference of the Court: Therefore repels the pursuer's pleas except so far as founded on said alleged illegal procedure; and in respect that the parties are at issue as to the facts regarding the said procedure, and are agreed that the same must be ascertained by a proof before further answer, allows to both parties a proof of their respective averments as to said matter as contained in cond. 4 and the defender's answer thereto, and to the pursuer a conjunct probation." Against that interlocutor this reclaiming note has been taken, the pursuer urging that she should be entitled to a proof of the whole of her averments on record. The respondents do not desire to disturb the Lord Ordinary's interlocutor, and therefore in any case there must be a proof upon the limited matter allowed.

The Lord Ordinary's interlocutor is confessedly based upon the judgment which was pronounced by this Division of the Court in the case of *Lundie* v. *Magistrates of Falkirk*.[1] The facts in that case are these:—Lundie, who was a public-house keeper, and had applied in ordinary form for a renewal of his certificate, had his certificate refused, and the ground on which it was refused was that he had improperly conducted his house; and the way in which that was sought to be proved in Court was that two constables deponed to having seen drunk persons issuing from the public-house, and that state of facts was corroborated by the personal knowledge of the presiding member of the Licensing Court at that time. Lundie complained that he had not had an opportunity of shewing, as he said he was prepared to shew, that these drunk persons had not been supplied with liquor by him, and that so far consequently from the fact of these drunk persons having been seen issuing from his public-house being evidence of the bad keeping of the public-house, it really, if the facts had been truly known, would have proved something quite the other way, namely, that in his anxiety to obey the conditions of his certificate by maintaining good order and rule in his premises, he had properly turned away men who had entered his premises intoxicated without supplying them with further liquor, so as not to contravene the statute. He complained that, though he could prove all these

[1] 18 R. 60.

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facts, he never had an opportunity of doing so, and judgment had been pronounced *de plano* against him. Now, the reasons that are alleged why the application of *Lundie's*[1] case to the present case should be considered or reconsidered are these—in the first place, that that case was under a different Act, for, as your Lordships know, a recent Act has passed since that date; and secondly, that that case was decided upon 31st October 1890, whereas the well-known case of *Sharp* v. *Wakefield*,[2] in the House of Lords, was not decided until 1891.

As regards the first point—I mean the point of the difference of the two Acts—there is no doubt one specialty in *Lundie's* case,[1] which does not apply to this. Lord President Inglis, who delivered the judgment of the Court in *Lundie's* case, says at one portion of his judgment,—"When an appeal is given to a particular tribunal, that would in ordinary circumstances impliedly exclude any other appeal; but in the present case the statutes do not leave the matter there, for they provide not only that there shall be an appeal to the Quarter-Sessions, but by the 34th section of the Act 25 and 26 Vict. cap. 35"—that being the ruling licensing Act in this country at that date—"it is further provided that no warrant, sentence, order, decree, judgment, or decision made or given by any Quarter-Sessions, Sheriff, Justice or Justices of the Peace, or Magistrate in any matter under the authority of these Acts shall be subject to reduction, or appeal, or any other form of review, on any ground or for any reason whatever, other than by this Act provided." So that to a certain extent, no doubt, the Lord President in that case did go upon the finality clause, and he held that, as this was a judgment given by the Justices of the Peace and Quarter-Sessions, the finality clause applied. Now, that cannot be said of the present Act, because the finality clause in the present Act is in somewhat different terms. The finality clause of the present Act is embodied in section 103, and it is this,—"No warrant, sentence, order, decree, judgment, or decision made or given by any Quarter-Sessions, Sheriff, Justice, or Justices of the Peace, or Magistrate in any cause, prosecution, or complaint, or in any other matter under the authority of this Act, shall be subject to reduction," and so on. Now, it is clear on the construction of that section that that applies to matters such as prosecutions, and that it does not apply to decisions given by a Licensing Court, because a Licensing Court is a specially constituted Court under the Act and does not come under the nomenclature of Quarter-Sessions, Sheriff, or Justices of the Peace, or Magistrates; and accordingly the pursuer is probably entitled to say that in so far as Lord President Inglis' judgment in *Lundie's* case[1] rested on the finality clause, she has been able to make good a distinction between the state of the law as it existed then and the state of the law as it exists now. But that I think is all that can be said upon the differences between the two cases. As your Lordships know, the recent Act made no difference, on what may be called the general scheme of licensing, from the old law. It altered the tribunal, making a specially constituted tribunal instead of Justices of Peace in counties and Magistrates in cities, which was the old tribunal, and it constituted a new Appeal Court; but it left the

[1] 18 R. 60. [2] [1891] A. C. 173.

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general scheme of the law as to the granting of licences, and in particular it left the whole question as to discretion, precisely where it found it. Accordingly the subsequent remarks of Lord President Inglis may be right or may be wrong, but I do not think that they can be fairly put aside because they were made under a different Act. I think, for his purpose, they might just as well have been made under the present Act. His Lordship goes on thus. He says,—"I cannot comprehend upon what ground we are asked to entertain this reduction. The true nature of the action is not disguised. We are asked to reduce the proceedings of the Justices upon their merits—perhaps not in this sense, that the pursuer of the reduction takes up the position that the Court came to a wrong conclusion upon the evidence before it. It may be that the ground of objection is that the defenders did not take the proper evidence to enable them to decide the question before them, or that they excluded evidence which ought to have been admitted, or allowed evidence which ought to have been excluded. But all these things are within the jurisdiction of the Court to whom is committed a privity of jurisdiction under the statutes, and we have nothing to do with the way in which that Court conducts its inquiry, or with the propriety of its proceedings, any more than we have with the general result at which it may arrive. In short, we are not entitled to touch a judgment of the Justices or of the Quarter-Sessions unless it can be shewn that these tribunals, or either of them, have exceeded their statutory jurisdiction, and I cannot find any relevant averment in the present case that they have done so."

Now, it remains for us therefore to see whether or not, in the light of what I think now must be considered a supreme authority, namely, in the light of what the Lord Chancellor said in the case of *Sharp* v. *Wakefield*,[1] there is anything to take back from this observation of Lord President Inglis. I am bound to say I do not think there is, except to this extent, that there may be a criticism on the actual form of the words used, especially where he says that the tribunals cannot be touched unless they have exceeded their statutory jurisdiction. But even then I think a good deal depends on how you construe these words, "exceeded their statutory jurisdiction." The leading passage in the case of *Sharp* v. *Wakefield*[1] is a passage in the judgment of Lord Halsbury, the Lord Chancellor, on page 179, where his Lordship says this,—"An extensive power is confided to the Justices in their capacity as Justices to be exercised judicially; and 'discretion' means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, not according to private opinion . . . according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular." If, consequently, you were to read the words "exceed their statutory jurisdiction" in their very narrowest sense, then I admit that I think the words used by Lord President Inglis would require reconsideration, but I am not at all sure that his Lordship used them in their narrowest sense, and I have not the slightest doubt that, if the question could have been put to him, he would have quite admitted that if the

[1] [1891] A. C. 173.

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Justices or tribunal he was then dealing with—and the same is to be said of the tribunal we are now dealing with—should have so flagrantly violated all conditions which shew a judicial spirit, they might be interfered with to the extent of being told that they must consider the matter in a judicial frame of mind.

But as regards the merits it seems to me that the judgment of Lord President Inglis remains, that no change is made by the recent Act, and that on the merits the tribunals are absolute Judges. And when I say "the merits," I mean not an adjudication of right on the one side or on the other, but the right to say "Aye" or "No" to an application, after having given a judicial consideration to the request. As I have said, I think that, on the question of evidence, there might be such a flagrant departure from all laws and practice of judicial consideration as to admit of interference by this Court. I think the analogy is very close between this matter and one on which there is much authority, namely, where the Court will interfere with the proceedings of an arbiter, and, without citing further authority on that I will only say that I know no authority from which may better be gathered the true rules under which this Court will proceed than by a contrast of the circumstances of the two old but well-known cases of *Mitchell*[1] and *Mowbray*,[2] which are both reported in the tenth volume of Dunlop.

Now, what is it that is said here? It is said that there was no evidence allowed as to the insanitary condition of these premises, but, on the other hand, one is not entitled to disregard the fact that these persons were local gentlemen, and that they might have personal knowledge of the subject which made it in their view useless for them to insist upon evidence in the matter. Then it is also said that there was an offer to put the premises right. Now, if putting them right would have given the licence-holder a right to the licence, then certainly I should have been of opinion that the disregarding of that offer would have amounted to substantial injustice. But if the premises had been put right it gave the licence-holder no absolute right in law to have his licence. The licensing authorities were perfectly entitled, if they chose, to go upon this view, that the district was what they called congested—that is to say, in other words, that there were more public-houses than the public required, and I think all that they needed over and above that was that they must give personal consideration—I mean in the sense of not mixing it up with other cases—to the case on hand. They were entitled to refuse A or B or C for any reason that seemed best to them, as long as they had truly considered the cases of A and B and C, and, whether in my view it would have been a good reason or not, I cannot say that I think it is an illegal reason, that they refused A and preferred B upon the ground that, in the past, A's premises had not been in such a good sanitary condition as B's, even although they were met with a standing offer on the part of A that, if they chose, A would put his premises in as good a condition as B's were. They did in this case all that they were bound to do under section 11 of the Act, which, dealing with the granting

[1] Mitchell v. Cubla, June 17, 1848, 10 D. 1297.
[2] Mowbray v. Dickson, June 2, 1848, 10 D. 1102.

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of certificates, provides that it shall not be lawful to refuse a certificate without hearing the party in support of the application in open Court. Now, if they had contravened that provision, then I think this Court would have had a jurisdiction to interfere, but they did not do that, and, for the reasons I have stated, I do not think that here we could interfere upon the ground that, if we had to form our opinions, we would have liked more evidence on this matter or the other. These are my views formed on the Act.

But the pursuer here urged very strongly upon your Lordships, and that very rightly, certain decisions which have been come to in England, which, though not binding on us, are, I need scarcely say, entitled to the very greatest respect. The decisions which she brought before our notice were, first, the decision of *Evans* v. *The Justices of Conway*.[1] The rubric, which is short, brings out the point of the case well enough. It is this:—"On an appeal to Quarter-Sessions against the refusal of Licensing Justices to renew a licence, the Quarter-Sessions are not entitled to refuse to renew the licence without evidence of any ground of objection to its renewal." And the case was followed in the case of *Raven* v. *Justices of Southampton*,[2] where although there was not in one sense no evidence at all, there was something which the Court held tantamount to no evidence. There was the mere production of a map shewing public-houses upon it, but not shewing anything about one particular house as against another. Now, the reclaimer argued that these cases were decided after *Sharp* v. *Wakefield*[3]—in other words, that they would live with *Sharp* v. *Wakefield*,[3] but were explanatory of the discretion as set forth in *Sharp* v. *Wakefield*[3]—and she asked your Lordships to come to the same conclusion in this case. But without for one moment saying that I, if I had been on that bench, would not have agreed with these judgments, I am bound to say I think they were pronounced upon a law which differs in one very important particular from the law which we are now administering. The section on which much turns on this matter is the 42d section of the Licensing Act of 1872.[4] I am of course referring to the English Act. Now, that section has provisions as to the renewal of licences, and is in the following terms:—"Where a licensed person applies for the renewal of his licence the following provisions shall have effect:—(1) He need not attend in person . . . unless he is required by the Licensing Justices so to attend. (2) The Justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the General Annual Licensing Meeting . . . (3) The Justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath"; and then it goes on to say,—"Subject as aforesaid, licences shall be renewed and the powers and discretion of Justices relative to such renewal shall be exercised as heretofore." I need scarcely point out that we have nothing at all corresponding to that section. That section

[1] [1900] 2 Q. B. 224.
[2] [1904] 1 K. B. 430.
[3] [1891] A. C. 173.
[4] 35 and 36 Vict. c. 94.

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was greatly canvassed in the case of *Sharp* v. *Wakefield*,[1] because of course it was really a strong point of those who argued against the decision of *Sharp* v. *Wakefield*[1] as it was eventually given. They argued, naturally enough, that these words which I have read at the end of the section left no discretion in the Justices at all, but shewed that if these things were not done the right to renewal was an absolute right. The House of Lords held otherwise, and it assigned to section 42 its proper place. It said, 42 is a procedure section, and that procedure must be followed; but subject to that procedure being followed, then the Justices have got full discretion.

Now, I think, in the light of the decision in *Sharp* v. *Wakefield*[1] when it is properly considered, it is not at all difficult to see the true ground of judgment in *Evans* v. *The Conway Justices*[2] and *Raven* v. *The Justices of Southampton*.[3] These decisions simply amount to this, and nothing more, that they are a finding that in these cases the provisions of section 42 had not been followed, and accordingly, if they had been disregarded, I say no doubt the Court was perfectly right in setting aside the judgment, just as if we had a completely analogous case here, I should think we would be right in setting aside the judgment if the provisions of that particular procedure section I have referred to, section 11, had not been followed in this case. I should have been prepared then to interfere with the judgment, just as they did there, but I do not think these decisions can be raised beyond that, looking to the interpretation authoritatively given to section 42 by the House of Lords in the case of *Wakefield*.[1]

Accordingly, I have come to the conclusion on the whole matter that the judgment of Lord Kyllachy was right, and that we ought to adhere thereto.

LORD JUSTICE-CLERK, LORD ADAM, LORD M'LAREN, LORD KINNEAR, LORD KINCAIRNEY, and LORD STORMONTH-DARLING concurred.

THE COURT adhered.

JAMES PURVES, S.S.C.—INGLIS, ORR, & BRUCE, W.S.—Agents.

No. 182. July 19, 1905. Caledonian Railway Co. v. Glasgow Corporation.

CALEDONIAN RAILWAY COMPANY, Pursuers.—*Clyde, K.C.*—*Cooper, K.C.*—*King.*

CORPORATION OF THE CITY OF GLASGOW AND ANOTHER, Defenders.—*Campbell, K.C.*—*Wilson, K.C.*—*M. P. Fraser.*

*Process—Statutory Remedy—Sheriff—Declarator and reduction pending statutory appeal—Competency—Glasgow Building Regulations Act*, 1900 (63 *and* 64 *Vict. cap. cl.*), *sec.* 9 (2).—The Glasgow Building Regulations Act, 1900, by sec. 9 (2), directs that a Register of Streets shall be prepared, in which, *inter alia*, the width of streets may be entered, and that any proprietor aggrieved by any entry in the register may appeal to the Sheriff, whose decision shall be final.

A proprietor of subjects fronting on various streets in Glasgow brought an action in the Court of Session for declarator that the width of streets entered in the register must be the actual width, and that the width entered in certain cases opposite his properties was not the actual width, with conclusions for deletion of the entries and for interdict, and reduction. On the same date he appealed to the Sheriff against these entries.

[1] [1891] A. C. 173. [2] [1900] 2 Q. B. 224.
[3] [1904] 1 K. B. 430.

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*Held* (by First Division with three consulted Judges) that the action, although not incompetent, was premature, and fell to be dismissed.

*Police—Street—Building Regulations—Width of Street—Burgh—Glasgow Building Regulations Act*, 1900 (63 *and* 64 *Vict. cap. cl.*), *secs.* 4, 9 (2), *and* 20.—*Opinion* (*per cur.*) that in preparing the Register of Streets provided for by sec. 9 (2) of the Glasgow Building Regulations Act, 1900, "the width" of streets when entered therein must be the actual width of the street at the various points in its course, and not an ideal width fixed with a view to a public improvement.

1st Division. with three consulted Judges. Lord Low.

THE CALEDONIAN RAILWAY COMPANY, on 30th July 1904, brought an action against the Corporation of the City of Glasgow and Thomas Nisbet, Registrar of Public Streets, appointed under the Glasgow Building Regulations Act, 1900,* in which the pursuers concluded,

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* The Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), enacts:—Sec. 4, *inter alia*,—"'Public Street' means any road, street, lane, vennel, wynd, alley, bridge, quay, passage, square, or other place within the city used either by carts or foot-passengers which has been maintained by the Corporation, or which is by the Police Acts or shall hereafter in pursuance thereof be declared to be a public street."

"'Width' in relation to street or lane means the width of the carriageway and foot-pavements taken together."

Part II.—Streets.—Sec. 9 (1) "(*Register of Public Streets*).—'The Register of Public Streets' kept under the Act of 1866, with the additions and alterations made or to be made thereon, shall continue in force until the new Register of Public Streets hereinafter provided for is completed."

(2) (*a*). "(*Register and Map of Streets*).—The Corporation shall on or before the 1st day of January in the year 1902, or as soon as conveniently may be thereafter, cause a register (hereinafter referred to as 'The Register') to be prepared of all the public streets then in existence in the city, in which may be entered with regard to each such street:—(1) The name; (2) the situation by reference to numbers or other marks on the map hereinafter mentioned; (3) the point of commencement and termination; (4) the width; (5) the distance between the centre of the street and the building line, where such building line is fixed by statute, decree of the Sheriff or the Dean of Guild, or any resolution of the Sheriff or the Dean of Guild, or any resolution of the Corporation under or in pursuance of the provisions of this Act; (6) the character, whether an ordinary street, or a lane or court, and whether formerly a turnpike road, statute-labour road, or highway; (7) any other particulars which the Corporation may prescribe in pursuance of agreements between the Corporation and the owners of lands and heritages adjoining to and having a right of access by such street or in pursuance of any decree of the Dean of Guild.

"The Corporation shall further, on or before the said first day of January in the year 1902, or as soon as conveniently may be thereafter, cause the said streets to be marked and the area thereof coloured upon an Ordnance Survey map (hereinafter referred to as 'the map')."

(*b*) contains provisions as to public exhibition of the register for two months after notice by advertisement, and directs intimation by post to owners of lands.

(*c*). "Any proprietor who may be aggrieved by any entry in the register, or omission therefrom, or by any relative marking on the map, may, within the said period of two months, appeal to the Sheriff against the same. The Sheriff shall, after the expiry of the said period of two months, deal with any such appeal in a summary manner, and may order any entry in the register or relative marking on the map to be deleted or

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*inter alia*, for declarator (1) "that the defenders are not entitled to insert in the Register of Public Streets prepared under and in terms of the said Act, section 9, subsection (2) (*a*), under the heading 'Width of Street,' any entry stating, or to make on the Ordnance Survey map referred to in the said section of the said Act any marking shewing the width of street to be greater than the actual width thereof, where the railways, works, or properties of the pursuers front or abut on the same, or where the pursuers are interested therein, and that the width stated in the entries under the said heading and shewn on the said map to be the widths of streets are not the actual width of the following streets, where railways, works, or properties of the pursuers front or abut thereon, or where the pursuers are interested therein, viz.:"—(Then followed a list of streets).

There were also conclusions for deletion of the entries and markings on the map referred to; for interdict against the defenders making or retaining or reinserting in the said register or map any of

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altered, or direct such other or further entry to be made in the register or marking to be made on the map as he shall think fit, and his decision shall be final. Where any appeal is taken, or where, within the said period of two months, any representation is made to the Corporation with regard to any entry, omission, or marking, the Corporation may, with the consent of the Sheriff, make any alteration on the register and map which may appear necessary."

(*e*). "The register and map, with any deletion, alteration, correction, or addition that may be made on appeal or representatioh as aforesaid, or that may hereafter be made as above provided for, shall be docqueted by the Clerk to the Corporation and the Master of Works, and shall immediately thereon come into operation, and shall fix conclusively the particulars as aforesaid of the streets therein entered."

Sec. 18. "(*Grounds for refusal to sanction plans of streets*).—The Dean of Guild shall not, except with the consent of the Corporation, and subject to such conditions, if any, as the Corporation may prescribe, grant decree for the formation or laying out of any street:—

"(1) Where the width of such street proposed to be formed or laid out—

(*a*) Is less than 50 feet; or

(*b*) Where the width in case of a street the distance of the building lines whereof is at least 30 feet from the centre is less than 36 feet; or

(*c*) Where the width in case of a street which from the configuration of the ground cannot be built upon except on one side thereof is less than 30 feet. . . ."

Sec. 20. "(*Restraining erections within certain distance in streets*).—The Dean of Guild shall not, without the consent of the Corporation, grant decree for the erection or re-erection of any building upon ground adjoining any street unless on the condition that one half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures, if any, existing thereon, and shall, subject to the provisions of the Police Acts, be wholly dedicated to the public for street purposes, and this condition shall be presumed to be made by the Dean of Guild in every decree granted by him.

"Where the Dean of Guild shall, with the consent of the Corporation, grant any decree for the erection or re-erection of any such building nearer to the centre of such street than one-half of the width thereof, it shall be a condition of such decree that the space between such building and the centre of such street shall be cleared of all structures, if any, existing thereon, and shall, subject to the provisions of the Police Acts, be wholly

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the foresaid entries or markings; and if necessary for reduction of the said entries and markings.

The register and map prepared under section 9 (2) (*a*) of the Glasgow Building Regulations Act, 1900, were placed on completion in the office of the clerk to the Corporation on 28th May 1904, and the pursuers received a large number of notices as owners of certain lands and heritages in terms of section 9 (2) (*b*).

The pursuers set forth in a schedule appended to the summons excerpts from the register of streets of the entries of the several streets in which the pursuers were interested. With regard to these entries the pursuers averred:—(Cond. 7) "In the case of the undernamed streets set forth in the said Schedule No. 1, the width stated in the register under the heading 'Width of Street,' and coloured on the Ordnance Survey map relative to the said register referred to in the said subsection (2) (*a*) of section 9 of the said Act, is not the width of the street as it actually exists where the pursuers' railways and works or properties are situated or where they front or abut thereon. There is no authority under the statutes in force in the city of Glasgow or otherwise for stating the width of the streets at a different width from that actually existing. In certain cases the width of street as stated in the register and shewn on the map includes not only parts of areas of unbuilt-upon land in front of property belonging to the pursuers, although not actually used as street, but also includes the railways, works, and buildings, and the *solum* thereof belonging to the pursuers. The following are the streets referred to, viz."—(Then followed a list of streets).*

In answer, the defenders stated:—(Ans. 7) "Admitted that in the case of certain of the streets here specifically enumerated the width in the register under the heading 'Width of street' is not the width of the street as it actually exists where the pursuers' railways, works, and properties are situated, or where they front or abut thereon.

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dedicated to the public for street purposes, and this condition shall be presumed to be made by the Dean of Guild in every such decree.

"For the purposes of this section the width of a public street shall be the width set forth in the register, where such width is entered therein. And the width of a private street formed with the authority of the Dean of Guild shall be the width specified in the decree authorising the formation or laying out of such street or the width shewn on the plans on which such decree proceeded. And the width of any public street of which the dimensions are not set forth in the register, and of any private street of which the dimensions are not specified or shewn as aforesaid, shall be fixed by the Master of Works. And the position of the centre of any such street shall be defined by the Master of Works with reference to any application which may be made to the Dean of Guild for a lining to erect or re-erect any such building."

Sec. 21. "(*Appeal as to width and centre of streets*).—Any person deeming himself aggrieved by any determination of the Master of Works under the immediately preceding section, may appeal to the Dean of Guild within fourteen days thereafter, and the Dean of Guild shall thereupon have power to fix such width and define such centre of such street, and in fixing such width the Dean of Guild shall, as far as conveniently may be, have regard to the provisions as to width of streets contained in the section of this Act whereof the marginal note is 'Grounds for refusal to sanction plans of streets'" (viz., sec. 18).

* An example of an entry in the Register and its effect are given in the Lord President's opinion, *infra*, p. 1028.

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Explained that the width of such streets is in all cases properly entered in accordance with the provisions of the said Act, and particularly of sections 9, 18, 20, and 21, and that the colouring on the Ordnance Survey map, relative to the said register, referred to in subsection (2) (*a*) of section 9 of that Act shews in each case the width of the street as it actually exists opposite the respective properties in those streets. Explained that it is impossible to enter in said register the actual or existing widths of every public street in the city at every point in such streets. In a great number of instances such streets vary in width at numerous points, and would require as many as one hundred entries for one street. The pursuers are called upon to specify in detail the parts of areas of unbuilt-upon land in front of property belonging to them not actually used as street, and also the railway, works, and buildings, and the *solum* thereof belonging to them which they allege are included in the width of streets. Without such detailed information the defenders are unable to answer more specifically."

The defenders also founded on the fact that the pursuers on 30th July 1904 had appealed to the Sheriff of Lanarkshire under section 9 (2) (*c*) of the Glasgow Building Regulations Act, 1900, in respect of all entries in the Register of Streets which were objected to in this action, and that these appeals were still pending.

The pursuers pleaded;—(1) The entries in the said register . . . and the markings on the said Ordnance map, being in the respects condescended on unauthorised by the Glasgow Building Regulations Act, 1900, it is *ultra vires* of the defenders to insert them in the Register of Public Streets and mark them on the said Ordnance Survey map, and decree of declarator should be granted as concluded for.

There were also pleas in support of the conclusions for deletion, interdict, and reduction.

The defenders pleaded;—(1) *Lis alibi pendens.* (2) The action is irrelevant. (3) The action is incompetent, and is excluded in respect the said Glasgow Building Regulations Act determines the pursuers' rights by providing a remedy by appeal to the Sheriff of Lanarkshire at the instance of any proprietor who may be aggrieved by any entry in the register or omission therefrom, or by any relative marking on the map, and the decision of said Sheriff is declared to be final. (4) The pursuers having exercised their right of appeal regarding the whole entries complained of in terms of section 9 (2) (*c*) of said Act, are barred from suing this action. (5) The entries complained of being authorised by the provisions of the Glasgow Building Regulations Act, 1900, the defenders should be assoilzied, with expenses.

The case was reported to the First Division by the Lord Ordinary (Low).

On 10th March 1905 the First Division, in respect of the importance of the question raised in the case, appointed the cause to be argued before seven Judges.

The case was heard before the Judges of the First Division, and Lords Kyllachy, Stormonth-Darling, and Low, at the same time as the case of *Hamilton* v. *Nisbet*, reported *infra*, p. 1034.

Argued for the defenders;—(1) In view of the special appeal to the Sheriff provided for by section 9 (2) (*c*) of the Glasgow Building Regulations Act, 1900,[1] the present action was incompetent, or at

[1] 63 and 64 Vict. cap. cl.

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least premature. Where as here there was a new subject-matter as to which the Courts of law had no jurisdiction originally, and a statutory remedy was provided, that remedy was exclusive even where excess of power was alleged.[1] The register was still inchoate. It was not complete until the Sheriff had considered the appeals against the entries complained against.[2] There was here no invasion of any right of property. The case of *Lord Advocate* v. *Police Commissioners of Perth*[3] was really in contrast to the present. (2) Sections 9, 20, and 21 of the Glasgow Building Regulations Act, 1900,[4] must be read together. If so read, it was plain that the "width" to be entered on the register was not the tape measure width, but that the authorities had a certain discretion, and were intended to fix one general mean width for each street. If the width was the tape measure width, and there was no discretionary power, then the appeals provided for to the Sheriff and the Dean of Guild were useless; and the provisions in sec. 21 as to the Dean of Guild having regard to the provisions of sec. 18 were meaningless. The defenders did not maintain that they had power to fix an ideal width, but they claimed that they were not confined to the actual width, which in many cases differed at different points in the street. They were entitled to fix one general width for each street, even if this involved shewing ground as street in the register which never had been street *de facto* or *de jure*. Sec. 24 of the Glasgow Building Regulations Act, 1900,[4] only applied where the Corporation desired at once to acquire a building, and were not willing to wait until the owner proposed to rebuild. The case of *M'Dougall* v. *Nisbet*[5] was rightly decided, and should not be overruled. If not overruled it was conclusive in favour of the defenders' contention. [LORD KYLLACHY referred to *Bruce* v. *Corporation of Glasgow*.[6]] If it were objected that the width as entered in the register and as shewn on the map were not the same, and that consequently in framing the register the enactments of the statute had been disregarded, the answer was that the register overruled the map.

Counsel for the defenders also referred to the Burgh Police (Scotland) Act, 1903,[7] sec. 5 (an enactment to the same effect as sec. 9 (2) (*a*) of the Glasgow Building Regulations Act, 1900[4]); *Neilson* v. *R. B. Wilson & Co.*;[8] *Plumstead Board of Works* v. *Spackman*.[9]

Argued for the pursuers;—(1) The register was meant to be a register of actual existing streets, not of imaginary ideal streets. It

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[1] Craigie v. Mill, Feb. 11, 1826, 4 S. 447 (453), aff. June 25, 1827, 2 W. and S. 642; Campbell v. Mill, June 28, 1823, 2 S. 440 (392); Alexander v. Seymour, Dec. 2, 1828, 7 S. 117; Aberdeen Road Trustees v. Knowles, June 12, 1811, Hume, 262; Crawford v. Lennox, July 15, 1852, 14 D. 1029, 24 Scot. Jur. 629; Leith Police Commissioners v. Campbell, Dec. 21, 1866, 5 Macph. 247, *per* L. J.-C. Inglis, at p. 251, 39 Scot. Jur., at p. 102; Magistrates of Portobello v. Magistrates of Edinburgh, Nov. 9, 1882, 10 R. 130, *per* L. J.-C. Moncreiff, at p. 137; Milne & Co. v. Aberdeen District Committee, Nov. 30, 1899, 2 F. 220, *per* Lord M'Laren, at p. 229, and Lord Kinnear, at p. 231.

[2] Glasgow Building Regulations Act, 1900, sec. 9 (2) (*e*).

[3] Dec. 7, 1869, 8 Macph. 244, 42 Scot. Jur. 106.

[4] 63 and 64 Vict. cap. cl.

[5] Nov. 17, 1904, *ante*, p. 55.

[6] Nov. 12, 1903, 6 F. 94.

[7] 3 Edw. VII. cap. 33.

[8] Nov. 17, 1904, *ante*, p. 60.

[9] 1884, L. R., 13 Q. B. D. 878, 1885, L. R., 10 App. Cas. 229.

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was admitted that as regards width the width stated was not the actual width. Here in constructing the register there had not merely been no due compliance with the statute, but no compliance at all, and total disregard of its provisions. In such circumstances the decisions quoted by the defenders on the question of competency, and the rule upon which they were founded, did not apply.[1] (2) The width to be inserted in the register was the actual width, not an ideal non-existent width. An appeal might be necessary although the only question was what was the actual width. Questions of some intricacy might arise as to the terminus *a quo* or *ad quem*, or where the sides of the street were not parallel, or where the limits of the street were not physically defined. In respect of the admission given by the defenders as to the principle upon which the register had been made up, and the want of specification otherwise, the defences were irrelevant, and the pursuers were entitled to decree.

At advising,—

LORD PRESIDENT.—In this action, reported to your Lordships by the Lord Ordinary, Lord Low, and heard before seven Judges, in respect of the intrinsic importance of the case, the Caledonian Railway Company are the pursuers and the Corporation of Glasgow are the defenders. The matter of the controversy is as to certain entries made in the Register of Streets which the corporation are bound to cause to be prepared under the provisions of the Glasgow Building Regulations Act of 1900. The action contains declaratory and reductive conclusions. The declaratory conclusions are framed to express what the pursuers conceive to be a just interpretation of the provisions of the Act, and the reductive conclusions are directed against entries which they conceive violate those provisions. I shall presently examine with some minuteness the provisions of the statute, but in the meantime in order to explain the contention of the pursuers, I shall give a general description of them. Part II. of the Act, which has the general heading "Streets," provides by section 9 for the formation by the defenders of a register of public streets in which are to be entered various particulars as regards the streets, and, *inter alia*, the point of commencement and termination and the width. It also enjoins the marking of such streets and the area thereof on an Ordnance Survey map. When completed, the register and map are to be laid in a place where they can be inspected, and notice is to be given in the newspapers that they are there for inspection, and then if no objection is made, the register and map are deemed conclusively to fix the particulars as aforesaid of every public street. But there is provision for anyone aggrieved going to the Sheriff, and the Sheriff is, after the expiry of the period of two months, to deal with any appeal on that matter in a summary manner, and his decision is to be final. At first sight the statement of the width of a street might seem to be a matter of no great moment, but its vital importance really depends on the provisions of a section which follows, namely, section 20. Now that section, with the marginal note of "restraining erections within certain distance in streets," provides that "the

[1] Lord Advocate v. Police Commissioners of Perth, 8 Macph. 244, 42 Scot. Jur. 106; Stirling v. Hutcheon, May 25, 1874, 1 R. 935; Shand v. Henderson, July 28, 1814, 2 Dow, 519.

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Dean of Guild shall not, without special consent of the Corporation, grant decree for the erection or re-erection of any building upon ground adjoining any street unless on the condition that one-half of the width of such street, measuring such half from the centre of such street towards such ground, shall be cleared of all structures, if any, existing thereon." It goes on to say that, "for the purpose of this section, the width of a public street shall be the width set forth in the register, where such width is entered therein." The effect of this is that where the width is fixed no proprietor can ever have any building nearer to the street than what I may call the edge of the street as so fixed.

Now, the Caledonian Railway Company aver that under the guise of fixing the width, the Corporation have not had regard to actual width, but have laid down what may be termed an ideal width, totally irrespective of the actual condition of affairs. The averments of the pursuers are as follows in condescendence 7:—"In the case of the undernamed streets set forth in the said schedule No. 1, the width stated in the register under the heading 'width of street,' and coloured on the Ordnance Survey map relative to the said register referred to in the said subsection (2) (*a*) of section 9 of the said Act, is not the width of the street as it actually exists where the pursuers' railways and works or properties are situated, or where they front or abut thereon." I leave out a passage which is a statement of law and not a statement of fact. "In certain cases the width of street as stated in the register and shewn on the map includes not only parts of areas of unbuilt-upon land in front of property belonging to the pursuers, although not actually used as street, but also includes the railways, works, and buildings, and the *solum* thereof belonging to the pursuers." There then follows a long list of streets in which they say these things have occurred. The interest of the Company to raise this action is obvious, because in view of the provisions of section 20, which I have already summarised, if the entries in the register are correctly described and are allowed to stand, the moment the Caledonian Railway Company come to erect or re-erect any building they will be bound to surrender large slices of their property, and throw them into the public street without any compensation.

Such being the conclusions of the summons and the averments of the pursuers, what is the attitude taken up by the defenders? *In limine* founding on the provision as to appeal which I have quoted, they say that the action is incompetent. I do not mean to examine the authorities cited upon this matter, because I think that the principle underlying those authorities is not doubtful. So long as the defenders keep within the lines prescribed by the statute, the Court will give effect to the finality clause, and will not interfere by way of a declaratory finding or reduction, but if under the name and guise of statutory proceeding the defenders attempt to do something quite different from what the statute allows, then they are doing an *ultra vires* act, and no finality clause will or can protect their illegal acting from the restraint of the Supreme Court. Now, I am of opinion that the averment of the pursuers is a good averment, because if the construction of the statute on which it is based is correct, and the allegations are in fact true, then under the guise of entering width the defenders are not entering the width at all, but are fixing an ideal street, which by the operation of section 20

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will be turned into a real street the moment the pursuers wish to build, to their great loss and detriment. It therefore becomes of the first importance to see what is the answer of the defenders to the pursuers' averment. The answer of the defenders to the pursuers' averment, which I have quoted in the condescendence, is as follows:—"Admitted that in the case of certain of the streets here specifically enumerated the width in the register under the heading 'width of street' is not the width of the street as it actually exists where the pursuers' railways, works, and properties are situated, or where they front or abut thereon. Explained that the width of such streets is in all cases properly entered in accordance with the provisions of the said Act, and particularly of sections 9, 18, 20, and 21, and that the colouring on the Ordnance Survey map, relative to the said register, referred to in subsection (2) (*a*) of section 9 of that Act, shews in each case the width of the street as it actually exists opposite the respective properties in those streets. Explained that it is impossible to enter in said register the actual or existing widths of every public street in the city at every point in such streets. In a great number of instances such streets vary in width at numerous points, and would require as many as one hundred entries for one street." I point out to your Lordships that this is a very peculiar answer. It is entirely negative. It admits that the entry of the streets is not an entry of the actual width, but it does not go on to say upon what view the register has been prepared. I need scarcely say that a mere averment that the widths are properly entered in accordance with the provisions of section so-and-so is really no averment in fact at all. In the course of the discussion I pressed the learned counsel for the defenders again and again to say what was the theory upon which they said that the register was constructed. I cannot say that I was met with any frankness of statement on the matter. Sometimes what one cannot discover in the abstract one can discover in the concrete, and what is left vague in generalisation may be made plain in the particular. There is a portion of Buchanan Street which is well known to many of your Lordships, where the street, which for the most of its length is broad, is constricted at the end near Argyle Street. If your Lordships will look at the foot of page 23 in the schedule annexed to the summons you will find that the entry in the register as to Buchanan Street is "From Argyle Street to Bath Street, width 70 feet, distance between centre of street and building line 35 feet." In other words, that constriction is completely ignored so far as the register is concerned. Now, the ground there in question is very valuable ground, and there is little doubt but that the extent is very considerable: probably, looking at the map, it is not less than 60 or 70 square yards. It needs no speculation to see that the value of that ground in what is certainly one of the very best situations of Glasgow for shops is represented by a very large sum of money. Indeed, we were informed that the corresponding piece on the other side of the street which was bought by the Corporation and then removed did cost a very large sum of money. When I proceeded to ask the learned counsel if on the next building or rebuilding of that side of the street that ground, upon the argument of the defenders, was to be confiscated, Mr Campbell, who appeared for the defenders, answered that he could not deny that it would

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then be thrown into the public street, but that he preferred to call it "the transference of private property to public uses." When counsel of the eminence of Mr Campbell makes such a statement on a matter which he well knows is at the root of the whole case (because that was explained to parties at the time this case was sent to the seven Judges), I am bound to assume that he makes that statement on instructions, and the result to my mind is, to put it at the very lowest, that I am satisfied that it would not be safe to assume that this register had not been framed with a view, in the supposed interests of the public in general, to effect this compulsory transference without payment, which plain people are accustomed to call confiscation. I need hardly say that if the proceeding is one warranted by Act of Parliament your Lordships have nothing to do with the question of whether it is confiscation or not: your duty is to give effect to what the Legislature has ordained. But none the less are you the guardians of justice to private rights, and as such entitled closely to scrutinise Acts of Parliament to see whether they have brought about a result so repugnant to the principles on which Acts of Parliament usually proceed. If the doctrine of *fortius contra proferentem* is to be given effect to at all, it should be given effect to in a case of this sort where the Act is promoted as a private bill by a corporation, and does not receive the general discussion which ordinary public Acts of Parliament receive.

I accordingly proceed to examine the provisions of the Act. The 9th section is as follows:—(His Lordship then read sec. 9 (1) and (2) (*a*)).* Then follow clauses providing for the lodging of this map and register, objections being made, the appeal to the Sheriff, and the deciding by the Sheriff in a summary manner, which I need not read at length.

Some aid to the meaning of the section may be taken from certain portions of the interpretation clause, clause 4. In that clause it is stated that "public street" means any road, street, "lane, vennel, wynd, alley, bridge, quay, passage, square, or other place within the city used either by carts or foot-passengers which has been maintained by the Corporation, or which is by the Police Acts or shall hereafter in pursuance thereof be declared to be a public street."

Further width is thus defined,—"'Width' in relation to street or lane means the width of the carriageway and foot-pavements taken together."

On section 9 the following remarks seem to suggest themselves:—

(1) The said register is *prima facie* to come in place of the register of 1866. Now, the register of 1866 was only a list. It came in place of a still older register, and I am not sure that there was not even an older one before that. The purpose of these older registers was simply to set forth what were public streets in contradistinction to the private streets.

(2) The register with its accompanying map has to be made once for all, and after provisions for corrections it is a completed document.

(3) The register is to be made of streets then in existence.

(4) The particulars other than the width *de quo queritur* are *de facto* particulars describing actual and existing things, not prospective and ideal

* Quoted *supra*, p. 1021, note.

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things. The definition of width in the interpretation clause also describes an existing state of circumstances.

(5) The register and map are not contradictory, but are ancillary documents, the one proceeding by description and the other by delineation.

All this points clearly and plainly in one direction, namely, that width, like the other particulars, has reference to an existing state of affairs and not to an ideal or future state of affairs, however desirable that state of affairs might be. Indeed on this section the defenders have but little to say. Their only argument on that section is an argument *ab inconvenienti;* it is embodied in that portion of their averments which I have read, saying that it might require as many as one hundred entries for one street. But see what they say as to the map. They say that although it would be so very difficult, and indeed almost impossible, to describe such a street in the register, the colouring on the map shews the width of the street exactly as it exists. I need scarcely point out to your Lordships that in making the map different from the register, they seem to me to have gone clean in the teeth of the statute, but at the same time I cannot think that what can be done on a map cannot be done on a register, and I am not in any degree alarmed by the prospect of there being even so many as one hundred entries in one street. After all, the rights of individuals, of whom there may be more than a hundred in a street, are to be very gravely affected in this matter, and I cannot say that it is any argument for the Corporation to say that they have neither paper nor time to make one hundred entries in one street.

The strength of the defenders' argument is really not rested on a consideration of the 9th section at all, but is rested on the provisions of sections 20 and 21, and the reference in section 21 to section 18. I would remind your Lordships that section 20 has the heading of "Restraining erections within certain distance in streets," and I have already read the first portion of the section which prohibits building within half of the street nearest the side where the buildings are to be. But then it goes on thus:—"For the purposes of this section the width of a public street shall be the width set forth in the register, where such width is entered therein. And the width of a private street, formed with the authority of the Dean of Guild, shall be the width specified in the decree authorising the formation or laying out of such street, or the width shewn on the plans on which such decree proceeded. And the width of any public street of which the dimensions are not set forth in the register, and of any private street of which the dimensions are not specified or shewn as aforesaid, shall be fixed by the Master of Works. And the position of the centre of any such street shall be defined by the Master of Works with reference to any application which may be made to the Dean of Guild for a lining to erect or re-erect any such building." Section 21 says:—"Any person deeming himself aggrieved by any determination of the Master of Works under the immediately preceding section may appeal to the Dean of Guild within fourteen days thereafter, and the Dean of Guild shall thereupon have power to fix such width and define such centre of such street, and in fixing such width the Dean of Guild shall, as far as conveniently may be, have regard to the provisions as to width of streets contained in the section of this Act,

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whereof the marginal note is 'Grounds for refusal to sanction plans of streets.'"

The section of this Act referred to is section 18. It belongs to a fasciculus of sections which have to do with the laying out of new streets, and it is in these terms:—"The Dean of Guild shall not, except with the consent of the Corporation, and subject to such conditions, if any, as the Corporation may prescribe, grant decree for the formation or laying out of any street—

"(1) Where the width of such street proposed to be formed or laid out—

"(*a*) Is less than 50 feet; or

"(*b*) Where the width in case of a street the distance of the building lines whereof is at least 30 feet from the centre is less than 36 feet; or

"(*c*) Where the width in case of a street which from the configuration of the ground cannot be built upon except on one side thereof is less than 30 feet."

The grammar of that section makes it nonsense, but I think one can see the meaning of it, and it is this—"(*a*) is less than 50 feet; or"—and that is alternatively—"Where the width in case of a street the distance of the building lines whereof is at least 30 feet from the centre is less than 36 feet." As it is expressed, the second case would never occur, because it would all come within the first, but I do not see that your Lordships will have any doubt as to the real meaning of that. I need not read the rest of the section, because it does not deal with width at all.

The defenders' argument on these sections can be summarised thus: the Master of Works is, in lack of the width in the register, to fix the width and centre of a public street; an appeal is given to the Dean of Guild, from whom at common law there lies an appeal to the Court of Session; if the question was one of mere measurement such a prolonged appeal would be absurd. "Fix," therefore, means that he is to have a discretion. This is made clear from the terms of section 21, which, if he was merely to measure, would be unintelligible. Lastly, if he, the Dean of Guild, can do all this when there is no entry in the register, in order to supply that entry, the Corporation can do the same in the original register, subject only to the possible correction by the Sheriff on the merits, which they say is protection enough. If upon a consideration of section 9 I come to the conclusion that its construction is not to give a discretion, I confess I should be slow to import into it a distinctly opposite meaning by implication from another section which *prima facie* is concerned with other matters and only deals incidentally with the fixing of widths. Obviously the portion of section 20 as to fixing the width of a public street only applies to a period of interregnum. I have already pointed out that the register is to be finished once for all. New public streets are not dealt with by section 20, but are dealt with by section 11. I do not think that considering the enormous interests involved in a city of the magnitude of Glasgow, it is at all likely that to all proprietors on the register, in other words, *prima facie* the whole city, the only appeal in such a matter which is of such vital pecuniary importance should be an appeal to the Sheriff to be dealt with in a summary manner, while to the fortunate few who happen to build before the register is quite complete,

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and find their property unmarked, you are to give an appeal not only to the Dean of Guild but also to this Court.

If the sections are inconsistent I should hold that in this matter section 9 was the ruling section, but to my mind the sections are not inconsistent, and no such implication as is suggested is to be derived from sections 20 and 21 for the following reasons:—(1) The word "fix" is equivalent to "determine," and is equally applicable to finding a fact as to exercising a discretion; (2) There is in truth no absurdity in supposing an appeal on what is called mere measurement. Even in measurement, that is in stretching and reading a tape, mistakes may occur which would have a serious consequence if stereotyped. But apart from that there may be material for real contention as to the terminus *a quo* and the terminus *ad quem*. Even the definition of width in the interpretation clause, clear as it is, does not avoid this, because in a city like Glasgow all streets are not accurately defined as to pavement and roadway; (3) The words at the end of section 21, with the reference to section 18, are by themselves hopelessly inappropriate to the fixing of the breadth of an existing street. It would mean the abolition altogether of some of the smaller streets—that is to say, not the abolition of the streets, but the destruction of the houses abutting on the streets. The draughtsman of the sections must have had some glimmering of suspicion that this was so, and he introduced the words "as far as conveniently may be." But after all the clause may find application in the solitary instance of a new private street for which the Dean of Guild has granted a decree, which is silent as to dimensions, and the plan, *per incuriam* or for want of a scale, does not specify the breadth. Such a street being new, it might well be subjected to the same conditions as other new streets.

But further, seeing that the fixing of width is only a temporary matter contained in an ancillary provision, I think it is in such a case appropriate to see first what section 9 means, and then to draw inferences from that as to what is to be done with section 20. As to inequity of result, though that, I admit, is not conclusive, there can be no doubt, and I need not expatiate on such considerations, but the argument is at least aided by a consideration of these matters. As regards new streets where there is no such inequity (the proprietor being the owner of the whole ground which is being laid out), the Corporation have most ample and drastic powers, not conferred by a side-wind but in plain and unambiguous terms. I refer to sections 17, 18, and 22, but I need not read these sections. They practically make the Corporation entirely masters of the situation as to the dimensions of any new street, and they absolutely prohibit anyone from laying out a new street or building opposite a new street without having got the approval of the Corporation. Further, if reference is made to the interests of the public, I would refer to the ample powers which are given to the Corporation by section 24, where there is a most drastic power to take land compulsorily without going through the ordinary provisions of a Provisional Order, but by mere application to the Sheriff and putting in force the compulsory clauses of the Lands Clauses Act, which would enable the Corporation to take any land they chose for public improvement, subject of course to always paying compensation.

Such being my interpretation of the Act, I proceed to consider what

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ought to be done with the action. I have already said that I think the pursuers' averments relevant for reduction, but it is clear, I think, that reduction could not be pronounced without a proof, because, although I have commented unfavourably on the averments made by the defenders, yet it would not be right to reduce the register without being quite sure that it was really *in fraudem* of the provisions of the Act of Parliament and amounting in essence to an *ultra vires* act. But I think there is another objection to the action as it stands, and that is that it is premature. The register is not yet complete; it is only lying before the Sheriff, and the appeals are still undisposed of. Now, if the register so far departs from its proper function as the pursuers say, we cannot assume that the Sheriff will not correct it, and it seems to me that to reduce it *de plano* would be to make that assumption. It is true that the Sheriff might go wrong on such a question, but I am entitled to assume that he would take the correct view of the Act, and I am quite sure that with the loyal adherence to the law as laid down by the Supreme Court which the Sheriff has always shewn, he would not set up for himself a construction of the Act different from that which a bench of seven Judges has declared to be the true one. I assume that he will approach the question with the view of your Lordships clearly expressed that width means actual width, not necessarily a measurement of scientific and mathematical accuracy, but a width fixed with regard to actual conditions, and not based on theories as to what would be a public improvement. If he applies that view, his determination will render any such action as this unnecessary. But if, for argument's sake, we assume that the Sheriff did not do so, and the register when finished and authenticated contained some deviations from the actual state of matters, then the register would be still open to reduction, because no imprimatur of the Sheriff could make *intra vires* what was an *ultra vires* act of the Corporation.

I am therefore of opinion that the action should be dismissed, but as the defenders have not succeeded in making good their plea of incompetency, and have taken up what I consider an unjustifiable attitude on record, I am of opinion that no expenses should be found due to either party.

LORD ADAM, LORD M'LAREN, LORD KINNEAR, LORD KYLLACHY, and LORD STORMONTH-DARLING concurred.

The LORD PRESIDENT intimated that LORD LOW, who was absent at the advising, also concurred.

THE COURT pronounced this interlocutor:—"The Lords of the First Division, along with Lords Kyllachy, Low, and Stormonth-Darling, having considered the cause and heard counsel for the parties, dismiss the action as being premature, and decern."

HOPE, TODD, & KIRK, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 183.

July 19, 1905. Hamilton v. Nisbet.

DAVID HAMILTON AND OTHERS, Appellants.—*Mackenzie, K.C.—Hunter.*
THOMAS NISBET (Master of Works, Glasgow), Respondent.—*Campbell, K.C.—Wilson, K.C.—M. P. Fraser.*

*Police—Street—Building Regulations—Width of Street—Burgh—Glasgow Building Regulations Act*, 1900 (63 *and* 64 *Vict. cap. cl.*), *secs.* 4, 9 (2), 18, 20, *and* 21.—*Held* (by the First Division with three consulted Judges) that, under secs. 20 and 21 of the Glasgow Building Regulations Act, 1900, the Master of Works and the Dean of Guild on appeal from him are not entitled in fixing the width of an existing street to fix such width at anything else than the actual existing width of the street.

*M'Dougall* v. *Nisbet*, *ante*, p. 55, *overruled.*

1ST DIVISION, with three consulted Judges. Dean of Guild, Glasgow.

MESSRS DAVID HAMILTON AND OTHERS, sole partners of and trustees for their firm of J. & D. Hamilton, oil refiners and merchants, and paint and colour manufacturers, Glasgow, in February 1904 presented a petition in the Dean of Guild Court, Glasgow, craving a warrant and decree of lining for erections and additions to existing buildings on property belonging to them at Port Dundas, Glasgow, and described as bounded "on the east by Port Dundas Road."

Objections to the petition were lodged by the Master of Works.

Port Dundas Road was a public street of the city of Glasgow in the sense of the Glasgow Police Acts. Its dimensions were not set forth in the Register of Public Streets existing at the date of the presentation of the petition, viz., the Register of Streets kept under the Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.). The new Register of Public Streets under the Glasgow Building Regulations Act, 1900, had not then come into force.

In the course of the proceedings the Master of Works, acting under the powers conferred upon him by the Glasgow Building Regulations Act, 1900,* section 20, issued a determination fixing the width of Port Dundas Road at 72 feet *ex adverso* of the property of Messrs Hamilton, Nos. 117 to 125 of said road, and defining the position of the centre of said street as a line 36 feet to the east of and parallel to the face of the front wall of the Messrs Hamilton's existing building.

The existing building line of Messrs Hamilton's property was 12 feet to the west of a wall which bounded the existing roadway of the Port Dundas Road on the west. Of this 12 feet the westmost 6 feet was according to their titles the property of Messrs Hamilton, but by their titles it was restricted against building. The eastmost 6 feet was apparently still the property of Messrs Hamilton's superior. To the east of the wall above mentioned there was 48 feet which had always been roadway since before 1824. To the east of the 48 feet there was 12 feet, which in 1824 was feued to the trustees under the Port Dundas Road Acts. It now belonged to the Corporation of Glasgow, and formed part of the existing roadway of Port Dundas Road. This 12 feet was bounded on the east by the building line of the buildings on the east side of that road, which was thus at this point 60 feet in width as actually existing.

The effect of the Master of Works' determination as to the width of Port Dundas Road was to include in the width of the road as so

* See the Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), secs. 4, 9 (2), 20, and 21, which are quoted *ante*, pp. 1021-3, note.

fixed, the space between the wall, above mentioned as bounding the road as at present existing on the west, and the building line of Messrs Hamilton's buildings. The centre fixed by the Master of Works was not the centre of the road as at present existing, but the centre of the proposed 72 feet road, which was also the centre of the original 48 feet road.

Messrs Hamilton appealed to the Dean of Guild under section 21 of the Glasgow Building Regulations Act, 1900,* against the Master of Works' determination fixing the width and defining the centre of Port Dundas Road. Certain other neighbouring proprietors also appealed against the determination.

By interlocutor, dated 26th May 1904, the Dean of Guild (Lord Inverclyde) allowed the Master of Works to lodge a statement of data used by him in fixing the width and centre of Port Dundas Road, and the other parties to lodge answers thereto. A statement of data and answers were lodged accordingly,† and the record in the appeal against the Master of Works' determination having been closed and parties heard thereon, the Dean of Guild, on 4th August 1904, pronounced this interlocutor:—"Sustains the determination of the Master of Works, and dismisses the appeals: Fixes the width of the public street, called Port Dundas Road, at 72 feet: Defines the centre of the said street to be along the red ink line marked on the said plan, No. 11 of process," &c.‡

The appellants Messrs Hamilton, and also two other appellants against the Master of Works' determination, appealed to the First Division of the Court of Session.

The case was heard before the First Division on 28th February and 1st March 1905.

By interlocutor, dated 10th March 1905, the cause was appointed to be reargued before the Judges of the First Division along with three other Judges.

The case was accordingly argued before the Judges of the First Division and Lord Kyllachy, Lord Stormonth-Darling, and Lord Low. It was heard at the same time as the immediately preceding case of *Caledonian Railway Company* v. *Corporation of Glasgow* (*ante*, p. 1020).

The appellants adopted the argument as to the meaning of "width" in sections 9, 20, and 21 of the Glasgow Building Regulations Act, 1900,§ which was presented for the pursuers in *Caledonian Railway Company* v. *Glasgow Corporation*, *ante*, p. 1026. With regard to the case of *M'Dougall* v. *Nisbet*,[1] they pointed out that in that case the

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* Quoted *ante*, p. 1023, note.

† The Master of Works founded, *inter alia*, upon the Act 5 and 6 Will. IV. cap. cix. (an Act, *inter alia*, for improving and maintaining Port Dundas Road), sec. 19, which enacts:—" . . . No house, building, or other erection whatever shall be put up or erected within 40 feet from the centre of the said road from the city of Glasgow to Port Dundas. . . ."

‡ "NOTE.— . . . The Dean ultimately founds his determination upon the Act of Parliament founded on by the Master of Works (5 and 6 Will. IV. cap. cix. sec. 19), and whatever criticism may have been passed upon this Act there is no trace of any plea that a reference to it is incompetent. The Dean also founds his determination on the view he holds of the public requirements as to the road in question. . . ."

§ Quoted *ante*, pp. 1021-3, note.

[1] Nov. 17, 1904, *ante*, p. 55.

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provisions of section 9 of the Glasgow Building Regulations Act, 1900,[1] were not considered, and that the street there was treated as being a new street, and not an existing street. But if *M'Dougall*[2] was to be regarded as an authority for the proposition that in fixing the width of an existing street anything but the existing actual width could be regarded then it was wrongly decided, and ought to be overruled.

The respondent's argument upon the question as to the meaning of "width" in secs. 9, 20, and 21 of the Glasgow Building Regulations Act, 1900,[1] is stated in the argument for the defenders in *Caledonian Railway Co.* v. *Glasgow Corporation*, *ante*, p. 1020, at p. 1025. He founded upon *M'Dougall* v. *Nisbet*,[2] as being directly in point in this case, and maintained that that case was rightly decided, and ought not to be overruled.

At advising,—

LORD PRESIDENT.—The judgment which your Lordships have just pronounced in the last case[3] really rules this case, because it is perfectly clear on the face of it that the Master of Works and the Dean of Guild have not here taken the actual breadth of the street. I am aware that this judgment conflicts with the judgment pronounced in this Division of the Court in the case of *M'Dougall* v. *Nisbet*.[2] I have been unable to agree with that judgment, which of course was meant to be considered in the present judgment, but while saying so, I feel less diffidence than I otherwise would, because it is impossible to read the report of that judgment without seeing that that case was decided on an isolated view of the 20th section without any argument addressed to the Court upon the provisions of the 9th section. There is no trace of the Court having had brought before it what would be the extreme consequences of holding the 9th section to be construed according to the opposite contention. Further, it is impossible to read Lord M'Laren's opinion in that case without seeing that it had been argued as a case where it was not a question of an old street, but of laying out for the first time a street in a new neighbourhood. I should like to say also that quite apart from that I do not think the judgment of the Dean of Guild could have been supported on the merits, because on the merits he went clearly upon the provisions of an old Act of Parliament dealing with a road, and I think he there confused two perfectly different things—a provision prohibiting building within a certain distance of the road with a provision dedicating to the road itself the land over which this, so to speak, statutory servitude had been constituted. There is no ground for any such dedication. I think the interlocutor in this case will necessarily be to remit to the Dean of Guild to fix the breadth of the street in terms of the opinion which has just been pronounced.

LORD ADAM concurred.

LORD M'LAREN.—It is quite true that in considering the case of *M'Dougall* v. *Nisbet*[2] our attention was not particularly called to those provisions about streets that are on the register, and it is not improbable that if we had considered the bearing of the case then before us upon the width

[1] 63 and 64 Vict. cap. cl.
[2] *Ante*, p. 55.
[3] Caledonian Railway Co. v. Glasgow Corporation, *ante*, p. 1020.

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of the old streets that are on the register we should have seen that a principle of construction that seemed to be reasonable when applied to suburban thoroughfares would break down when applied to the narrow and irregular thoroughfares in the ancient city. Be that as it may, we have now had an opportunity of considering this question in a Court consisting of a larger number of Judges and with the benefit of the application of fresh minds to its solution. I have come to be satisfied that no sound distinction can be taken between this case and the case of the *Caledonian Railway Company*[1] which we have just decided. Your Lordship pointed out in deciding the case of the *Caledonian Railway Company*[1] that in the case of streets that had never been built upon, but were merely in course of being laid out, the authority of the Dean of Guild was absolute. He can fix their width, and can thereby secure that all provision desirable shall be made for traffic. That is a different case, because it does not involve any substantial interference with private property, but only such appropriation of property to means of communication as any sensible proprietor would be disposed to make of his own accord. I agree in the decision.

LORD KINNEAR, LORD KYLLACHY, and LORD STORMONTH-DARLING concurred with the Lord President.

The LORD PRESIDENT intimated that LORD LOW, who was absent at the advising, also concurred.

THE COURT pronounced this interlocutor:—"19th July 1905.—The Lords . . . recall the interlocutor of the Lord Dean of Guild, dated 4th August 1904, and in respect of the opinions delivered on this date in the case of the *Caledonian Railway Company* against *The Corporation of the City of Glasgow*, remit to the Dean of Guild to proceed in the cause."

AULD & MACDONALD, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 184.
July 20, 1905.
Browning's Factor.

WILLIAM JOHN TAYLOR (Browning's Judicial Factor), Petitioner.—*Horne.*

*Judicial Factor—Special Powers—Permission to retain shares involving liability for calls—Distinction between position of a Judicial Factor on a trust-estate and a Curator Bonis.*—A judicial factor presented a petition for authority to retain for two years shares in a limited company which were subject to a liability for possible calls of £8, 10s. per share, and which could only be disposed of by payment of £3 per share. The petitioner stated that the prospects of the company were improving.

On the report of the Junior Lord Ordinary the Court, in the circumstances, *authorised* the factor to retain the shares, but only *hoc statu* and for no definite time, and *directed* the factor, should any change occur in the circumstances of the company, to communicate with the Accountant of Court.

*Observations* (*per* the Lord Ordinary, Johnston) as to the distinction between the position of a judicial factor appointed on a trust-estate and a curator bonis or factor *loco tutoris*, with regard to his powers and responsibilities and his right to apply to the Court for instructions.

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[1] *Ante*, p. 1020.

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July 20, 1905. Browning's Factor.

Bill-Chamber. 1ST DIVISION. Ld. Johnston.

MR WILLIAM J. TAYLOR, judicial factor on the trust-estate of the deceased Alexander Mackinnon Browning, to which he had been appointed in place of trustees who were desirous of resigning, presented a note in the Bill-Chamber to the Junior Lord Ordinary (Johnston) asking for authority to continue to hold certain shares, which formed part of the trust-estate, and on which there was a large liability for calls.

The Lord Ordinary (Johnston), by interlocutor dated 1st July 1905, reported the cause to the First Division. The circumstances of the case are fully narrated in his Lordship's opinion.*

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* "OPINION.—The late Mr Alexander Mackinnon Browning, formerly of Blantyre, died on 3d April 1902, in Australia, during a temporary residence there, survived by his widow and an only child, Miss Robina Frazer Browning. Mrs and Miss Browning have continued to reside in Australia.

"Mr Browning left a settlement under which he conveyed his whole estate to Robert Parlane, Bonhill, Dumbartonshire, and Joseph M. Taylor, LL.D., writer, Glasgow, as trustees. Substantially, the purposes of the trust were for payment to Mrs Browning of the free annual income of the estate for her alimentary liferent use only, and, in the contingency of there being only one child, to hold and convey the residue, subject to her mother's liferent, to Miss Browning, under the declaration that in the event of her predeceasing her mother, leaving issue, the fee destined to her should be held not to have vested, and should be payable to, and equally among, her issue. Accordingly, Mrs Browning is restricted to an alimentary liferent, while Miss Browning has a fee which at best is subject to defeasance, and which, if certain other clauses, which it is not necessary to narrate, are considered, may be not even vested subject to defeasance, but may prove to be entirely suspended. I refer to the above in order to make it clear, with reference to the question at issue, that Mrs and Miss Browning have no such rights in the estate as would enable them by their consents to empower the parties administering the estate to deviate in any way from the strict lines of trust administration, or to give any effectual indemnity to the parties administering, should the necessities of the estate require them to undertake abnormal responsibilities.

"The deceased's estate may be taken as of the value of £8000, excluding from consideration one asset, which is truly not an asset except negatively, but a very grave liability. For the testator left at his death 1696 ordinary shares of £9 each, 10s. paid, in the New Zealand Loan and Mercantile Agency Company. The liability for calls on these shares at £8, 10s. per share was therefore £14,416, or nearly double the whole other estate. The circumstances of this company have long been, and still are, such that this liability for calls is a very real anxiety to those involved as shareholders. Not only are the shares unrealisable in the ordinary sense, but they could not be got rid of except on payment of a very large sum to anyone taking them with their liability. In these circumstances, although the trustees nominate accepted the trust and confirmed, they very soon came to the conclusion that they would not take the responsibility of managing the estate, and, accordingly, they applied for the appointment of a judicial factor in January 1904, in order to their own resignation. Mr William John Taylor, C.A., Glasgow, was appointed judicial factor on the estate on 2d February 1904, and he has found caution, given up a factorial inventory, and entered on the administration of the estate.

"The factor found, on investigating into the circumstances, that, at the time of his appointment, he could not get rid of the New Zealand Loan and Mercantile Agency Company shares and their liability for calls, except upon a payment of £4 per share, amounting to nearly £6800, a payment which would have substantially exhausted the estate, and left only about

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The Court having expressed a desire to be informed as to the English practice in such matters, a letter was obtained from an English firm of solicitors in which, after stating that they had consulted one of the Masters of the Supreme Court and also the official solicitor, they summed up the result of their inquiries thus:—"Therefore we have no hesitation in advising that the practice of the English Courts is to give ordinary trustees liberty to hold shares involving liability for uncalled capital for a limited period (to be renewed on reasons justifying the application), so long as there is kept in hand sufficient estate to meet the calls should they be made. In deciding upon similar cases the English Court invariably gives great weight to the reasonable wishes of the persons for the time being entitled to the property in question."

Counsel for the judicial factor stated that the parties at present in right of the trust funds consented to the course proposed. He also referred to the case of *Lindsay*.[1]

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£1200 for the widow's liferent and for the daughter, or whomsoever it may ultimately concern, in fee. He has, during the last twelvemonth, continued to watch the situation, and, owing to the prospects of Australasian affairs generally, and of those of the New Zealand Loan and Mercantile Agency Company in particular, having improved with a change of seasons, he has found that he could now probably get rid of the shares for a payment of £3 per share, involving the sacrifice of about £5100 of the general estate, leaving him with a balance of about £2900. He himself is of opinion that, in the interests of the estate, he should continue to hold the shares, but he is not unnaturally averse to undertake the very grave responsibility involved at his own hand, and he has accordingly presented a note in the factory asking the Court to authorise him to hold the shares in question 'for at least the space of two years, and during such further period as the Accountant of Court shall authorise.' In his report the Accountant commits himself to no opinion, but he states that he is not aware of such powers having been granted, and therefore reports the matter to the Court. I have, however, had an interview with the Accountant, and discussed the matter with him, and he has informed me that, had the factor taken the reverse course, and craved authority to apply the necessary portion of the estate in getting rid of the shares in question, and freeing the estate from the corresponding liability, he would have felt himself justified in recommending that the power craved should not be conferred, at least *in hoc statu*. I have felt the situation to be so exceptional that I have not thought myself justified in dealing with the application without reporting it to the Inner-House. I have been led to the conclusion that I ought to take this course, because, while, if I acted on my own responsibility, I should grant the application, though only *sub modo*, the result one way or the other is of such grave importance to the estate and to those interested therein, and more particularly because, there being no contradictor, there would be no prospect of bringing my judgment under review.

"The point raised by the application is whether the factor is entitled to ask the Court to sanction the course which he proposes to take, so as to relieve him *a priori* of responsibility, or whether the factor must either act on his own responsibility or relieve himself by resigning. The question whether, should the Court entertain the application, it will sanction the course proposed, is subsidiary and depends on practical considerations.

"In determining the preliminary question, the first point for consideration is the precise relation of the Court to the judicial factor and the estate. In appointing a judicial factor on a lapsed trust, and that is virtually the

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[1] Dec. 9, 1848, 11 D. 232.

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LORD PRESIDENT.—This is a report by Lord Johnston, the Lord Ordinary on the Bills, upon a note presented by a Mr Taylor, a judicial factor, asking for special powers. Mr Taylor was appointed judicial factor upon the trust-estate of the late Mr Browning, who, by settlement, conveyed his whole estate to two gentlemen in Glasgow as trustees. For reasons which will shortly appear, the trustees found that they were unwilling to hold the estate of the testator and resigned, and the present petitioner was appointed judicial factor on the trust-estate. What then happened may be conveniently taken from the narrative which the Lord Ordinary gives in his opinion, which is this :—(His Lordship then quoted the 3d and 4th paragraphs of the Lord Ordinary's opinion).

I think that gives your Lordships the whole of the material facts upon which you have to come to a decision, with this addition, that we are told now that the prospects of the Company have still further improved, and

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position in the present case, while the factor appointed is to certain effects the officer of the Court and responsible to it, the Court does not undertake the administration of the estate, or make itself the trustee, and treat the factor merely as its agent. I may refer to the case of *Ferguson* v. *Murray*, 15 D. 682; where in the course of administration of a lapsed trust, part of the estate being heritable property subject to a bond, the bondholders resorted to an action of maills and duties, thereby summarily dispossessing the factor, who hitherto had been managing the property. It was held that the estate was not by the appointment of the factor *in manibus curiæ*, so that the freedom of creditors to proceed in ordinary course of law should be in any way interfered with. I refer to the case not because its circumstances are analogous to those of the present, but only for the expression of opinion of the Court in defining the position of the factor. 'We must look to the object and nature of the appointment,' *per* Lord President (Colonsay). 'The matter depends entirely upon the nature of the appointment. There is merely a failure of the family trust, and the appointment was made to defend the interests under that trust,' *per* Lord Fullerton. 'It appears to me quite clear that the powers of a judicial factor appointed to supply the place of trustees in a lapsed trust can never be greater than those of the party over whose estate he is appointed. The measure of a factor's power is exactly the same as that of the trustee, in whose place he comes, would have been, had the trust subsisted. The factor takes the estate with all its burdens, as if the trust had subsisted, and his duty is to execute the trust. The Court have always held the measure of his power to be the same as that of a trustee,' *per* Lord Ivory. These expressions are naturally limited by the subject-matter of the case which the Court had been considering, but I think that they support the view that not merely the powers but also the duties and the responsibilities of a factor appointed in lieu of trustees, are the same as those of the trustees whose place he supplies. There are, it is true, superadded safeguards, in respect that the factor now reports to and is under the supervision of the Court, through the Accountant of Court, but I do not think that he is in any way relieved of any of his trust functions to the effect of throwing the administration of the estate on the Court. I refer to *Hutton* v. *Annan*, 25 R. (H. L.) 23, where it was held that the passing of certain investments by the Accountant of Court, at his annual audit of the accounts of a curator bonis, did not relieve the latter from responsibility for an improper investment.

"The chief difficulty which I have experienced in dealing with the case has arisen from the doubt—which I am personally satisfied is well founded—whether a judicial factor, in room of trustees, does not stand in a different position, in relation to the Court, from a curator bonis, factor *loco tutoris*,

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that, although of course the liability for uncalled capital remains, yet at the same time the Company at present has succeeded in paying up the arrears of interest upon its debenture stock, and that, accordingly, if affairs continue as they seem likely to continue as at present, there is every reason to believe that the Company will resume paying a dividend upon its ordinary capital. We are also told that the prayer of the petition here is concurred in and urged by the beneficiaries who have at this moment an interest in the estate. I say at this moment, because from the way in which the trust-settlement is conceived, the liferenter is certain, but the ultimate fiar is not absolutely certain until certain events have happened.

There is no doubt that this is a novel application, and that it is one of considerable difficulty. Undoubtedly your Lordships would be the very last to countenance the idea that an officer of the Court, such as a judicial factor, should be encouraged to hold speculative investments, and I do not

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&c., who are more entirely the creatures of the equitable jurisdiction of the Court; and whether the former class of factors is entitled to come to the Court for instructions and powers in the same circumstances, and to the same effect, as are factors of the latter class, or are not bound to act on their own discretion in the same degree as the trustees whom they replace.

"The pupil or the lunatic is in a sense a ward of Court—though in Scotland Chancery terms are not used, nor does the Court exercise such extensive intervention or accept such extensive responsibility as does the Court of Chancery. But a trust-estate, even where a judicial factor is appointed in room of the trustees, is still a trust-estate governed by the deed of the deceased. I am, of course, not referring to the case where an estate is sequestrated for any cause and placed under judicial management. Then it becomes property *in manibus curiæ*.

"It is as well therefore to see what is the express provision of Mr Browning's settlement empowering his trustees in the matter of investment.

"It is this:—'That my trustees in the execution of the trust shall be entitled to the fullest powers, privileges, and immunities enjoyed by gratuitous trustees, with power to them to invest my estate in the purchase of heritable property, to borrow money on security thereof, and to appoint any one of their own number to be law-agent or factor to the trust; and my trustees shall have power of sale by public roup or private bargain, and persons transacting with them shall have no right to inquire into or see to the application of moneys paid to them, but shall be satisfied by their receipt therefor alone; and I declare that they shall not be liable for any omissions nor neglect of management so long as they act honourably and in good faith.' Accordingly, the powers and duties of Mr Browning's trustees were of the most common law kind, and the present question is not affected one way or the other by his settlement.

"In the next place, I do not find that the position of a judicial factor, *vice* trustees declining, resigning, or otherwise failing, is to any effect defined by statute or Act of Sederunt.

"The appointment of judicial factors was originally dependent entirely on the *nobile officium* of the Court. But though the Court was, I understand, early in use to supply the failure of trustees, it is to be noticed that the Act of Sederunt, 13th February 1730, was in terms confined to factors of the class *loco tutoris*, &c.

"This Act of Sederunt was virtually superseded by the Pupils Protection Act, 1849, 12 and 13 Vict. cap. 51, which was also in terms confined to the same class of factors, and section 7 provides pointedly for the application by such factors for special powers, and with reason, for the powers of such factors are derived from the Court solely. They neither represent a

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think it is too much to say that it is clearly the duty of a judicial factor in ordinary circumstances to get rid at once of all investments which, by having uncalled capital, subject the estate under his charge to a future and uncertain liability. I think that would be his duty even although the selling of the shares might involve what, in ordinary words, is called "a considerable sacrifice"—that is to say, that the shares might not bring in what the truster had paid for them. But, of course, that is a different set of circumstances from the question of having to sacrifice a large amount of the trust-estate in order to get rid of the liability. Even that might, I think, in some circumstances be the duty of a factor. But it is, I think, obviously a question of degree, and indeed the only authority which has been brought before our notice—and I am satisfied that Mr Horne has

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truster, nor take their powers derivatively from him, in succession to his trustees nominate. This Act established for the first time the office of Accountant of Court.

"Prior to 1856 there was no statutory provision for the appointment of judicial factors on the estates of deceased persons, whether testate or intestate, and no express provision for the regulation of such factories. By the Bankruptcy Act, 1856, section 164, provision was made for the appointment of factors on the estates of deceased persons. But its object, though its terms might receive wider application, was to provide summarily for the administration only of estates left derelict and subject to claims, though not necessarily bankrupt, on the death. And realisation and division according to a scheme to be approved was all that was contemplated, not a continuing administration. The only thing which was, as I read the section, subjected to the direction of the Court, as precedent to the factor's action, was the realisation of heritage.

"It was the Trusts Act, 1867, that incidentally made statutory the method of appointing, as in the present case, 'a judicial factor to administer the trust,' where trustees desired to resign and could not otherwise provide for the continuance of the trust after their resignation. But it does not appear that there is any special provision either in the statute or by Act of Sederunt in any way further defining the position, functions, &c. of such factors. I think accordingly that such factors stand exactly where they were prior to the statutory enactments above referred to.

"I have further considered the few cases which have occurred, where the liability of judicial factors in realising and investing factorial estates has been in question. *The Accountant of Court* v. *Baird*, 20 D. 1176; *Crabbe* v. *White*, 18 R. 1065; *Cowan's Trustees (in Ferrie's Curatory)*, 24 R. 590, and *Hutton* v. *Annan, supra*, were all cases of factors *loco tutoris* or curators bonis. *Guild* v. *Glasgow Endowment Board*, 14 R. 944, was the case of a judicial factor on an executry estate.

"From these it would appear that factors *loco tutoris* and curators bonis, and therefore *a fortiori* judicial factors on trust-estates, have substantially the same responsibility as trustees in the matter of investments. And I may here note that the Trusts Act, 1884, widening the powers of trustees in the matter of investments, includes under the definition of 'trustee' all classes of judicial factors.

"Lastly, it is necessary to look at the cases in which the Court has intervened to give directions or approval regarding investments on the application of factors or otherwise.

"In the old case of *Wright*, 1701, M. 7429, the Court very markedly refused directions, and left a factor to act on his own discretion and on his own responsibility.

"The case of *Bontine's Curator*, 8 Macph. 976, was that of a curator bonis to a lunatic. And the ward being involved as partner in the lease and

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diligently searched for authorities on this matter—the only authority he has been able to find touching the question at all is just a case of that sort. It is the case of *Lindsay*,[1] where a factor *loco tutoris* had a certain amount of shares on which there was uncalled capital, and the other shareholders—for it seems to have been a sort of semi-private company—offered to take over the shares, and discharge all liability upon payment of the small sum of £158. The Court granted the application, and allowed him to pay away that £158 so as to get rid of the liability. But as I have said, that is not the question here.

Now, after all, one, I think, is entitled to begin the consideration of this question by thinking what an ordinary prudent man of business would do if the shares were his own. Of course as long as the shares are kept there is a risk. But I have no doubt upon the facts I have narrated, that an ordinary prudent man of business in the circumstances would not pay £3 a

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working of a Welsh slate quarry, which had not proved successful, the curator obtained powers to unite with the other partners in turning the business into a limited company, with a view of limiting his ward's liability, as he could not apparently extricate his estate from the adventure entirely.

"In *Grainger's Curator*, 3 R. 479, the curator having made certain investments on the security of local rates, the Accountant of Court required him to realise these investments, but at the desire of the curator, requested instructions from the Lord Ordinary, and on report by the Lord Ordinary, the Inner-House approved the investments, and instructed the Accountant to withdraw his requisition for realisation.

"In *Lloyd's Curator*, 5 R. 289, an investment in railway debentures was brought in the same way before the Court at the request of a curator bonis, but the Court disposed of the case by finding that debentures of railway companies were securities which the Accountant of Court may sanction as investments for funds in the hands of a curator bonis, provided he is satisfied that the special investment is a good and safe one of its class.

"In the case of *Dunn* v. *Chambers*, 25 R. 247, where the validity of the sale under direction of the Accountant of Court of the ward's shares in a mercantile company by her curator bonis was in question, it was incidentally observed by Lord M'Laren, page 250,—'To begin, the Accountant's opinion was not absolutely binding on the curator bonis. Mr Mowat was an officer of Court, and he might have applied to the Lord Ordinary, and if necessary, to the Court, for authority to hold the shares for a definite term, or until he should be able to test their value.' It does not, however, appear that this has ever been done except in the solitary instance to be now mentioned.

"The Accountant of Court has also informed me that he finds that in the case of *Barr's Curator Bonis* in 1898 (unreported), where the ward was sole partner of a bonded warehouse business, power was given in the Outer-House, on strong representations as to the absence of risk in such businesses, first to float the concern as a limited company, accepting payment for the ward's interest chiefly in shares, and afterwards to retain the shares for a year, and for such time thereafter as the Accountant of Court might approve. These are the only cases I have been able to find bearing on the Court's intervention in the matter of investments, and it will be observed that they are all cases of curators bonis, between whose position and that of factors on trust-estates I conceive, as I have above indicated, that there is a difference.

"But notwithstanding that difference, I should myself be disposed to say, though the general rule is that it is the duty of judicial factors of all kinds to realise funds of the estate involved in business ventures or otherwise

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[1] 11 D. 232.

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share to get rid of these shares, that is to say, if his estate consisted only of the amount represented by this estate. If he were a wealthy man he might perhaps pay that sum, but if you suppose a man with a capital equivalent to the capital of this estate I do not think that he would pay this amount of money, and so reduce his capital in order to get rid of his liability for these shares. Therefore it really comes to this, whether your Lordships feel yourselves bound to prevent this judicial factor doing what an ordinary prudent man of business would do. For myself I do not find myself compelled to go that length.

Your Lordships were anxious to discover if there was any practice in England to help us. There seems nothing to be found in the ordinary text-books, but we have the advantage of a very sensible letter from a London solicitor, who has made inquiry into the matter, and which points to this, that although the question might not arise in the same way, yet in special circumstances in England persons have been allowed to keep shares on which there was a liability for a limited term. This is an investment which must be watched, and if things were taking a turn the other way it might become the duty of the factor to save the little that would be left of the estate rather than lose it all. But in the meantime I do not think we would be stretching the powers of the Court in allowing this judicial factor to do what a prudent man would do, and that being so, I would suggest that your Lordships should take the suggestion of the Lord Ordinary and grant the prayer of the petition in the form suggested by his Lordship rather than in the form suggested by the petitioner.

His Lordship says this:—"I should therefore be disposed to authorise the factor to retain the shares, but only *in hoc statu* and for no definite term, with instructions to communicate with the Accountant of Court, not merely in his annual reports, but at any time should any change of circumstances occur."

I think we should grant the prayer of the petition in that form, but I desire to make it excessively clear that we are not sanctioning any speculation, and I think that the moment these shares can be got rid of without sacrificing the rest of the trust-estate, that then they ought to be sold or transferred at once, and should not be held on the speculative prospects of a rise in their value.

LORD M'LAREN.—I agree. I look upon this as a point of considerable

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speculatively invested, that where such realisation involves so serious a question of responsibility, the factor, even though a factor *vice* trustees under a settlement, is entitled to the direction of the Court as to the course he should follow. Otherwise, for his own safety, the factor may be compelled to relieve himself by prematurely parting with the major part of the trust-estate to effect the realisation of the loss upon the particular asset, against the real interest of the estate, or be compelled to resign, in which case presumably no other satisfactory factor would be likely to accept the position.

"I should therefore be disposed to authorise the factor to retain the shares, but only *in hoc statu*, and for no definite term, with instructions to communicate with the Accountant of Court, not merely in his annual reports, but at any time should any change of circumstances occur.

"But, as above mentioned, I have thought it proper to report the matter to your Lordships for instructions."

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importance in the judicial administration of estates where the estate consists of shares on which there is uncalled capital. Even when such shares are paying a dividend it is the recognised duty of a factor to realise prudently, because such stock is not suitable for trust investment. On the other hand, where there is reasonable expediency for keeping the shares the Court has sometimes authorised their retention. When it comes to paying a sum of money to an outside person to take the shares off the hands of a judicial factor, I hardly think that is a step which he would be entitled to take on his own responsibility, and I agree that this is an application for special powers which we ought to entertain, and to deal with according to our belief of what is best for the estate. A prudent man of business would hold the investment for a year or two years rather than give a sum of money to a transferee to take it over. What a prudent man would do in his own affairs, not by way of speculation, but for the purpose of lessening loss to his estate, is, I think, a proceeding which in the interests of this estate the Court has power to authorise.

LORD ADAM and LORD KINNEAR concurred.

THE COURT pronounced this interlocutor:—"Find that in the circumstances of the case the factor is entitled, and is hereby allowed, to retain the shares, but only *in hoc statu* and for no definite time, and direct the factor, should any change occur in the circumstances of the New Zealand Loan and Mercantile Agency Company, Limited, at any time to communicate with the Accountant of Court as to his continuing to hold said shares: With this finding and direction remit to the Lord Ordinary to grant the prayer of the note on the conditions specified, and to proceed."

BONAR, HUNTER, & JOHNSTONE, W.S., Agents.

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Earl of Lauderdale v. Scrymgeour Wedderburn.

FREDERICK HENRY, EARL OF LAUDERDALE, Pursuer.—*Campbell, K.C.—Macphail.*
HENRY SCRYMGEOUR WEDDERBURN, Defender.—*Johnston, K.C.—Stevenson—Hunter.*

*Process—Proof—Diligence and Recovery of Writs—Hereditary Office—Fishing Diligence to prove Pedigree.*—In an action by Lord Lauderdale against Scrymgeour Wedderburn for declarator that the pursuer had the sole right to the office of Hereditary Royal Standard-Bearer for Scotland, the defender stated that he was heir-male of a Scrymgeour to whom the office had been confirmed and of new granted in 1600, and heir-male of the original grantee of the office, to whom it was said to have been granted between 1057 and 1124. Proof having been allowed, the defender, with the view of ascertaining and proving his pedigree, moved for a diligence for recovery of documents under a specification which did not specify any particular document, and in effect embraced all documents relating to the family of Scrymgeour now in the possession of Lord Lauderdale or others on his behalf, provided that they were not titles of any lands now possessed by him. The Court *granted* the diligence.

FREDERICK HENRY, EARL OF LAUDERDALE, brought an action against Henry Scrymgeour Wedderburn of Wedderburn, in which the pur-

1ST DIVISION.

* Decided Dec. 16, 1904.

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suer concluded, *inter alia*, for declarator (1) that the pursuer had the only good right to the hereditary office of Royal Standard-Bearer for Scotland, (2) that the defender had no right to that office.

The pursuer alleged that the office of Hereditary Royal Standard-Bearer was confirmed and of new granted to Sir James Scrymgeour of Dudhope and his heirs-male by Act of Parliament 1600, cap. 44; and that John Scrymgeour, Earl of Dundee, to whom the office of Standard-Bearer belonged as heir-male and successor of Sir James Scrymgeour of Dudhope, having died in 1668 without issue or heirs-male, the office reverted to the Crown as *ultimus hæres*, and was granted to the pursuer's ancestor, Charles Maitland of Hatton, afterwards Earl of Lauderdale, by charter from the Crown in 1670. He also founded on a charter of recognition in favour of the same ancestor, and charters following upon sundry apprisings, and on Acts of Parliament sanctioning the grants in his ancestor's favour.

The defender averred that the hereditary office of Royal Standard-Bearer for Scotland was granted by the King to Sir Alexander Carron in return for an act of bravery either in the time of Malcolm III. (1057-1093) or of Alexander I. (1106-1124), and that the name of the family was then changed from Carron to Scrymgeour. He referred to a charter of lands dated in 1298 in favour of Alexander Scrymgeour for his past services as Royal Standard-Bearer, and a charter dated in 1458 in favour of the burgh of Dundee in which James Scrymgeour was named as "*Vexillator domini nostri regis*," and averred that there were numerous other evidences that the office of Standard-Bearer had been hereditary in the defender's family for centuries before the date of the Act 1600, cap. 44. (Ans. 3) "The defender is direct heir in male line of the Scrymgeours of Kirkton, a branch of the Scrymgeour family which is now the senior line of said family, and as such he is heir-male of the Sir James Scrymgeour mentioned in the Act 1600, cap. 44, and of the original grantee of the office of Hereditary Royal Standard-Bearer of Scotland."

The defender did not set forth any pedigree. He alleged that after the death of John Scrymgeour, Earl of Dundee, the Duke of Lauderdale, brother of Maitland of Hatton, surrounded the house of Dudhope, into possession of which John Scrymgeour of Kirkton had entered as heir, and seized all the family papers and records.

By interlocutor, dated 29th November 1904, the First Division allowed the parties a proof of their respective averments, and to the pursuer a conjunct probation.

On 16th December 1904 the defender moved for a diligence to recover documents under the following specification:—

"1. All charters, dispositions, conveyances, patents, gifts, presentations, assignations, warrants, signatures, procuratories and instruments of resignation, precepts and instruments of clare constat, and of sasine, of or relating to heritable offices, lands, baronies, teinds, patronages, and other heritages belonging to or possessed by the Scrymgeours, Constables of Dundee, or by other members of the Scrymgeour family, or otherwise by persons of the name of Scrymgeour.

"2. All general and special services and retours of the Scrymgeours, Constables of Dundee, or other members of the Scrymgeour family, or otherwise of persons of the name of Scrymgeour.

"3. All wadsets, contracts, bonds and other obligations, and reversions, renunciations, and discharges thereof; all charges, letters of [illegible]ning, inhibitions, and other diligences; all apprisings and adjudica-

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tions; all rentals, tacks, and leases, and all petitions, summonses, interlocutors, and decreets to which the Scrymgeours, Constables of Dundee, or other members of the Scrymgeour family, or otherwise persons of the name of Scrymgeour, were parties, which were granted or pronounced in favour of, or which were directed or pronounced against, the said Scrymgeours, Constables of Dundee, or others of the name of Scrymgeour.

"4. All tailzies, settlements, wills, testaments, letters, memoranda, or other documents of or relating to Scrymgeours, Constables of Dundee, or others of the Scrymgeour family, or otherwise of or relating to persons of the name of Scrymgeour; [all which charters and other documents enumerated in the foregoing being those] which fell into the hands of the pursuer's authors at or after the death of John, Earl of Dundee, in 1668, or otherwise are now in the hands of the pursuer or others on his behalf [and which are not the titles of any lands now possessed by the pursuer]."

The words in square brackets were added by amendment made at the Bar.

Counsel for the pursuer objected to the diligence being granted, and argued;—The defender's demand here was not for particular documents or classes of documents, but for a warrant to search the pursuer's charter-chest in order that he might be able to make out a case which as yet he was not able even to aver. That was altogether incompetent.[1] The defender had not set forth any pedigree. His purpose now was to see if there was anything in the pursuer's charter-chest which would enable him to do so. If ever there was a fishing diligence it was this one. It was not admitted that the papers called for had been violently seized, but even if they were they had been in the peaceable possession of the pursuer and his predecessors for 200 years.

Argued for the defender;—The documents called for had a purely historical interest for the pursuer. His title did not depend on them, but upon the grants upon which he founded. The pursuer was in possession of Scrymgeour documents.[2] Indeed, this was admitted, and he had printed and produced some of them. It was not fair that he should have the choice as to which he should produce. These documents had been taken by force. The defender only claimed documents relating to the family of Scrymgeour. These were documents of the defender's family to which he had right of access, not only for proof but for information. The defender did not ask for any document which was a title of any lands now held by the pursuer.

LORD PRESIDENT.*—We have heard a full and anxious argument in this case, and undoubtedly it is a case of a great peculiarity. It is right to keep in view that the call is not made to support a claim to lands, but to a dignity. I could understand that a person in peaceable possession of lands would be well entitled to say,—"I will not be deprived of my estates except by someone who can at least aver a better title without ransacking my charter-chest to enable him to do so." But considerations of that kind

[1] Duke of Hamilton v. Douglas, 1761, Mor. Dict. 3966, at p. 3968; Ersk. Inst. iv. 1, 52; Richardson v. Fleming, March 12, 1867, 5 Macph. 586, 39 Scot. Jur. 295; Lord Lovat v. Fraser, Dec. 19, 1840, 16 F. C. (Oct.)

[2] Historical Manuscripts Commission (5th Report, 1876), App. p. 612.

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are not of the same weight in the case of a claim to a dignity. It has also to be observed that many things are proper evidence in a claim to a dignity which would not be evidence in a claim to lands. I am in favour of granting the specification as it stands, subject to the restriction made at the Bar by Mr Johnston. Beyond the general objection to the granting of this diligence with which I have dealt, I did not understand that there was any particular objection to any special item of the specification.

LORD ADAM.—This is certainly a peculiar case, and the documents now called for are called for simply as historical documents. Mr Johnston is willing to amend his specification so that it includes no documents which can affect the title of Lord Lauderdale to lands now possessed by him. The documents are wanted for two purposes :—(1) in so far as they refer to the office of Standard-Bearer, and (2) in order that he may obtain information as to his own pedigree. It is the latter point that is more special. If the case were one of recent pedigree there might be difficulty. But it appears from statements on record that Mr Johnston's client, in order to establish his right, has to go back to an ancestor in the 15th century, and for this purpose it is clear that he may very legitimately have recourse to all available historical documents. Here it is said that these are documents which on the face of them belong to the Scrymgeour family, defender's ancestors, and necessary to prove his descent. I think he is entitled to recover them.

LORD M'LAREN.—I agree that the diligence should be granted. I think with your Lordships that nothing that we do in this case can affect the rules or throw any doubt on the practice with regard to access to titles in cases of proper competition as to heritable rights, where in general a party will not be allowed to make an examination of his opponent's charter-chest, but only to call for specified writings or deeds. Here no documents are asked for falling within the category of titles to any heritable property belonging to Lord Lauderdale; what are asked for are in fact historical documents. It is said, however, that this specification is not sufficiently limited, but it appears to me that it has this very specific limitation, viz., that the name Scrymgeour appears in every article of it, and this shews quite clearly that no such documents are asked for as would bring this specification under the rules affecting the recovery of the adverse party's title-deeds, as in the case of competing brieves. It is also to be noticed that if Mr Scrymgeour Wedderburn fails to make out his pedigree his whole case fails, while Lord Lauderdale does not assert any prior independent title in himself, but rests his case entirely on the failure of heirs-male of the Scrymgeour family. I would not have said so much on a question of granting a diligence, had it not been that in this case the granting of this diligence is a matter of great importance to the parties, and raises a question of principle.

LORD KINNEAR concurred.

THE COURT granted "diligence at the instance of the defender against havers for the recovery of the documents specified in his specification," as amended at the Bar.

TODS, MURRAY, & JAMIESON, W.S.—WILLIAM DUNCAN, S.S.C.—Agents.

COUNTY AUDITOR OF THE COUNTY OF LANARK, Pursuer (Appellant).—*Mackenzie, K.C.—J. A. T. Robertson.*
ROBERT LAMBIE AND OTHERS, Defenders (Respondents).—*Campbell, K.C.—Constable.*

No. 186.
July 20, 1905.*
County Auditor of Lanark v. Lambie.

*Local Government—Audit of County Council Accounts—Illegal Payments—Surcharge by Secretary for Scotland on persons "making" the payments—Finality of Secretary's determination—Local Government (Scotland) Act*, 1889 (52 *and* 53 *Vict. cap.* 50), *secs.* 70 *and* 75.—The Local Government (Scotland) Act, 1889, with respect to the audit of county council accounts, enacts, sec. 70, subsec. (5), that if it shall appear to any county auditor that any payment is contrary to law and should be disallowed, he shall report to the Secretary for Scotland, who after due inquiry shall decide all questions raised by the report and shall "disallow all illegal payments, and surcharge the same on the person or persons making them."

Sec. 75, subsec. (1), enacts, that "all cheques for payment of moneys shall be signed by two members of the Finance Committee, and be countersigned by the county clerk or by a deputy approved by the council."

The Secretary for Scotland, on a report by a county auditor, under sec. 70, subsec. (5), of the Act, disallowed certain payments made out of county funds, and surcharged them upon the individuals who signed and countersigned the cheques in terms of sec. 75, subsec. (1).

The county auditor having brought an action in the Sheriff Court against the persons surcharged by the Secretary for Scotland for decree for the amounts of the cheques, the defenders maintained that they were not liable on the grounds (1) that the Secretary's determination was not final as regarded the legality of the payments in question, and that the payments were legal, and (2) that, in any view, the Secretary's determination was *ultra vires* in so far as it surcharged the defenders, in respect that they were not the persons "making" the payments within the meaning of the Act, since they had acted merely ministerially in signing and countersigning the cheques.

*Held* (1) that as regarded the legality of the payments in question the determination of the Secretary for Scotland was final and not open to review; and (2) that the defenders had rightly been surcharged, in respect that, being the persons who had signed or countersigned the cheques, they were the persons "making" the payments in the sense of the Act.

2D DIVISION. Sheriff of Lanarkshire.

IN the course of his audit of the accounts of the County Council of Lanark for the year ending 15th May 1902, the auditor of the county, appointed under the Local Government (Scotland) Act, 1889,† found

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* Decided June 7, 1905.

† The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), enacts:—

Sec. 69. "The Secretary for Scotland shall from time to time appoint one or more fit persons (in this Act referred to as county auditors) to audit the accounts of each county council (including those of the district committees), and may remove any county auditor. . . .

"Subject to the regulations hereinafter contained, the Secretary for Scotland may make, and when made may revoke and vary, rules for the guidance of county auditors in the discharge of their duties: Provided that no such rules when made or varied shall be in force until they have lain for not less than one month on the table of both Houses of Parliament."

Sec. 70. "The following regulations with respect to audit shall be observed —that is to say," *inter alia*,—

"(5) If it shall appear to any county auditor acting in pursuance of this section that any payment is in his opinion contrary to law

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certain payments which, in his opinion, were contrary to law, and should be disallowed, and in accordance with sec. 70, subsec. (5), of the Act, he submitted to the Secretary for Scotland an interim report dealing with these payments.

The payments were in respect of the following, viz.:—

(1) Expenses to London, amounting in all to £50, 4s. 3d., of two officials and one County Councillor on the matter of the Police Superannuation (Scotland) Bill, charged on the Police Assessments.—Payment of these expenses was made by four cheques, signed respectively by two of the following County Councillors, who were also members of the Finance Committee of the Council, viz.:—Messrs Robert Lambie, William Neilson, William Templeton, John D. Scott, and A. G. Barns Graham, and all countersigned by Mr Thomas Munro, deputy county clerk. With respect to these payments the County Auditor in his report stated—"The nature of expenditure which may

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and should be disallowed or that any sum, which in his opinion ought to have been, is not brought into account by any person, whether such payment or failure to account has been made matter of objection or not, he shall by an interim report under his hand report thereon to the Secretary for Scotland, setting forth the grounds of his opinion as aforesaid; and the Secretary for Scotland shall cause such interim report to be intimated to the objector, if any, and to the officer or other person affected thereby; and after due inquiry the Secretary for Scotland shall decide all questions raised by such interim report, and shall disallow all illegal payments and surcharge the same on the person or persons making them, and shall allow all sums which ought to have been but have not been brought into account.

"(6) If the Secretary for Scotland shall be of opinion that, although a disallowance or surcharge might be lawfully made, the subject-matter thereof was incurred under such circumstances as to make it fair and equitable that the disallowance or surcharge should not be made, he may abstain from making the same.

"(7) Every sum determined by the Secretary for Scotland under this Act to be due from any person shall be paid by such person to the county council within fourteen days after such determination has been intimated to him, and if such sum is not so paid it shall be the duty of the county auditor to recover the same, and the county council shall reimburse him for his expenses, including a reasonable allowance for his time in so far as not recovered from the person surcharged."

Sec. 75. "(1) All payments to and out of the county fund shall be made to and by the county treasurer, and all payments out of the fund shall, unless made in pursuance of the specific requirement of an Act of Parliament or of a decree of a competent Court, or on the requisition of any district committee or standing joint committee, or for the periodical payment of salaries and wages, be made in pursuance of an order of the council signed by three members of the finance committee and countersigned by the county clerk, and the same order may include several payments. Moreover, all cheques for payment of moneys shall be signed by two members of the finance committee and be countersigned by the county clerk or by a deputy approved by the council.

"(2) Any such order may be stayed by note of suspension in the Bill-Chamber, and may be wholly or partly disallowed or confirmed with or without expenses.

"county council shall annually appoint a finance committee

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be defrayed out of the Police Assessments is defined by the Police (Scotland) Act, 1857, sections 27, 28, 29, 40, 55, and 57, and by the Police (Scotland) Act, 1890, section 19. The above payments do not appear to fall within the scope of any of these sections."

(2) Expenses to London, amounting in all to £52, 5s. 6d., of a deputation of four County Councillors and one official in the matter of the Agricultural Rates Act, 1896, Continuation Act, 1901, charged on the General Purposes Assessment.—Payment of these expenses was made by five cheques, signed by Messrs Lambie and Neilson, and countersigned by Mr Alston Dykes, the County Clerk. With respect to these payments the County Auditor reported—"The above expenditure does not appear to me to have been made in the execution of any Act administered by the County Council."

On 4th June 1903 the Secretary for Scotland issued a determination, under section 70 of the Local Government (Scotland) Act, 1889, with regard to the above payments. By this determination, on the narrative of the interim report by the auditor, and on the further narrative that "such interim report has been intimated to the persons affected thereby, and due inquiry made in terms of the aforesaid section," the Secretary for Scotland determined that the payments in question "are illegal, and I hereby disallow such payments, and surcharge the same upon the persons undermentioned, as the persons by whom the payments were made, they having signed the cheques by which payment was effected." Then followed a list setting forth with respect to each cheque the name of the payee, the amount of the cheque, and the "persons surcharged" the latter being the two County Councillors who had signed, and the County Clerk or Deputy County Clerk who had countersigned, the particular cheque.

The persons surcharged not having within fourteen days of the date of the determination paid the sums found to be due from them, the County Auditor brought an action under section 70, subsection (7), of the Local Government (Scotland) Act, 1889, in the Sheriff Court at Hamilton, praying for decree "against (first) the defenders Robert Lambie, William Neilson, and Thomas Munro, ordaining them, conjunctly and severally, or severally, and according to their respective liabilities, to make payment to the pursuer as County Auditor foresaid, or otherwise, to make payment to the County Council of the county of Lanark, of the sum of £18, 2s. 3d.," being the amount of a cheque signed by Messrs Lambie and Neilson, and countersigned by Mr Munro. Then followed similar prayers for decree, *mutatis mutandis*, identical with respect to each of the other cheques.

The pursuer set forth his interim report and the determination of the Secretary for Scotland, and pleaded, *inter alia*;—(1) The sums concluded for in the petition having been determined by the Secretary for Scotland, in virtue of the powers conferred on him by "The Local Government (Scotland) Act, 1889," to have been illegally paid, and the said sums having been disallowed by him and surcharged on the

for regulating and controlling the finance of their county; and an order for the payment of a sum out of the county fund, whether on account of capital or income, shall not, save in the cases mentioned in the first subsection of this section, be made by a county council except in pursuance of a resolution of the council passed on the recommendation of the finance committee, and any expenses, debt, or liability exceeding fifty pounds shall not, save as aforesaid, be incurred except upon a resolution of the council passed on an estimate submitted by the finance committee."

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defenders, the defenders are conjunctly or severally liable to make payment of the respective sums surcharged upon them.

The defenders averred, *inter alia*;—(Ans. 4) " . . . Explained that the said determination is *ultra vires*, inept, wrongful, and disconform to the statute, in respect:—

" (1) That the payments disallowed were not illegal, but were properly made to defray expenses incurred, as regards the first four items, by the instructions of the Standing Joint Committee, in accordance with its duty as the authority administering the Police Pension Fund for the county of Lanark; and as regards the remaining five items, by the direct instructions of the County Council in accordance with its duty as the authority entitled to receive the Imperial grants in aid payable in respect of the reduction of rates under the Agricultural Rates, &c., Act, 1896. . . . The County Authorities, including the Commissioners of Supply and the County Council of Lanark, have always been in the practice of laying their views with reference to measures of administration affecting the interests of the county before Committees and Members of Parliament and Government departments or officials, with advantage to the county—as in the present cases — and to the legislation which supervened, and charges of expenses arising out of communings similar to those now in question have uniformly been charged against the County Fund without challenge,—a system which prevails throughout Scotland.

" (2) That in any event the Secretary for Scotland is not by virtue of section 70, subsection (5) of the Act of 1889, constituted the final Judge of what is a legal charge against the County Fund. . . . The jurisdiction of the Secretary for Scotland . . . does not extend beyond matters of taxation, or otherwise beyond determining whether payments have been duly authorised by the appropriate authority.

" (3) That even if the payments were illegal, they have not been surcharged on the person or persons making them in terms of the statute. The Standing Joint Committee made the first four payments, and the County Council the remaining five, both by the medium of the Finance Committee. Under section 75 of the Act of 1889 all cheques for the payment of money from the county funds must be signed by two members of the Finance Committee, and countersigned by the County Clerk, or by a deputy approved by the Council. In such a case the persons signing the cheques are not the persons making the payment. The individual members of the Finance Committee who signed the cheques in question have no veto or responsibility as such apart from their committee, and their signing the said cheques was merely a method of carrying out a payment made by the County Council or said committees, and a certification that the payment had received the sanction of the Finance Committee. It was in no sense a payment made by such members. The County Clerk and Deputy County Clerk, whose signatures appear on the said respective cheques, were bound to obey the instructions of the Finance Committee in granting said cheques, but they did not sign them as the said determination alleges. One or other of them countersigned the said cheques as required by section 75 (1) of the Act of 1889, to attest the authenticity of the signatures of the members of the Finance Committee signing them, and the fact that they were such members. Beyond verifying these facts, these officials incurred no responsibility by countersigning."

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The defenders pleaded, *inter alia*;—(4) The payments disallowed being lawfully and properly charged against the County Council, *et separatim*, their legal chargeability not being within the competence of the Secretary for Scotland to decide, the determination of the Secretary for Scotland is *ultra vires* and inept, and decree of absolvitor should be granted. (5) The defenders not being within the meaning of the statute the persons making the payments challenged, should not have been surcharged therewith, and are entitled to be assoilzied, with expenses. (8) *Separatim*, the defenders William Alston Dykes and Thomas Munro not having signed said cheques, and in any event being bound to obey, and having acted under the instructions of their constituents, are not personally bound to pay the amounts surcharged upon them, and should be assoilzied, with expenses.

On 30th March 1904 the Sheriff-substitute (Thomson) pronounced this interlocutor:—"Finds that the defences stated are incompetent in the Sheriff Court, repels the same accordingly, and grants decree against the several defenders, conjunctly and severally, for payment to the pursuer of the several sums in terms of the prayer of the petition: Finds the defenders all conjunctly and severally liable to the pursuer in expenses," &c.

On 6th August 1904 the Sheriff (Guthrie) pronounced this interlocutor:—"Finds that the pursuer has not stated facts and circumstances relevant and sufficient to support the prayer of the petition: Therefore recalls the interlocutor of 30th March last, dismisses the petition, and decerns: Finds the appellants entitled to expenses," &c.*

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* "NOTE.—. . . I decide the case on the assumption which, though it is not formally disposed of, is probably well founded, that the payments disallowed by the Secretary for Scotland are improper and beyond the powers of the County Council and the Joint Standing Committee. It may also be the case, though that also need not be decided here, that the statute commits to the Secretary for Scotland authority to determine finally whether these payments are or are not improper or *ultra vires*. There is room for argument as to the meaning of the Act on that point, although I am inclined to agree with Sheriff Thomson that the statute intends his determination to be conclusive, and the suit for recovery to be similar to an action to enforce a decree-arbitral.

"But in an action upon such a decree or determination,—and this is an ordinary action in a Court having jurisdiction to enforce the demand, and from which there is an appeal to the Supreme Court,—it is proper and incumbent upon the Judge to examine the decree-arbitral or determination which is the foundation of the suit in order to see whether it is valid and within the statute. . . .

"It humbly appears to me that the payments were not 'made' by the persons who signed and countersigned the cheques, except in a sense that a payment is made or goods delivered to John Smith by a messenger who is sent to pay or deliver by his employer. Suppose that employer be a banker or a lawyer directed to make a payment for a client, and that by mistake he pays through his messenger to a wrong person, the client's recourse is not against the messenger who did what he was ordered, and was bound to do, but against the banker or lawyer. In this case, which when analysed appears to be equally simple, the gentlemen who signed the cheques were merely the hands of the County Council who ordered the illegal payments to be made. This becomes clear when we turn to section 75 of the Act, which enacts (section 75 (1)), that all payments out of the County Fund shall be made by the County Treasurer, and except in certain specified cases, not including those now in question, that all payments out

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The pursuer appealed, and argued;—The determination of the Secretary was final both as regarded the legality of the payments and as regarded the persons on whom the surcharge was to be laid.[1] In any view the determination was right on both points. The meaning and policy of the Act was to leave the whole matter to the discretion of the Secretary for Scotland. If indeed the Secretary had gone flagrantly wrong, *e.g.*, by laying the surcharge on persons who on no reasonable view could be regarded as the persons "making" the payment, a different question would be presented. There was no question of that sort here. To hold that persons who had signed and countersigned the cheque were the persons "making" the payment, provided a good working rule, and was a reasonable construction of the Act. In any case a reduction would be necessary, since a determination of the Secretary for Scotland was not a deed which could be reduced *ope exceptionis* under the Sheriff Courts (Scotland) Act, 1877, section 11.[2]

The pursuer in the course of the hearing stated that he was willing that the argument should proceed on the footing that the defenders had brought a reduction of the Secretary's determination.

Argued for the defenders;—(1) The determination of the Secretary for Scotland was not final as regarded the legality of the payments in question. The Act 1889, section 70, subsection (5), dealt with pay-

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of the fund are to be made in pursuance of an order (see section 75 (3)), of the Council signed by three members of the Finance Committee and countersigned by the County Clerk. That is followed by a direction that cheques shall be signed by two members of the Finance Committee, &c. Obviously the duty of the person signing the cheques is only to see that the sum being paid falls under one of the heads enumerated in section 75 (1) or under an order of the Council, and they have not to do with the validity or legality of that order. It may even happen, as with the defendant Lovering in *Attorney-General* v. *Tottenham Local Board*, 27 L. Times R. 440, cited by Mr Smith, that they had voted against the payments for which in an executive capacity they signed the cheque. The accurate application of the rule would lead to the Treasurer's clerk being surcharged with 10s. paid by him by the Council's direction to a carriage-hirer for driving the members of a deputation in question to the railway station. It appears therefore that the rule *respondeat superior* must here be applied in construing the words in section 70, 'persons making them,' *i.e.*, the payments, and that the pursuer has failed in his condescendence to set forth any case against the defenders. He avers (Art. 4) that notice was given to 'each of the defenders being the persons who had signed the several cheques,' but entirely forgets that the real responsibility rested on those who ordered the payments of which the cheques were but the means or the signs. It is not alleged that the objection was ever notified to those truly responsible, for there is not,—as I have tried to shew,—reason or justice in saying that the defenders in respect of the ministerial act of signing the cheques were the 'officers or persons' to whom, as 'affected thereby' notice of the objection should be made. The result of sustaining the relevancy would be, if a decree were ultimately given against them, that the defenders would be forced to raise other actions for their relief, whether against the persons receiving the moneys or against the individual councillors who authorised the payment it is unnecessary now to inquire."

[1] Maclachlan & Mackinnon v. Cameron, March 12, 1899, see *infra*, p. 1058, note.

[2] 40 and 41 Vict. cap. 50; Neill v. M'Nair, June 11, 1901, 3 F. (J. C.) 85, 3 Adam, 384.

ments that were "contrary to law," and empowered the Secretary for Scotland to disallow "all illegal payments"—not "all payments which he might judge to be illegal,"—and it was for the Courts of law, *prima facie*, to determine whether any payments were or were not illegal. It was contrary to general policy that there should not be a right of appeal to a Court of law on a question involving rights to property. Such a right of appeal would be held as excluded only by express enactment or by the clearest implication,[1] and there was neither here. On the contrary, the Act, section 75, subsection (2), plainly contemplated an appeal to the Courts, and the analogy of the English Local Government Act of 1888[2] bore out the same conclusion. The payments here were legal.[3] (2) In any view the determination of the Secretary for Scotland was *ultra vires*, in so far as it surcharged the payments on the defenders. Assuming that the payments were illegal or, what came to the same thing, that the Secretary was final on that point, there was nothing in the Act to suggest that the Secretary was entitled without appeal to surcharge the payments on any persons he thought fit. It was for the Court when called on to enforce the Secretary's determination, to say whether the right persons had been surcharged. It was not necessary to bring a reduction to raise this question.[4] The Act, sec. 70, subsec. (7), provided a form of action for the recovery of illegal payments, and if the payments were illegal, either because the Court held so, or because the Secretary's determination was final on that point, it was doubtful whether the defenders had a title to bring a reduction of the determination, since their only interest was to see that decree did not go out against them if they were not the persons liable.[5] But all difficulty as to the form of the action had been removed by the pursuers' concession that the argument was to be taken on the footing that a reduction had been brought. The Court undoubtedly had jurisdiction to reduce a determination of the Secretary which was *ultra vires*.[6] The defenders were not the persons "making" these payments; they were the mere hands by which the payments were made. The Act itself said that all payments were to be "made" by the County Treasurer; but the true view was, looking to the substance of the thing, that the payments were made by the persons by whom the payments were authorised—that was to say, the members of the County Council or of the particular committee as individuals, for, of course, to lay the surcharge on the County Council or the committee as such would mean laying the surcharge on the County Council accounts, which would be meaningless. Delivery of a cheque was not payment; the actual payment was made by the bank-teller who gave cash for the cheque, so that if the actual fact of payment was the test the surcharge ought to have been laid on the bank-teller, which was a *reductio ad absurdum*. In

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[1] Hardcastle on Statutes, 3d edit., p. 134.

[2] 51 and 52 Vict. cap. 41, sec. 71, subsec. 3.

[3] Attorney-General v. Mayor of Brecon, 1878, L. R., 10 Ch. Div. 204; Magistrates of Leith v. Leith Dock Commissioners, July 25, 1899, 1 F. (H. L.) 65.

[4] Russell v. Magistrates of Hamilton, Dec. 17, 1897, 25 R. 350; Smith v. Magistrates of Irvine, Nov. 14, 1892, 5 F. 113.

[5] Nivison v. Howat, Nov. 22, 1883, 11 R. 182.

[6] Eastern District Committee of Dumbartonshire County Council v. Police Commissioners of Clydebank, Oct. 19, 1893, 21 R. 12.

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any view, the county clerk and the deputy county clerk were not liable, in the first place, because countersigning a cheque was not signing the cheque, it was merely certifying the signatures of those who signed; and in the second place, because the county clerk and the deputy county clerk had no discretion or option in the matter, they were merely the servants of the County Council.

At advising,—

LORD STORMONTH-DARLING.—This is an appeal from a judgment of the Sheriff of Lanarkshire dismissing as irrelevant an action brought by the Auditor of that county for recovery of the sums surcharged upon the defenders by a determination of the then Secretary for Scotland, dated 4th June 1903. This determination bears to have been made under sec. 70 (5) of the Local Government (Scotland) Act, 1889, which requires the Secretary for Scotland, on receiving an interim report from the County Auditor that any payment is, in his opinion, contrary to law, and should be disallowed, to intimate the report, and after due inquiry to "decide all questions" raised thereby, and to "disallow all illegal payments, and surcharge the same on the person or persons making them." The payments in question were charged in the accounts of the County Council for the year ending 15th May 1902, and consisted of sums amounting to £50, 4s. 3d. and £52, 5s. 6d. respectively, for expenses of certain County Councillors and officials on visits to London in connection with Parliamentary proceedings. The Secretary for Scotland, after intimation to the defenders and due inquiry, determined that these payments were illegal, disallowed them, and surcharged the same upon the defenders as the persons by whom the payments were made, "they having signed the cheques by which payment was effected."

The defenders challenge the determination upon two main grounds. They say (1) that the Secretary for Scotland is not final as to the illegality of the payments; and (2) that, even if he were, he has surcharged the wrong persons. It is on the second of these grounds that the Sheriff has dismissed the action as irrelevant, for on the first question, though not actually deciding it, he indicates an opinion adverse to the defenders. I am unable to agree with the conclusion of the learned Sheriff in dismissing the action.

I admit that the legality of any payment made out of a statutory fund would, apart from express provision in the statute establishing the fund, be a question for the Courts of law. This statute contains a provision (sec. 75 (2)) for any order of a County Council for payment out of the County Fund being stayed by a prescribed legal proceeding. But it also contains the provision (sec. 70 (5)) in virtue of which the Secretary for Scotland has issued his determination. That provision does not in terms declare that his decision shall be final. But it does not contain any machinery for review; it does not require him to describe the nature of the inquiry which he has made, or to state any reasons for his decision. The whole proceeding has reference merely to the particular items in the accounts under audit; it is essentially of a partly discretionary and altogether summary kind, for the Minister, even when satisfied that a surcharge might lawfully be made, may abstain from making it, if circumstances render such a course fair and

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equitable; and when he does make a surcharge, payment is to follow within fourteen days from the determination being intimated. It seems to me, therefore, that we have no materials, and no jurisdiction to review what the minister has done in the exercise of a statutory duty which is partly, no doubt, judicial, but is also largely administrative.

On the second question, it is unnecessary to consider whether, there also, the determination is conclusive, for I am clearly of opinion that, whether conclusive or not, it is right. Once the Secretary for Scotland has decided that payments are contrary to law, he has no option but to disallow them *and* to "surcharge the same on the person or persons making them." These latter words are in marked contrast to the words in the English Local Government Act (51 and 52 Vict. ch. 41), which, by reference to sec. 247 of the Public Health Act, 1875, (7) and (8), directs the Auditor to "disallow every item of account contrary to law, and surcharge the same on the person making *or authorising the making* of the illegal payment," subject to appeal either to the Court of Queen's Bench or to the Local Government Board. Who, then, are the persons making the payments under the Scottish Act? Clearly, I think, the persons who sign and countersign the cheques by which alone, under sec. 26 (2), and sec. 75 (1), payments out of the county fund can be made. It is said that these persons, in so doing, acted ministerially, and as the mere hands of the Standing Joint Committee, or the County Council and its Finance Committee, as the case may be. I do not doubt it; nor do I doubt that there may be hardship in holding the defenders personally liable for their ministerial acts. They may or may not have claims of relief against the persons who directed the payments to be made, or against the persons who received the money. As to that we can decide nothing in this action. All we can do is to construe sec. 70, and its meaning seems to be clear. If considerations of hardship be relevant at all, I would venture to point out that, in general, it is better for county councillors and county officials to be subject to the arbitrament of a minister of the Crown, invested with large discretionary and dispensory powers in individual cases, than to be left to the decision of a Court of law which would have no such discretion on the abstract question of legality.

I am therefore of opinion that we should sustain the appeal, and substantially revert to the judgment of the Sheriff-substitute, omitting his finding that the defences stated are incompetent in the Sheriff Court, for the pursuer asked us to take the case on the same footing as if the defenders had brought a reduction of the Secretary for Scotland's determination.

LORD KYLLACHY.—I concur, and have nothing to add except this—I had occasion, so far back as March 1899, to consider and decide in the Outer-House a precisely similar question to that raised in this action. The question there arose in a reduction of a certain report to and deliverance by the Secretary for Scotland, made with reference to alleged illegal payments in the county of Inverness—payments as here made by cheque—and surcharged as here upon the persons signing the cheques. The whole matter was then very fully argued, some other questions being included which do not arise here: and I came to the conclusion which Lord Stormonth-

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Darling has just expressed, both with respect to the question (1) whether the Secretary for Scotland had gone outside the statute; and (2) whether, supposing he kept within the statute, his deliverance was subject to review. I do not think it necessary to say more than that, with all possible impartiality, I have endeavoured to reconsider the judgment I then pronounced. I remain of the opinion I then expressed—an opinion which will be found reported in 6 Scots Law Times, at page 384, the case being *Maclachlan & Mackinnon* v. *Cameron*.*

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* MACLACHLAN & MACKINNON *v.* CAMERON, March 12, 1899.

In 1895 in an action between the Skye District Committee of the County Council of Inverness and the proprietor of an estate in the island, the District Committee was found liable in expenses to the proprietor. Payment of these expenses, as well as of the expenses of the District Committee in the action, was ultimately made by cheques drawn on funds which had been remitted to the District Committee by the County Council and placed in the District Committee's bank. These cheques were signed by the District clerks, Messrs Maclachlan & Mackinnon, solicitors, Portree, and by two members of the District Committee.

On 20th February 1897, on a report by Mr R. F. Cameron, C.A., Inverness, the County Auditor, the Secretary for Scotland, acting under section 70, subsection (5), of the Local Government (Scotland) Act, 1889, issued a determination by which he found the payment of these expenses to be illegal, disallowed the same, and surcharged the amount on Messrs Maclachlan & Mackinnon and the two members of the District Committee who had signed the cheques, as being the persons making the payments.

In July 1897 the County Auditor, Mr Cameron, acting under section 70, subsection (7), of the Act, raised an action for payment of the amount surcharged against Messrs Maclachlan & Mackinnon and the two members of the District Committee who had signed the cheques. This action was sisted to allow the defenders to bring an action for reduction of the determination of the Secretary for Scotland; and in November 1897 they brought an action of reduction against the Secretary for Scotland and the Lord Advocate, as representing him, and also against the County Council of Inverness and the Skye District Committee, for any interest they might have. The Secretary for Scotland and the Lord Advocate lodged preliminary defences, in which they pleaded that the action, in so far as directed against them, was incompetent. On 20th July 1898 the Lord Ordinary (Kyllachy) sustained these preliminary defences, found that the action, in so far as directed against the Secretary for Scotland, was incompetent, and dismissed the same in so far as directed against him and the Lord Advocate as representing him, on the ground, as set forth in the Lord Ordinary's opinion, that the Secretary for Scotland having discharged his statutory duty was *functus*, and had no interest or right to defend. "If there are grounds for reduction, it appears to me that it is against the County Auditor, the pursuer in the original action, that the reduction should be brought."

Messrs Maclachlan & Mackinnon and the two members of the District Committee who had signed the cheques then, in December 1898, brought the present action of reduction against the County Auditor, Mr Cameron, and against the County Council and the District Committee, for any interest they might have. The ground of reduction was that the Secretary for Scotland in issuing the determination had acted *ultra vires* in respect, *inter alia*, that the determination surcharged the payments on the pursuers, they not being the persons making the payments in the sense of the Act.

Defences were lodged by the County Auditor and by the County Council. The County Auditor pleaded that the action, in so far as directed against him, was incompetent, and both the compearing defenders pleaded that the

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LORD KINCAIRNEY.—I concur in the opinion read by Lord Stormonth-Darling and concurred in by Lord Kyllachy. I have felt the greatest possible difficulty on the second point—that of surcharge—but I have been forced to the conclusion that the opinion expressed, though it seems somewhat strained, is necessitated by the absolute and express provisions of the statute.

LORD JUSTICE-CLERK.—I also concur.

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determination of the Secretary for Scotland being in all respects in conformity with his powers, the action should be dismissed.

In this action *Campbell, K.C.*, and *Cook* appeared for the pursuers, and *Sol.-Gen. Dickson* and *M'Lennan* for the defenders.

On 12th March 1899—

LORD KYLLACHY.—(After expressing the opinion that the action had been properly directed against the County Auditor, and that all the necessary parties had been called)—The points, however, which are really important are —(1) Whether in making the determination here challenged the Secretary for Scotland has exceeded his powers; and (2) whether, if not, the statute permits review by this Court on the merits. This last point may perhaps belong rather to the original action (which has not, I observe, been conjoined), but it formed part of the argument, and I think I may deal with it now.

Now, the deviations from the statute alleged by the pursuers are, I think, these:—They say, in the first place, that the Secretary for Scotland had only power to surcharge the alleged illegal payment "on the person or persons making it," these last being the words of the statute (section 70, subsection 5), and that in surcharging the pursuers, who merely signed the cheque by which the payment in question was made, he has not surcharged the right persons —that is to say, the right persons in the sense of the Act. This is the first and principal excess of power which the pursuers allege.

Now, as to this the defenders' answer is twofold. They say, to begin with, that the ascertainment of the person or persons making the illegal payment is just one of the matters left to the Secretary for Scotland—the statute (sec. 70, subsec. 5) providing that he "shall decide all questions raised by the interim report," and subsec. 7 providing further that "any sum determined by the Secretary of Scotland under this Act to be due by any person shall be paid by such person to the county council within fourteen days after such determination."

The defenders contend further that, even if the construction of the statutory words is ultimately for the Court, the Secretary for Scotland has selected the right persons. They urge that where a payment is made by cheque, the persons making the payment are and can only be the persons who sign the cheque, and that the statute contemplating, as it does, that all payments shall be made by cheque must be held to have had this in view. They point out further that the surcharge falls to be made, not on the persons authorising the payment, but on the persons making it—and the Scotch Statute, in this respect differing from the English Local Government Act of 1888, which (incorporating the provisions of the Public Health Act of 1875) provides for illegal payments being surcharged (subject to appeal) "upon the person making or authorising the making of the alleged payment."

I am of opinion that on both points the defenders are right. I agree with them in their view that the Secretary for Scotland has to decide as to the person to be surcharged, and I incline to agree also—taking the facts as they appear upon record—that there is no sufficient ground for impeaching his decision on that question—(His Lordship then adverted to a branch of the case not now reported).

I am therefore of opinion that the pursuers have failed to impugn the

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THE COURT pronounced the following interlocutor:—"Sustain the appeal: Recall the interlocutor appealed against, as also the interlocutor of the Sheriff-substitute dated 30th March 1904: Grant decree against the several defenders conjunctly and severally for payment to the pursuer of the several sums amounting in all to the sum of £102, 9s. 6d. in terms of the prayer of the petition."

GRAHAM, JOHNSTON, & FLEMING, W.S.—TODS, MURRAY, & JAMIESON, W.S.—Agents.

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July 20, 1905.* Sommerville & Son, Limited, v. Edinburgh and District Water Trustees.

WILLIAM SOMMERVILLE & SON, LIMITED, Pursuers (Reclaimers).—*Lord-Adv. Dickson—Shaw, K.C.—Blackburn.*
THE EDINBURGH AND DISTRICT WATER TRUSTEES, Defenders (Respondents).—*Clyde, K.C.—Cooper, K.C.—R. S. Brown.*

*River—Pollution—Water supply for a town—Compensation water to riparian owners—Quality of compensation water—Reparation—Neglect of statutory duty.*—The water supply system of the Edinburgh and District Water Trustees included the Glencorse Reservoir in the Pentland Hills. This reservoir, which was constructed under statutory authority, was both

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validity of the Secretary for Scotland's determination as being outwith or disconform to the statute. And that is, I apprehend, enough to dispose of this action of reduction. But the original action is still before me, and it remains to consider whether in the one action or the other the pursuers can successfully maintain what I think was their last contention, viz., that, assuming the entire validity of the determination as a determination under the statute, it was not, on the just reading of the statute, final, but operated merely as a *prima facie* deliverance, which, under the statute, put the duty upon the county auditor of impeaching the legality of the surcharged payment in a Court of law.

I must say that, having given it all attention, I have not been able to appreciate this argument. It is quite true that when a new jurisdiction is conferred by statute upon a Sheriff or magistrate or other inferior Judge, there is, as has often been said, no such thing as implied finality. The presumption always is that review exists, unless clearly excluded. But it is, I should think, obvious that this principle, sound as it is, can have no application to the Secretary for Scotland, or to a jurisdiction such as that here in question conferred upon or transferred to him as the head of the Scotch Executive. The jurisdiction is partly, no doubt, judicial, but to a large extent it is also administrative, and involves, moreover, as section 70 of the Act shews, a very large element of discretion. I should not, I confess, expect to find that the Legislature in putting such duties upon the Secretary for Scotland placed him with respect to review in the position of an inferior Judge. And accordingly when I find, as I do, that the statute declares that he shall decide certain questions, and that upon his decisions payments shall be made and may be enforced by action, it appears to me that, so far from the statute contemplating review on the merits, it excludes such review as plainly as it can do so without express words. On the whole matter I shall repel the reasons of reduction and assoilzie the defenders; and with respect to the petitory action, I shall recall the sist and grant decree in terms of the summons.

The Lord Ordinary assoilzied the defenders in the action of reduction, and, in the petitory action, recalled the sist and granted decree in terms of the summons.

Duncan Smith & MacLaren, S.S.C.—Forbes Dallas & Co., W.S.—Agents.

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* Decided March 10, 1905.

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a supply reservoir and a compensation reservoir, the trustees being by statute bound to allow to flow out of the reservoir down the Glencorse Burn 220 cubic feet of water per minute, as full compensation for the right conferred on them to stop, dam up, and store the water of the burn.

The summer and autumn of 1902 were exceptionally dry, and in consequence the Glencorse Reservoir became so much depleted of water that the silt or mud which had accumulated at the bottom of the reservoir became exposed to the air in the shallower portions, with the result that in the following winter, owing to the action of frost, rain, and wind on the exposed silt, the water of the reservoir became contaminated with large quantities of very fine sand, which took a long time to settle. In consequence the compensation water passed down the Glencorse Burn in a very discoloured condition, which made it unfit for use in the manufacture of paper. This state of matters lasted for about three months.

In April 1903 the owners of paper mills on the Glencorse Burn about three miles below the reservoir, who were almost entirely dependent on the water of the burn for their water supply, brought an action against the Water Trustees for damages on account of loss sustained by the pursuers in the manufacture of their paper owing to the discoloured condition of the water.

The defenders, who had throughout the drought continued to supply the city of Edinburgh with water from the reservoir, maintained that they were not responsible for the quality of the compensation water, in respect that their duty was to supply Edinburgh with water from the reservoir subject only to the condition of giving off the specified quantity of compensation water—a condition which (it was not disputed) they had fulfilled.

*Held*, after a proof (1) that although the defenders were by the statute entitled to store the water in the reservoir, it was their duty to use the reservoir so that the compensation water should not be unnecessarily polluted; and (2) (*diss.* Lord Young, *rev.* judgment of Lord Low) on the evidence that the defenders had failed to perform this duty, and were liable in damages to the pursuers.

2D DIVISION. Lord Low.

THE Edinburgh water supply system, in so far as situated in the South Pentlands, was constructed by the Edinburgh Water Company under the authority of a series of private Acts of Parliament, dating from 1819 onwards.* By the Edinburgh and District Water-Works

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* ACT, 1819.—In 1819, by the Act 59 Geo. III. cap. cxvi., entitled "An Act for more effectually supplying the city of Edinburgh and places adjacent with water," the Edinburgh Water Company obtained power (sec. 36) to take and use for the purposes of their undertaking the spring called the Crawley Spring (which had formerly flowed into the Glencorse Burn), and such quantity of water from the Glencorse Burn "as the said Company shall deem expedient."

Sec. 44 further authorised the Company "to collect and dam up all the flood waters of Glencorse Burn and its tributary streams" in a "compensation reservoir" authorised to be made "for the purpose of making compensation to the said owners or occupiers of mills and landowners on the said burn of Glencorse, and on the said river North Esk below its junction with the said burn, for the water hereinbefore authorised to be taken from the said Crawley Spring and Glencorse Burn, for the purposes of this Act," and (sec. 54) an obligation was laid on the Company to discharge specified quantities of water into the Glencorse Burn.

Glencorse Reservoir was built under the powers thus conferred.

The Act of 1819 further enacted (sec. 64) that in the event of the reservoir proving inadequate to provide the quantities of compensation water specified the water from the burn and from the Crawley Spring should, on application to the Sheriff, be turned into their original channels, and should continue to flow therein for the use of the lands and mills so long as such

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Act, 1869 (32 and 33 Vict. cap. cxliv.), sec. 20, the undertaking of the Edinburgh Water Company and its whole powers, rights, and properties, were transferred to the Edinburgh and District Water Trustees, who were incorporated under sec. 5 of the Act.

The South Pentlands portion of the system included two reservoirs —the Glencorse Reservoir and the Loganlee Reservoir. The Loganlee Reservoir was on a higher level than the Glencorse Reservoir, and discharged its water into the Glencorse Reservoir by means of the Logan Burn.

The Glencorse Reservoir was both a supply reservoir and a compensation reservoir. The water for the supply of the town passed out of Glencorse Reservoir through filter-beds at a weir a little distance below the reservoir and was conveyed by a conduit to Edinburgh. About a mile below the reservoir the conduit was connected with the Crawley cistern, which collected the water from an adjacent source of supply called the Crawley Spring.

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deficient supply should continue to exist. This clause was repeated in all subsequent statutes.

Act 1843.—In 1843, by the Act 6 and 7 Vict. cap. lxxxix., secs. 141 and 143, it was enacted that the Company should erect a gauge on the Glencorse Burn near the Crawley cistern through which they were required to allow to flow down the burn the quantities of water specified in the Act, which were somewhat different from those specified in the Act of 1819.

Act 1847.—In 1847, by the Act 10 and 11 Vict. cap. ccii., the Company was empowered (sec. 49) "to raise the embankments of their existing reservoir on Glencorse Burn, and to make and maintain the several channels, cuts, conduits, aqueducts, and other reservoirs and works necessary for the purpose of obtaining, collecting, storing, and conveying to the city and suburbs of Edinburgh a further supply of water, according to and in the lines and upon the lands delineated" on the plans and described in the books of reference.

The Loganlee Reservoir was built under the powers thus conferred.

Sec. 70 of the Act of 1847 enacted,—"In order to make compensation to the owners of lands, mills, and other works upon Logan Burn and the North Esk River, for the right conferred on the Company to stop, dam up, store, and use the whole waters thereof above the Crawley cistern . . . the Company shall allow to flow through the gauge presently placed near the said Crawley cistern . . . 220 cubic feet per minute for ever thereafter, as a full compensation for the right hereby conferred on the Company to stop, dam up, store, and use the whole of the waters draining by the said Glencorse Burn and its tributaries above the said Crawley cistern," provided always that in the event of the reservoirs proving insufficient to supply the quantity of compensation water specified the landowners should be entitled to apply to the Sheriff in terms of sec. 64 of the Act of 1819.

Sec. 74 of the Act of 1847 enacted that it should be lawful to the Sheriff, upon application to him by the Company "to authorise the Company to draw and let off the water of their reservoirs, when and so often as it shall appear to them to be necessary, for the purpose of repairing the same or any of their works," the Company making full compensation for any loss or damage that may be thereby sustained.

Sec. 75 enacted that the Company "shall not cleanse any of the filter-beds already formed or which may be hereafter formed upon Glencorse Burn by flushing the same, or sending the impurities therein collected down the said burn, but they shall remove and carry away all such collected matter and impurities, so that the quality of the water in the stream may not be thereby affected."

Under their Acts the Water Company, and afterwards the Water Trustees, were bound to supply compensation water to the lower heritors and millowners out of the reservoirs, the quantity of the compensation water being ultimately fixed at 220 cubic feet per minute. This compensation water flowed out of the Glencorse Reservoir, and without going through the filter-beds above mentioned passed into the channel of the Glencorse Burn, which joined the river North Esk about three miles below the reservoir. At a point on the burn opposite the Crawley cistern a gauge was placed for the purpose of measuring the quantity of water that passed down the burn.

The Dalmore Paper Mills, belonging to Messrs William Sommerville & Son, Limited, were situated at the junction of the Glencorse Burn and the North Esk. The Dalmore mills had been in existence as paper mills since 1835, and prior to that date a grain mill had existed on the same site from time immemorial. The paper made at the Dalmore Mills was of a high-class quality, and the water used in its production was drawn principally from the Glencorse Burn.

The summer and autumn of 1902 were exceptionally dry, and in consequence the Glencorse Reservoir was so much depleted of water (partly for the supply of the town and partly for the compensation water) that large portions of the deposits of silt and mud at the bottom of the reservoir were exposed to the air. The effect was that in the following winter (1902-3) owing to the action of frost, rain, and wind on the exposed silt, large quantities of very fine silt (which when mixed with water took a long time to settle) became mixed with the water of the reservoir and passed down the Glencorse Burn, making its water unfit for the purposes of Messrs Sommerville's paper manufacture, as it discoloured the paper. This state of matters lasted from December 1902 to March 1903.

The Water Trustees having repudiated all responsibility for the quality of the water in the Glencorse Burn, Messrs Sommerville, in April 1903, brought the present action against the trustees concluding for declarator "(*primo*) that the defenders are bound to allow to flow through the gauge near the Crawley cistern . . . and down the Glencorse Burn for the use of the pursuers and the other owners of lands and mills on the said burn and on the North Esk River 220 cubic feet of water per minute in compensation for the water which the defenders are, under their Acts of Parliament, authorised to impound and to divert from the said burn and its tributaries for the use of the city of Edinburgh and other places; (*secundo*) that the pur-

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Act 1856.—In 1856, by the Act 19 and 20 Vict. cap. xci., the Company was incorporated.

Secs. 85, 88, and 89 of the Act of 1856 re-enacted secs. 70, 74, and 75 respectively of the Act of 1847.

Sec. 73 enacted:—"The Company shall at all times maintain efficient filter-beds or filters in connection with their works at Glencorse, . . . and shall filter all water supplied through the . . . main pipes, with the exception of water derived from springs, and conveyed directly from such springs in pipes or covered aqueducts to the distribution pipes of the Company, and such filtering operations shall be so conducted that all the water supplied for domestic use shall be pure and wholesome water." The Town Council of Edinburgh were empowered to apply to the Sheriff for the enforcement of this enactment.

There was no other reference in any of the Acts to the quality of the water.

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suers have good and undoubted right to have the whole of the said 220 cubic feet of compensation water per minute transmitted through the said gauge either (first) in a state fit for all primary purposes, or otherwise (second) in a state not inferior in quality or purity to the state of the said water before it enters either of the defenders' reservoirs known as the Loganlee and Glencorse Reservoirs, or otherwise (third), in a state not inferior in quality or purity to the state of the said water when it enters the defenders' reservoir known as the Glencorse Reservoir; and (*tertio*), that the defenders are bound to allow to flow through the said gauge not less than 220 cubic feet of water per minute in such of the said three foregoing alternative states as" the Court should determine. Then followed conclusions for interdict, and for decree for £5000 as damages.

The pursuers, after setting forth the defenders' statutes substantially as given *supra*, pp. 1061-3 note, averred;—(Cond. 7) "Since 1835 the pursuers and their predecessors have used the water coming down the Glencorse Burn in the ordinary processes of manufacturing paper, and, except as after mentioned, it was always in such a state as to be perfectly suitable for being so used. . . . The only other water available for their purpose is derived from a spring on the pursuers' lands, but the supply from this source is quite inadequate to keep the mills going." (Cond. 8) "Before the construction of the water-works the water in the said burn was fit for primary purposes and was used therefor, and from the commencement of said works until about the second week of December 1902," except on certain occasions in November 1901, "the water sent down the said burn continued to be so fit and used. From time immemorial the water supply for domestic purposes for various houses on the pursuers' lands was partly derived from the said burn. It is essential for the purpose of manufacturing white printing papers (which are chiefly the papers that have been made by the pursuers and their predecessors) that the water used should be pure, and until recently the pursuers had no serious cause of complaint with the quality of the compensation water supplied. After a heavy rainfall, when the burn is in flood, the water is occasionally unfit for use, but the burn has a rapid flow and a short course and the impurities from this cause never last more than a day or two at a time. In order to be prepared for such emergencies the pursuers have been in the habit of storing a reserved stock of water, which, together with the supply from the spring above mentioned, affords the necessary supply of pure water and keeps the mills going for about two and a half days. The pursuers have always found that before this supply was exhausted the water in the burn was again fit for use, and they have never suffered any loss through the impurity of the water in the burn caused by natural flooding. . . ."

(Cond. 9) "On or about the 12th day of December 1902 it was found that the water flowing down the burn to the pursuers' mill was so contaminated with silt and sand as to be quite unfitted for primary purposes or for the purposes of papermaking, and it continued in this condition without any material improvement until about the 7th day of March 1903. . . . This condition of the water was not due to flooding or any other natural cause, but to the fault and negligence of the defenders, and might have been prevented by reasonable precaution on their part. The defenders allowed great quantities of silt and sand to collect at the bottom of the Glencorse Reservoir. They were all along aware that this was going on. They how-

ever," except on the occasions in November 1901, "kept such a quantity of water in the Glencorse Reservoir that the said silt and sand was not disturbed and no evil results happened until last December. For some time prior to 12th December 1902 the defenders had drawn very largely on the Glencorse Reservoir and had very seriously depleted the water stored therein. The result of this depletion was to reduce the level of the water therein below the accumulation of silt and sand in the shallower parts of the reservoir, and to leave very little depth of water over other parts of said accumulation. In consequence, the water flowing into the Glencorse Reservoir, which was quite fit for primary purposes and for papermaking as it entered that reservoir, was mixed with the silt and sand which was stirred up in the reservoir and became quite brown and turbid, being mixed with silt and sand. The result was that, instead of pure water such as entered the Glencorse Reservoir being sent down as compensation water, the water which was sent down was very dirty and impure and quite unfit for primary purposes or for paper manufacturing purposes. The said silt or sand is so fine that when mixed with the water it does not readily precipitate therefrom, and for months after said 12th December the whole compensation water sent down the Glencorse Burn by the defenders was dirty, impure, and unfit as aforesaid. . . . But for the defenders' operations and actings there would have been all along, and especially since November 1902 an ample supply of pure water in the said burn sufficient for all the pursuers' purposes, and whatever the other obligations of the defenders were they were bound *ante omnia* to continue to the pursuers such a supply of pure water up to the statutory quantity of 220 cubic feet. . . ." Then followed (Cond. 10) averments as to the amount of damages.

In their defences the defenders, *inter alia*, averred;—(Ans. 9) "Owing to prolonged drought towards the end of 1902 the water in the Glencorse Reservoir became very low. This was the necessary result of (1) implement by the defenders of their obligation under the Acts referred to, to send a fixed quantity of water down the Glencorse Burn, and (2) the withdrawal of the necessary supply of water for the inhabitants of Edinburgh as required and authorised by statute. When the water had sunk below its usual level the fact was disclosed that a certain quantity of silt had been deposited in the reservoir during the course of years by the streams flowing into the reservoir. The existence of this silt to the extent deposited was not known to the defenders, and it could not have been removed by them. The defenders are under no obligation to filter the water which is sent from the reservoir down the Glencorse Burn. During the period referred to they discharged from the reservoir the water which they were bound to discharge. This water was perfectly suitable for driving a grain mill. . . . Prior to the formation of the reservoir the quality of the water in the Glencorse Burn varied greatly, and in times of spate, which were frequent, the water could not be used for any primary purposes. The result of constructing the reservoirs has been to hold back spate water, and consequently the water passing down the burn from the reservoir is much more equal in quality throughout the year than it formerly was. In consequence of the said drought towards the end of 1902, prior to 12th December 1902, the Glencorse and other burns flowing into the reservoir became dry, and if the reservoir had not been in existence, and there had not

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been a supply of compensation water flowing from it, there would have been practically no water in the burn at the pursuers' mill."

The pursuers pleaded, *inter alia*;—(2) The compensation water supplied to the pursuers being in lieu of the water impounded and diverted by the defenders, they are entitled to have the same transmitted to them by the defenders in the state of purity concluded for in the summons, and decree of declarator and interdict should be pronounced as concluded for. (3) The pursuers having suffered loss and damage to the extent concluded for by the wrongful and illegal actings and neglect of the defenders, they are entitled to decree for damages as concluded for. (4) The defenders not having supplied compensation water of the quality required by the statutes condescended on, and the pursuers having in consequence suffered loss, they are entitled to decree as concluded for. (5) The pursuers having been wrongfully deprived by the actings and operations of the defenders of the compensation water to which the pursuers were entitled under the statutes, they are entitled to decree as concluded for.

The defenders pleaded;—(3) The pursuers' averments, so far as material, being unfounded in fact, the defenders should be assoilzied. (4) The defenders should be assoilzied in respect that they have all along fulfilled their whole obligations under the statutes with regard to compensation water. (5) The defenders should be assoilzied in respect that (*a*) the statutes do not impose any obligation on the defenders to maintain the compensation water at any standard of purity; (*b*) the pursuers' mill was erected after the compensation reservoir was authorised; and (*c*) the pursuers have no right under the statutes to require that the compensation water from the reservoir should be adapted to the processes of their manufacture.

A proof was allowed and led. The import of the evidence sufficiently appears from the opinions of the Lord Ordinary and the Court.

On 13th July 1904 the Lord Ordinary (Low) assoilzied the defenders from the conclusions of the summons.*

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* "OPINION.—The first question which I shall consider in this case is, what are the rights of millowners and other riparian proprietors on the Glencorse Burn in regard to compensation water?

"1. In regard to *quantity*. The amount of the compensation water is fixed by the 85th section of the Act of 1856 (19 and 20 Vict. c. xci.) at 220 cubic feet per minute. That amount is passed through a gauge at Crawley, which is about a mile and a half below the Glencorse Reservoir. That is the only statutory enactment in force in regard to the quantity of the water, with this exception, that it is provided that in the event of the reservoirs 'proving inadequate to afford the quantities of water provided to the owners of lands, mills, and other works,' any of the owners shall be entitled to apply to the Sheriff, who is given power to ordain that the burn and springs which the water trustees were authorised to impound and divert, shall be turned into their original course, and continue to flow therein, and through the gauge, so long as a deficient supply shall continue to exist.

"That provision appears to me to have an important bearing upon this case. The Glencorse Reservoir and its supplementary reservoir of Loganlee were supply as well as compensation reservoirs. If they had only been compensation reservoirs, I think that it is plain, considering their capacity, that it would not have been necessary to provide for the contingency of the reservoirs becoming empty, and not being able to furnish the amount

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The pursuers reclaimed, and argued;—The defenders had no statutory authority to pollute the water, and in doing so they exceeded their powers. The terms of their statutes were not imperative, but permissive, and the powers thereby conferred must be exercised in strict conformity with private rights.[1] The common law rights of the pursuers as lower heritors had never been taken away. They were accordingly still entitled to receive the water in its natural state as it entered the reservoirs. Parliament having said nothing as to the quality of the compensation water, the inference was that it should remain the same as before the water-works were constructed. In any event, the pursuers were entitled to the water in a state as near to its natural state as was consistent with a reasonable use by the defenders of their powers under statute, and were not bound to take it in any condition to which it might be reduced by the negligence of the defenders. The defenders had acted negligently inas-

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of the compensation water. It was because the reservoirs were supply as well as compensation reservoirs that it was provided that if they became so depleted as not to be able to furnish the full amount of compensation water the riparian owners should have the whole water contained in the burn and springs.

"I think that that shews that there was no definite proportion of the water contained in the reservoirs which was specially appropriated to the purposes of compensation, and that there was no stage in the process of drawing upon the reservoirs when the riparian owners were entitled to call upon the water trustees to cease taking water for supply purposes in order that a sufficient amount might be left to secure the continuance of the compensation water. I think that the right of the water trustees to take water for supply, and the right of the riparian owners to compensation water, were concurrent rights, and that the trustees were entitled to draw upon the reservoirs for both purposes to their full capacity.

"2. In the next place, in regard to the *quality* of the compensation water. There is nothing said in the statutes as to quality, and the only enactment which in any way touches the question of quality is the provision that the filters which were to be erected for the purpose of filtering water going to Edinburgh were not to be cleaned out in the Glencorse Burn. I suppose that that provision was inserted because the filters were placed near the burn, and it might have been very convenient to cleanse them by flushing them into the burn.

"The reasons why the quality of the compensation was not specified I take to have been (1) that it was impossible to do so, because the compensation water was to be measured and given off about a mile and a half below the reservoir, and was liable to pollution between the reservoir and the gauges from causes over which the water trustees had no control, and (2) that it was thought that if the riparian owners got a sufficient quantity of the water impounded in the reservoirs there would be nothing to complain of as regards quality, because the water given off from a reservoir in which a stream is impounded is upon the average certainly not worse, and probably somewhat better, than the water of the stream in its natural state. As matter of fact there have been no complaints in regard to the quality of the water until the incident which gave rise to the present action, with

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[1] Clowes v. Staffordshire Potteries Water-Works Co., 1872, L. R., 8 Ch. 125; Metropolitan Asylum District v. Hill, 1881, L. R., 6 A. C., 193, *per* Lord Watson at p. 213; Duke of Richmond v. Burgh of Lossiemouth, June 25, 1904, 12 S. L. T. 166; The Queen v. Bradford Navigation Co., 1865, 6 Best and Smith, 631; Canadian Pacific Railway v. Parke, L. R., [1899] A. C. 535; Rapier v. London Tramways Co., L. R., [1893] 2 Ch. 588.

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much as they could have prevented the damage to the pursuers by a reasonable and proper use of their statutory powers.[1] The pollution could have been avoided in several ways—by filling up Glencorse from Loganlee, by diminishing the supply to Edinburgh, or by drawing on Gladhouse—and the defenders had full warning as to the probable result of their action from the similar pollution in 1901. The defenders had failed to give the compensation fixed by statute, which consisted of water, not merely of a certain quantity, but also of a certain quality, namely the quality accompanying and resulting from the reasonable administration of the water-works in the interests of both parties. Glencorse was primarily a compensation reservoir, and the pursuers were entitled to demand that the defenders should consider the effect of their management of it not only on the supply of water to Edinburgh, but also on the quality of the compensation water. The defenders had admittedly acted solely in the interests of

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the exception of an occasion in 1901, when the water was for a short time in a condition which led to a complaint by the pursuers.

"The circumstances under which the present action was raised were as follows:—The pursuers are papermakers who deal in a high class of paper, for the manufacture of which water of a comparatively high standard of purity is required. The mills now owned by the pursuers were established in 1835, and from that date until the end of 1902 the water of the burn—that is, the compensation water—was fit to be made use of in the manufacture of paper. The pursuers have not used the water of the burn alone for manufacturing purposes, but they have mixed it with a considerable quantity of spring water, and the water composed of that mixture has been found satisfactory and sufficiently pure for the manufacture of high class paper. Further, the pursuers have not been able to use the burn water continuously, because when it is turbid after heavy rains it is not fit for use. They have, however, means of storing a sufficient quantity of water to keep the mills going for two or three days, and they have found such storage to be an ample provision to meet the case of natural floods.

"About the 12th December 1902 the water of the burn became so turbid that it could not be used for the class of paper which the pursuers make, even when mixed with the spring water at their command, and that state of matters continued without interruption until 7th March 1903. The condition of the water during that period was different from that caused by spates. It was highly impregnated with very fine matter of a whitish colour, which took a long time to settle. That the water during the period referred to was entirely unfit for the pursuers' purposes seems to me to be proved without any doubt. There is one fact which I may mention because it illustrates in a somewhat striking way the difference between the quality of the water during the period complained of, and at other times, and that is that the flannel bags which are put upon the ends of the pipes which discharge the water into the machines, in order to catch up any solid matter, require to be changed in ordinary times only about once a week, while during the period in question they required to be changed every ten minutes or quarter of an hour. That fact appears to me to demonstrate that the water was in a highly contaminated condition, and it is plain that if such a condition was to become constant or of frequent occurrence and long continuance, the pursuers would either have to manufacture paper of

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[1] Geddis v. Proprietors of Bann Reservoir, 1878, L. R., 3 A. C. 430, *per* Lord Selborne at p. 452, and Lord Blackburn at p. 455 (definition of negligence); Shelfer v. City of London Electric Lighting Co., L. R., [1895] 1 Ch. 287; Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co., Feb. 21, 1893, 20 R. (H. L.) 35; Reid v. Baird, Dec. 13, 1876, 4 R. 234.

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the town and without regard to the interests of the pursuers. In so doing they had caused damage for which they were responsible.

Argued for the defenders;—The pursuers were not entitled to the compensation water in its "natural" condition, as defined in *Young & Co.* v. *Bankier Distillery Co.*[1] This, the standard by which in ordinary circumstances the rights of a lower heritor were measured, had been abrogated by statute and another standard substituted. Parliament had authorised the erection of the reservoirs and other works. It followed that all that the pursuers were now entitled to was 220 cubic feet per minute of such water as the reservoirs in fact contained from time to time, improved or deteriorated, as the case might be, by the existence of the water-works and the use of the works for the purposes sanctioned by Parliament. Accordingly the pursuers were not entitled to decree in terms of any of the declaratory conclusions of their summons. As to the wrong alleged to have been

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an inferior quality, or obtain a new supply of water from another source, or establish a system of filtration for the burn water. The second of these alternatives is very likely impossible, and the seriousness of either of the other two is sufficiently obvious.

"As to the cause of the pollution there is really no dispute. During the summer and autumn of 1902 there was a long continued drought—indeed so severe a drought had not been experienced since 1842. The result was that the defenders had, in order to furnish the necessary supply of water to Edinburgh, to draw largely upon all their reservoirs, including Glencorse. The latter was accordingly run down to an unusually low level. During the long period which has elapsed since the reservoir was constructed there has necessarily been a considerable deposit of sand, mud, and other material upon the bottom of the reservoir, and when the water in the reservoir falls to a low level a greater or less extent of the deposited silt becomes exposed. The effect of that is to create some turbidity in the water, and the lower the level to which the water falls the greater the danger of turbidity. That arises from various causes. The most powerful agents are rain, wind, and frost. The effect of frost is to raise up the surface particles from those beneath them, so that when thaw comes they are loose. If, when that condition of matters exists, there is heavy rain or high winds, that detached matter is very readily washed into the water. Another cause of turbidity is the action of the streams which feed the reservoir, and which, when the water is low, require to cut channels for themselves through the silt, and in doing so they necessarily carry away a portion of the silt. If, however, the level of the water is lowered gradually, that process is also gradual, and is not, I think, likely of itself to cause serious turbidity. The sides of the channels cut by the streams are, however, steep, and are liable to be undercut, when a considerable quantity of material may fall from them into the water. The same result may be caused by frost and thaw.

"Further, one of the streams which feed the reservoir appears to bring down material which is very fine and light, and which accordingly takes a long time to settle. That material may be carried further down the reservoir than heavier material, and be deposited nearer the lower end. Therefore, turbidity which is set up when the water is very low is likely to be more serious than when a less extent of the silt is uncovered, partly, of course, because there is less water in which to distribute any silt washed into it, but also because there may be a larger amount of the lighter material, which remains a long time in suspension. I think that there can be no

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[1] Young & Co. v. Bankier Distillery Co., July 27, 1893, 20 R. (H. L.) 76, *per* Lord Macnaghten at p. 78.

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committed by the defenders, it was a case of *damnum sine injuria*. Even admitting that the loss suffered by the pursuers was caused by the actings of the defenders, these actings being incidental to and necessary for the carrying out of the undertaking authorised by Parliament, no action could lie against the defenders provided they had used reasonable care to prevent unnecessary damage being done.[1] The pursuers were entitled only to the statutory compensation—namely, 220 cubic feet per minute—for the rights or property originally taken from them, and having received that, had no further claim for damage sustained through the use of the property for the purposes of the undertaking.[2] Admitting that the defenders—after seeing that the pursuers received the statutory amount of compensation water—had acted solely in the interests of the town, it was not disputed that they had acted reasonably from that point of view. The defenders were under no obligation in managing the reservoirs

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doubt that upon the occasion complained of a large quantity of the lighter silt was washed into the water.

"Now, the pollution complained of could only have been avoided by the adoption of one or other of three courses. The defenders might have cleaned out the reservoir so as to make the bottom practically free from silt; or they might have filtered the compensation water; or they might have ceased to draw upon Glencorse for supply purposes when the water got to so low a level that to reduce it further would have been to run the risk of its becoming polluted to such an extent as to be unfit for use by the mill owners.

"No one says that the first of these alternatives ought to have been adopted or was practicable. In regard to the suggestion that the compensation water ought to have been filtered the answer is that the defenders are compelled by statute to filter the water going to Edinburgh, and that the filter accommodation is not more than sufficient to filter the amount of water which it is necessary to draw from Glencorse for supply purposes. The third alternative, however, requires more consideration, and it is the one upon which the pursuers ultimately insisted.

"Before dealing with the evidence on that point, however, I think that it is well to consider what duty, if any, lies upon the defenders in regard to the quality of the compensation water.

"I have already pointed out that no express duty is laid upon the defenders in that respect; and that apparently what was contemplated by the Legislature was that if a sufficient quantity of the water impounded in the reservoir was sent down the channel of the burn, it was unnecessary to make any provision, or to lay any express obligation upon the water trustees, in regard to quality. I do not think that it can be assumed that those who were responsible for framing the statutes were ignorant of, or ignored, the fact that silt is inevitably deposited in the bed of a reservoir, and that such silt is likely to be stirred up when the water falls to a low level. Yet the statutes seem to me to authorise the reservoirs to be drawn upon for supply as well as compensation to their full capacity.

"It does not, however, follow that the defenders are under no obligation whatever in regard to the quality of the compensation water. It is well

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[1] London and Brighton Railway Co. v. Truman, 1885, L. R., 11 A. C. 45; Parrett Navigation Co. v. Robins, 1842, 10 M. and W. 593; Cracknell v. Mayor of Thetford, 1869, L. R., 4 C. P. 629; Mersey Docks Trustees v. Gibbs, 1866, L. R., 1 Eng. and Ir. App. 93, *per* Lord Blackburn at p. 112; River Ribble Joint Committee v. Halliwell, L. R., [1899] 1 Q. B. 27.

[2] Hammersmith Railway Co. v. Brand, 1868, L. R., 4 Eng. and Ir. App. 171.

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to consider the interests of the pursuers, and indeed, being under an obligation to provide the town with an adequate supply of water,[1] it was not in their power to diminish that supply in order to improve the quality of the compensation water.

At advising,—

LORD JUSTICE-CLERK.—We were favoured in this case with a most able and elaborate debate, receiving from both sides every possible assistance for its consideration, and I feel bound to say that although the discussion was lengthy it was not more so than was called for by the importance and difficulty of the questions in dispute. The action taking the form of a declarator, followed by a conclusion for damages, the debate on the declarator necessarily occupied a large part of the time devoted to the discussion. If it were necessary to deal with the case by findings relating to the different

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settled that, where the Legislature has empowered a certain thing to be done, no action will lie for injury caused thereby, provided that all reasonable precautions have been taken to prevent injury. If, however, the injury has been caused by negligence it is no answer to a claim of damages that what was done was authorised by statute. I think that that rule applies here, and that if the long continued pollution of the water of which the pursuers complain was caused by the defenders' negligence, they are liable to make good the loss thereby occasioned. If, upon the other hand, there was no negligence on the defenders' part, then the pursuers have no ground of action.

"The question therefore seems to me to be, whether, in the circumstances which happened, the defenders have been convicted of negligence.

"The pursuers' case is that the defenders in 1902 entirely ignored the interests of the mill owners, and drew upon Glencorse reservoir for supply purposes unnecessarily and unjustifiably, until it was reduced to so low a level that the water remaining was, by the operation of the causes to which I have referred, rendered for a long period totally unfit for the manufacture of paper.

"The men of skill who gave evidence for the pursuers said that what occurred in 1901 shewed that there was a level below which the water in the reservoir could not be reduced without causing abnormal turbidity by the fine silt being stirred up. In the early winter of that year the level of the water was reduced until it was thirty-eight feet below the sill of the weir. While the reservoir was in that condition the compensation water became turbid and unfit for use for some time. That occurrence, it was said, was sufficient to warn the defenders that there was a level below which it was not safe to reduce the water; and that level the pursuers' witnesses fix at thirty-six feet below the sill of the weir. Their contention is that the defenders ought not to reduce the water below that level, because if they do so there is the risk of the water being rendered so turbid as to be unfit for the purposes of compensation.

"Now, when the water stands at thirty-six feet below the weir, there are still some fifty-seven millions of gallons of water in the reservoir, and it is rather a startling proposition that the defenders are not entitled to draw upon that large volume of water, whatever the exigencies of supply may be, although their statutory right is to use all the water which the reservoir contains.

"Further, it seems to me that it is impossible to fix any precise limit of safety. Whether the drawing off of a certain amount of water will or will not result in that which remains being impregnated with silt, depends not so much upon the level which the water has reached as upon the accom

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[1] Water-Works Clauses Act, 1847 (10 and 11 Vict. cap. 17), secs. 35, 36.

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matters to which the declarator relates it would, I think, be difficult to affirm in the terms of the pursuers' conclusion. But the true question is, whether by their actings a legal injustice has been done to the defenders, and if so, what is the fair amount of damages to compensate for it.

I shall first state shortly what I consider to be the facts of the case as disclosed in the evidence. The defenders, under powers obtained by themselves or their predecessors, store water in two reservoirs in the Glencorse valley and in the Loganlee valley above it, by which they impound water in the watershed flowing into the Glencorse Burn above Glencorse Reservoir, that being the lower of the two. Loganlee discharges the water impounded in it to Glencorse, and from Glencorse the defenders discharge into the Glencorse Burn below, at a point fixed by the statute, 220 cubic feet per minute, being the compensation in quantity to which the proprietors below

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panying climatic conditions, and the conclusions at which I have arrived upon the evidence are—(1) that if the lowering of the level of the water is gradual (as it has always been) the fouling of the water by the feeders cutting channels through the silt alone will not be very great, and (2) that if the weather is dry, calm, and without frost, the level of the water may be reduced to an indefinite extent without serious pollution; while, on the other hand, if there is frost, followed by heavy rains and high winds, there may be serious pollution although the level of the water is considerably higher than thirty-six feet below the weir.

"When, however, the pollution of the water in the end of 1902 commenced, the level of the water had undoubtedly fallen to an exceptionally low point. The maximum reached was forty-three feet nine inches below the weir. That is a very unusual degree of depletion, because, although the water has on previous occasions been as low and lower, such a thing has not occurred since 1870.

"Now, 1902 was an unusually dry season. There had been nothing like it since 1870, and then the drought was not so severe, and prior to that there had been no year of equal drought since 1842. The result was that there was a great strain on the defenders' resources, and they had considerable difficulty in furnishing the supply which was necessary for Edinburgh. Mr Tait, the defenders' engineer, however, recognised the desirability, if possible, of preventing Glencorse being unduly depleted, and so early as June 1902 he largely restricted the draught upon that reservoir. In August, however, he was compelled again to increase the draught to the ordinary amount, but he was again able to restrict it in November and December, and he says that in the middle of December it was reduced to an almost unprecedentedly low draught. It was said that there was plenty of water at Gladhouse, which ought to have been drawn upon to a larger extent. It is true that as regards the reservoir at Gladhouse there was a sufficient quantity of water to afford a larger draught than was taken from it, but the Gladhouse water cannot be used without filtration, and as much was passed through the filters (which are at Alnwickhill) as they were capable of carrying.

"But then it was said that there was a simple means available by which all the water which was actually supplied from Glencorse could have been given off without depleting the reservoir to a dangerous extent. It appears that when Glencorse was at its lowest there were thirty-six millions of gallons in Loganlee—a reservoir which was constructed for the very purpose of supplementing Glencorse. In these circumstances the pursuers' witnesses say that all that the defenders required to do to avoid pollution of the Glencorse water was, when the water of the latter became dangerously low—thirty-six feet below the sill—to let down ten or fifteen millions

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the reservoir are entitled in respect of the ordinary flow of the water down the valley being interfered with by the defenders' works, which include an abstraction from the stream below the Glencorse Reservoir of water, called Crawley water, from the springs which would otherwise discharge into the stream. In addition to discharging 220 feet per minute of compensation water the defenders, when the exigencies of their supply to the inhabitants of Edinburgh require it, draw off water from the reservoir for town supply. These are the facts as regards the normal use of the reservoir for the two purposes of compensation to riparian proprietors and supply to the city.

The facts of which complaint is made, and which are in my opinion established, are that towards the latter end of 1902 the compensation water was discharged into the stream in a polluted state, as a consequence of which the pursuers were unable to make the quality of paper which they

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of gallons from Loganlee, which would have been sufficient to allow the defenders to continue their draughts from Glencorse without bringing the level of the water down to danger point.

"That is a very plausible suggestion, and my first impression was that the course suggested was one which ought to have been followed. It is, however, easy to be wise after the event, and it is necessary to consider the matter from the point of view of Mr Tait at the time.

"Loganlee Reservoir, when full, contains in round numbers one hundred and twenty-two millions of gallons. It was full in the beginning of 1902 and continued full until the end of July, but in the months of August and September the water was drawn off, and in October it was for some time practically empty. The reason for that being done was that the pitching of the embankment required to be repaired.

"When the repairs were completed Mr Tait considered it to be his duty to have Loganlee filled again as soon as possible. The sluices were accordingly shut and the water gathered until, as I have said, when Glencorse was at its lowest, there were some thirty-six millions of gallons in Loganlee, which represents less than one-third of its full capacity. Mr Tait's reason for wishing to fill up Loganlee was this: Where there are upper and lower reservoirs—the one feeding the other—the general rule is that the water should be so managed that the upper reservoir fills first. That is in order to avoid waste. If, for example, the upper reservoir was empty, while the lower was half full, then when rain came the result might be that the lower reservoir would be overflowing and running to waste, while the upper reservoir would not yet be full.

"Now, I do not think that the course adopted by Mr Tait was open to criticism until the beginning of December, because it was only on the 1st of December that the level of the water in Glencorse fell so low as thirty-six feet below the weir, which the pursuers' witnesses regard as the limit of safety, and so long as he could safely draw from Glencorse I think that the evidence shews that it was proper management for Mr Tait to do his best to fill up Loganlee in order to avoid the risk of waste.

"The question, however, is whether when it became apparent that Glencorse would be reduced to a lower level than thirty-six feet below the weir, unless it was supplemented it was not Mr Tait's duty to utilise for that purpose the water which was stored in Loganlee. Whether that was or was not the proper course to follow, seems to me to have been a question of opinion upon which men of equal skill might very well have differed.

"Probably if Mr Tait could have foreseen that an abundant rainfall would commence (as it did) upon the 15th of December, he would have drawn upon Loganlee, but in the beginning of December he had to contemplate the possibility of the deficiency of rainfall continuing for an indefinite

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had been in use to supply to the trade for many years, it being the fact that the flannel bags used on the ends of their delivery pipes from their supply into the works became in a very short time so choked up with solid matter that they often burst and destroyed the pulp about to be used for making paper, and where this did not happen it was impossible to prevent so much colouring matter passing, that the paper turned out was of inferior quality, and in consequence many complaints were made by customers, and orders and customers were lost. It is plain that such a discharge, not made foul by spate, was not in accord with the ordinary rights of lower heritors as regards the flow from above to them. The facts as to the cause of this are, that at the time there had been an exceptional drought, that in consequence the level of the water in Glencorse was so lowered by the drawing off the compensation water and what was drawn off for town supply, that

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period. That was the most serious contingency for which Mr Tait (whose duty was to supply water to a great city) had to provide. He therefore deemed it to be prudent so to manage the reservoirs as to secure that whatever rainfall there was should be impounded and should not run to waste. It appears, however, that the gathering ground for Loganlee is larger in comparison to the size of the reservoir than the gathering ground of Glencorse, and it was suggested that there was therefore really no risk of Glencorse becoming full and overflowing before Loganlee was also filled. But that has not been proved, and Mr Tait, who has had practical experience of the reservoirs thought otherwise. He also referred to an actual instance in which Glencorse was overflowing before Loganlee was filled up.

"Further, I am not satisfied upon the one hand that even the probable result of allowing the water in Glencorse to fall considerably lower than thirty-six feet was to cause serious and long-continued pollution of the compensation water, nor upon the other hand that the pollution which actually occurred would have been prevented, to any material extent, by letting down ten or fifteen millions of gallons from Loganlee. It all depended upon the climatic conditions, and the conditions which actually occurred were as unfavourable as could well be imagined, because there was hard frost, followed by heavy rain—one inch falling in the first twenty-four hours—and there were also very high winds. Even if Glencorse had contained ten or fifteen millions of gallons more than it did contain, there would still have been a very considerable expanse of silt uncovered, upon which the frost, the rain, and the wind would have taken effect, with the result, so far as I can judge, that turbidity would inevitably have been caused. It may be that the turbidity would not have been of so serious a character as that which actually occurred, because so much of the fine matter might not have been stirred up. But it is impossible to estimate what the extent of the turbidity would have been, or how long it would have continued, seeing that during the remainder of the winter constant gales and frequent heavy rains prevailed, which prevented the water from settling.

"The case appears to me to be one of great difficulty, and I fully recognise the hardship to the pursuers, but after the most careful consideration I am unable to affirm that there was negligence on Mr Tait's part. He was placed in a position of great difficulty, and while to have utilised the water which was stored in Loganlee might have, to some extent, mitigated the pollution, I do not think that it could have prevented serious pollution, and further the course which he followed of gathering water in Loganlee was in accordance with what is generally recognised as prudent management when water is scarce and it is important to avoid waste.

"I am therefore of opinion that the defenders must be assoilzied."

the large accumulation of silt, which in course of years had collected in the reservoir bed, was exposed to a considerable extent, and that when stormy weather supervened, the wind causing the water to surge over the silt disturbed it and so polluted the water.

The pursuers maintain that this discharge of polluted water was a wrong, not excusable on any plea that it was unavoidable or caused by a *damnum fatale*, and that it might easily have been avoided if reasonable care had been exercised.

The defenders allege the contrary, and further maintain that they were under no obligation in the matter—that all they were under obligation to do was to send down the quantity of water prescribed as compensation by the statutes under which they or their predecessors got their powers, and that if they so sent down that quantity their whole obligations under the conditions of their compulsory powers were fulfilled. They found upon the fact that no reference is made to quality in the Acts of Parliament, and maintain that all that was reserved to those below the reservoir was a flow of water to the extent of 220 gallons per minute.

There can be no doubt that in the time before the water-works were erected the supply of water to the pursuers would at times be impure—necessarily it would be so in times of spate—and against this the pursuers provided by establishing a certain amount of storage at their mills so as to carry them over a period when there might be spate water in the burn. And if the difficulties of which they complain in this case had been similar to those of ordinary spates they do not maintain that they would have a legal ground of complaint. But what they do maintain is that in the way in which the defenders—not of necessity, but for their own ends, as suppliers of water to the city—have proceeded in the use of their works, they have unnecessarily, both as regards extent and duration of the injurious action, sent polluted matter down the stream, to the pursuers' damage.

The defenders do not deny the fact, but they maintain that they have done nothing they were not entitled to do. The question therefore comes to be, what, if any, is the obligation resting upon the defenders as to the character of the water which they supply as compensation? Is their obligation only to send down water in bulk regardless of its condition, unless it can be shewn that by some wilful act of theirs, not in the exercise of their powers, they polluted it before sending it down? The defenders deny that there is any obligation. They practically admit that in dealing with the water they impound they consider only the interests of the city of Edinburgh as their water consuming area, and hold that as paramount, subject only to the condition that they pass 220 feet of liquid from the reservoir to the stream. They say that the accumulation of silt in the reservoir was a necessary consequence of its construction, that if such an accumulation causes turbidity of the water to any extent and for any length of time they would incur no responsibility if it suited them in the interests of the city supply to conduct their works so that such a state of things would ensue. In other words, they maintain that if they can so utilise the reservoir as best to serve the ratepayers' requirements, they need consider nothing else beyond securing that 220 cubic feet, of whatever quality, shall pass to the lower proprietors.

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The pursuers on the other hand maintain that while under the statutes they must be content with water coming from the reservoir in lieu of what before came direct to them by the stream, it is an implied condition in the compulsitor upon the defenders to give compensation that the water of compensation shall be sent down not in a state of pollution inconsistent with a reasonable and ordinarily careful management of the artificial works—reasonable and careful not in the sole interest of the supply of Edinburgh with water, but also with a proper regard to the interests of those whom the statute compelled to accept compensation for the taking away of their natural rights. They plead that the natural use of a reservoir for compulsory compensation is to provide water fit to make up the volume of a natural stream, so that the stream shall in a reasonable sense be as it was before as regards the uses to which the water in it could be applied. It was pointed out that as regards the stream and its feeders between the reservoir and the pursuers' premises the water flowing in the burn would reach them in a fit state for their uses, but that if it was part of the defenders' statutory right to send foul water from the reservoir when that was convenient for their own ends in securing the supply to Edinburgh, the good water in the stream below would necessarily be rendered unfit for use, and that certainly it could not have been the intention of the Legislature that that should be the case if it was possible to prevent it by reasonable means, even although it might cause difficulty in giving a full supply to the inhabitants of Edinburgh, which has a population always increasing, and for whose wants it is the duty of the defenders to exercise foresight in making provision. Upon this part of the case I am of opinion that the pursuers' contention is sound, and it only remains to consider whether it has been made out that the defenders in the particular circumstances are responsible for what occurred, in respect that the course which they followed caused injury which might have been avoided by reasonable action on their part.

The direct cause of the mischief was that they, by allowing the level in Glencorse to fall abnormally, caused a large surface of silt to be uncovered, or in parts to be so nearly uncovered that when a stormy wind arose and swept along the surface the silt was washed from its position of rest into mechanical mixture with the water, with the consequence that for a long time the water was in a state of great turbidity and the solid matter was carried by the water in large quantities over the compensation weir.

This is clearly proved to have been the fact, and I do not think it is disputed that such a state of things was inevitable if sufficient water was not kept in Glencorse to prevent the action of a high wind from stirring up silt by the pressure of the waves. Therefore the primary cause was the lowness of the water in Glencorse. The contention of the pursuers is that this risk might have been prevented had the level in Glencorse been kept higher by passing water down from Loganlee, in which there was a supply of 36,000,000 gallons at the time, and it cannot be disputed that this was so. The defenders maintain that this was not done from motives of prudence as regards supply, as Loganlee being the upper reservoir it was advisable to keep water in it, so that when rain came there would be less risk of waste from Glencorse overflowing before Loganlee was full. This,

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of course, was a sound view for those who were considering primarily the interests of water supply to Edinburgh, and there was nothing unreasonable in Mr Tait taking that view from the position of engineer of Edinburgh Corporation. I do not think that there is any ground for attaching blame to Mr Tait for the view he took. He had his masters to serve, and had no reason to consider, unless it was brought before him by the legal advisers of the Corporation, what were or were not the claims at law that might be made. Apparently their views were that what was done was legally within their rights, and had Mr Tait applied to them for directions as to what he should do, according to the views they have maintained in this case they would have told him to go on as he was doing. Either they considered the question and approved of what he was doing or they failed to consider it. One thing is certain, that they must have known what was likely to follow the course taken, for there had been a similar pollution on the occasion of the drought in 1901, which had been brought fully to their notice by complaint, and it is therefore not possible for them to say that they found themselves in unforeseen circumstances, for which they could not reasonably be expected to make provision if legally bound to do so.

There can be no doubt that if they had acted as they could have done, and if there had been a continued drought, there might have been some inconvenience to the inhabitants of Edinburgh, who might have been obliged to be satisfied for a time with water from Gladhouse and elsewhere, under difficulties as to the sufficiency of filtering appliances, owing to the want of a sufficient number of filtering beds being provided by the Corporation, and doubtless this was in the minds both of Mr Tait, whose sole duty it was to carry out the will of the Corporation, and of the members of the Corporation themselves.

But if, in considering first or solely the interests of Edinburgh, there was failure to give to the pursuers what they were entitled to as the true compensation for the loss of their primal rights as regards the water flowing from Glencorse valley, then I can see no ground on which they can be exempted from liability for injury done to the pursuers. It appears to me that the words of Lords Blackburn and Selborne in *Geddis* v. *Bann Reservoir Proprietors*[1] may be applied to this case, to the effect that if by reasonable action damage could be prevented, it is negligence not to use such action, and that statutory powers must be reasonably and properly used.

I wish to add that I do not think that the class of cases so largely quoted to us by the parties apply to the present question. It is not a case of permissive statutory powers on the one hand, nor on the other is it a case of something authorised to be done to the detriment of private rights, in respect of a public benefit, with which they are incompatible. The question is as to how statutory powers have been exercised where certain duties have been imposed on the public body in favour of private persons as a condition of the powers being given. The question is, there being a right given subject to compensation, has the duty of compensation been justly fulfilled? In my view it has not, and I am of opinion that the pursuers are entitled to a decree for damages.

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[1] L. R., 3 App. Cas. 430.

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The amount to be awarded appears to me to be fairly estimated at £2000.

LORD KYLLACHY.—In this case I have read the defenders' statutes so far as necessary to understand their scheme. I have also read the evidence, and considered the lengthened and able argument with which we were lately favoured. Coming as I have ultimately done to a conclusion different from the Lord Ordinary, I wish to say that I do so with diffidence. But on the whole I am of opinion that the pursuers have suffered at the hands of the defenders a wrong for which they are entitled to damages.

I may say at the outset that I am not myself prepared to affirm as expressed the pursuers' declaratory conclusion in any of its alternatives. In any case, I consider that that conclusion may be dismissed as unnecessary. For the real question I think is whether and to what extent the pursuers have suffered an actionable wrong for which the defenders are liable, and that question can quite well be tried under the conclusion for damages.

I may also say at the outset that I have come to be satisfied, and think, when the position is understood, it is fairly clear that we are not here much concerned with certain well-known decisions, which were a good deal canvassed at the discussion—decisions to the effect (1) that statutory powers which are only permissive, and not expressly or by implication directory, do not, unless the contrary is expressed or implied (as by full provision for compensation), authorise interference with private rights, and to the effect (2) that where the Legislature has in plain terms authorised a specific thing to be done, the thing so authorised may be done even to the detriment of private rights, and even although there may be no provision for compensation. In particular, we are not here in the region of such cases as *Metropolitan Asylum District* v. *Hill;*[1] *Canadian Pacific Railway Company* v. *Parke;*[2] and *Clowes* v. *Staffordshire Potteries Water-works Company;*[3] or (on the other hand) of such cases as *London and Brighton Railway Company* v. *Truman;*[4] and *Hammersmith Railway Company* v. *Brand.*[5] For in the present case not only do the defenders' statutes authorise the construction of specific works for which they have compulsory powers, but the private rights which are here in question—I mean the riparian rights of the lower heritors on the Glencorse Burn—are not really taken away, but only commuted. The defenders get the right to appropriate and take to, generally speaking, Edinburgh (1), the Crawley Spring, and (2), the whole flow of the burn above Flotterstone Bridge, but in exchange they are taken bound to send down from Crawley Weir—a little distance below—220 cubic feet of water per minute, being an assumed *quid pro quo*, which is by the statute of 1847 declared to be in full compensation to the lower heritors for the exercise of the defenders' powers. Accordingly there can here, I apprehend, be no question as to the extent or limits of the defenders' powers. Any question for which there is room must relate, not to the defenders' powers, but to the due per-

[1] L. R., 6 App. Cas. 193.
[2] L. R. [1899] App. Cas. 535.
[3] L. R., 8 Ch. Apps. 125.
[4] L. R., 11 App. Cas. 45.
[5] L. R., 4 E. & I. App. 171.

formance of their statutory obligations—that is to say, their due performance of their side of the commutation arrangement.

Similarly, there is, I think, for the same reason no room, properly speaking, for any question of alleged negligent exercise of statutory powers. The defenders—if and while they perform, according to its true intent and meaning, their statutory obligation—that is to say, if and while they give the pursuers and their co-heritors the full measure of the stipulated *quid pro quo*—are entitled—so long at least as they do not act emulously—to exhaust their powers to the uttermost. They may take from the burn and reservoir above Flotterstone every drop of water which they can use, and may do so, considering simply their own interests, and not considering the pursuers' interests at all. Accordingly here again, so far as the present case involves any question of negligence, it can only do so in this sense—that it may involve questions of neglect of duty—failure on the defenders' part to perform duly their statutory obligation.

In short, to put it otherwise, if the compensation here had been, not in kind but in money, the pursuers could, I apprehend, have had no case—at least no case of the kind here maintained, either on the head of excess of power, or abuse of power, or negligent use of power. Up to that point I go entirely with the Lord Ordinary and the defenders' argument.

But then, as it happens, the compensation here is not in money but is in kind, that is to say, in water; and the pursuers' complaint really is that during the three months in question the defenders sent down along with the compensation water a quantity of dirty material—material mixed with it and held in suspension—which not only (1) made the compensation water itself useless for the pursuers' purposes, and those of the other lower heritors, but also (2) polluted and rendered useless the flow of the natural stream below Crawley, in which natural stream—so far as fed from its own drainage area—the lower heritors retained their rights. This, the pursuers say, was not due and proper performance of the defenders' statutory obligation.

Now, the question thus raised seems to involve two points—(1) What is the just construction of the defenders' obligation with respect to what may be called the character of the compensation water which they have to supply; and (2) how far did the water sent down by them during the three months in question comply with their statutory obligation. I shall try to consider those two points in their order.

Now, as to the first point there are two views presented. The defenders' view is a very short one. They say it is enough for them that they send down the water as it comes out of the reservoir, that the admixture of foreign matter—of mud and silt—comes from the reservoir, and is, according at least to their mode of working the reservoir, a necessary consequence of the storage in the reservoir—a storage which the statutes contemplate. They say that that is enough for them, and as regards the suggestion that they might so manage the reservoir as to prevent or mitigate the pollution their position is this—(1) that they cannot prevent the accumulation of mud and silt in the reservoir; (2) that it is impracticable now, and has always been so, to clean the reservoir; and (3) that assuming that the difficulty might be met by keeping the reservoir always of a certain depth, that is a thing which they are not bound to do, because it would involve

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practically a restriction of their statutory powers. In short, the defenders' position is that they are not bound with respect to the character of the compensation water, to manage the reservoir in any interest except that of their constituents, the inhabitants of Edinburgh. Indeed, as I understand them, they carry their case so far as this, that even if in the course of years the accumulation of mud and silt so increased as to make the conditions which prevailed during the three months in question permanent instead of occasional, they would still be entitled to manage and work the reservoir on the same principle—at least they would be so entitled so long as the turbidity of the water did not reach a stage at which their statutory filters became unable to cope with it, and at which therefore they would have to do something in the interests of Edinburgh.

The pursuers on the other hand—I do not think unnaturally—take a different view. They do not say that they are entitled to pure water, or to water free from solid matter in suspension, or even to water as free from such matter as that which they or their predecessors enjoyed before the defenders' advent. They do say that that is *prima facie* the meaning of the defenders' obligation, seeing that the water sent down comes to them as a substitute for water taken away—water which was in its ordinary state fit for all their purposes. They do also, it is true, say that although the defenders may have undoubted power—and are indeed obliged—to send the compensation water down the natural burn, there is at least a strong presumption against the Legislature having intended that the water so sent down should, besides being useless in itself, also pollute and render useless what remained of the natural burn. But they acknowledge, and I think rightly, that storage in the reservoir, or passage through the reservoir, was a thing which was contemplated by the statutes and which has therefore to be accepted. And accordingly their proposition, as I understand it, goes in effect no further than this—that while they (the pursuers) are bound to accept the water as it comes from the reservoir, it is yet an implied condition, binding on the defenders, that it shall be at least as free from injurious impurities as is compatible with the existence and use of the reservoir, that is to say, with its existence and use managed fairly and reasonably, and with due regard not merely to the interests of Edinburgh, but also (co-ordinately if not primarily) with regard to their (the pursuers') interests. They point out that the Glencorse Reservoir although partly used, and quite lawfully so, as a supply reservoir, is after all primarily a compensation reservoir, and is indeed so described in the statutes, and that accordingly methods of management which may be quite suitable to a supply reservoir, as providing water good enough for use after filtration, may yet be quite unsuitable to a compensation reservoir, especially to a compensation reservoir which has as its primary function to provide water fit to be sent down a natural stream in lieu of water which formerly flowed in that stream and was used in its natural state by the riparian owners.

Now, as between those views of the true meaning and measure of the defenders' duty, I am of opinion that the pursuers are right. I do not think they put their case too high—I think they put it reasonably and moderately—when they say that they are not bound to accept as their statutory compensation, or to allow to flow into what remains of their

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natural stream, water which has been unnecessarily polluted—that is to say, water which the defenders might, and probably would, have kept sufficiently pure if they had managed the reservoir with due and reasonable regard to the pursuers' rights. I cannot, I confess, subscribe to the defenders' doctrine that the pursuers are bound to take and accept any water which the defenders find it convenient to give them—convenient, that is to say, with regard simply to the interests present or future of the inhabitants of Edinburgh.

It remains, however, to consider whether the defenders did in fact during the months in controversy send down to the pursuers water which was, in the sense which I have explained, unduly and unnecessarily polluted.

As to this, which is a question of fact, my opinion is also with the pursuers. I think it is proved—and indeed is hardly disputed—that the defenders did send down during the three months between the early part of December 1903 and the early part of March 1904 water so turbid, so mixed with mud and silt, as to be useless not merely for papermaking but for the ordinary uses of the riparian owners. I think it is also clear—so far as the fact is material—that the state of the burn thus induced was greatly worse than (except perhaps in extreme spates occurring occasionally and for short periods) would have been possible under natural conditions, and that it was also greatly worse than it had been previously under existing conditions except once for a short period in November 1901. I further think it clear that this pollution of the water was caused by the stirring or ploughing up by the feeders of the reservoir of the mud and silt which had accumulated in its bed, and which had become exposed by the depletion of the reservoir during the drought of the previous autumn—a depletion allowed to continue until its effect was aggravated and prolonged by rain and wind in the latter half of December. The attempt to attribute the result wholly or primarily to extraordinary rains and winds in my opinion entirely fails. For having examined the evidence I am satisfied that, while the weather conditions when they came into play may have aggravated the mischief, the initial and real operative cause was the depletion of the reservoir by the drafts which, without any replenishment, continued to be made upon it during the drought.

But further (and this is perhaps the crucial matter) I am of opinion upon the evidence that the defenders might without difficulty and quite lawfully—that is to say, without violating any obligation or any duty—have prevented this depletion of the reservoir, which, as I have said, caused the mischief. Indeed, I am unable to doubt that they not only could but would have done so if they had understood or even considered their legal position as I have tried to define it. There were, I think it is clearly established, several courses open to them, all lawful and all effective. In the first place, they might, when the reservoir got too low, have restricted the supply of water to Edinburgh. That might have caused inconvenience, and would probably have been unpopular, but with that of course the pursuers had and have no concern. In the next place, without diminishing the supply to Edinburgh they might have taken a larger proportion of that supply from their other reservoirs, particularly their reservoir at Gladhouse, where there was at least no difficulty as regards quantity, and where I

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cannot but think that if they had been really anxious they might have surmounted any difficulty of filtration. Lastly, and assuming that for good reasons they rejected both of the foregoing alternatives, I have found myself quite unable to see any sufficient reason for their omission to maintain the Glencorse Reservoir at an adequate level by passing into it, at once or from time to time, a part of the water stored in Loganlee Reservoir, which was not being used otherwise, and which was available and amply sufficient if they had chosen to use it.

It has to be kept in mind that the Loganlee Reservoir really existed as a reserve reservoir for Glencorse, and it is not disputed that in the events which in fact happened the transference could have been made without detriment to anybody. As to that, as I read his judgment, the Lord Ordinary is satisfied. What is said only is that if the transfer had been made and the drought had immediately broken up, and been followed by heavy rains, there might possibly have been some waste of flood water by reason of the Glencorse Reservoir filling up and overflowing. But that, as it seems to me, merely means that it was a fact in the situation which had to be faced, that the accumulation of mud and silt in the Glencorse Reservoir had diminished its working capacity, and had done so not merely to the extent of its own mass but also to the extent of the layer of water required to be left above it to prevent disturbance.

It may be quite true that prevention of such disturbance was not necessary, having regard only to the interests of the water supply of Edinburgh. From that point of view it may have been quite legitimate to keep the Glencorse Reservoir as low as possible and the Loganlee Reservoir as high as possible. As regards the supply to Edinburgh the statutory arrangements for filtration made the turbidity of the water of minor importance. All that is quite true, and accordingly I do not, any more than the Lord Ordinary, impute it as a matter of blame to Mr Tait, the defenders' engineer, that he refrained from taking a step which might possibly have in certain events involved some waste of storage. He (Mr Tait) was not the defenders' law-agent, nor was he, I presume, bound to be conversant with the defenders' statutes and their proper interpretation. Presumably he accepted without question the views—I think the extreme views—of their rights which the defenders seem to have held, and which they still maintain. But all that, as I have already said, is just a part of the pursuers' complaint. Their complaint is that the defenders, and by consequence their engineer, holding the views which they did of their own duties and the pursuers' rights, failed even to consider the question how far pollution of the pursuers' compensation water was probable, and how far by timeous action on their part it could be prevented or mitigated. It is not as if the likelihood of what occurred could not have been foreseen, or as if there had been no previous warning. For in fact, as the Lord Ordinary points out, they had in November 1901 a very pointed warning. The Glencorse Reservoir had then got too low (too low as it turned out), and the result was that the same thing which is now complained of then occurred, although in a less degree, and was the subject of complaint by the pursuers and correspondence with the defenders. It is not necessary to go into detail. The correspondence speaks for itself. But it seems to me quite to exclude

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the suggestion that what occurred in December 1902 was a *damnum fatale* which nobody could have foreseen or prevented.

It follows, if I am right, that the defenders by their action or inaction in and previous to December 1902 failed in their duty—that is to say, failed duly to perform to the pursuers their statutory obligation. It also, of course, follows that for the wrong which they have thus suffered the pursuers are entitled to damages. As to the amount of damages, that raises, I apprehend, a jury question, which must be solved on ordinary principles as it would be solved by a jury. Having considered the evidence and the whole circumstances, I see no sufficient reason to differ from the amount of £2000 which your Lordship proposes.

LORD YOUNG was absent at the advising, but the Lord Justice-Clerk intimated that Lord Young dissented, and agreed with the Lord Ordinary for the reasons stated by the Lord Ordinary in his opinion.

LORD KINCAIRNEY not having been present at the hearing, gave no opinion.

THE COURT recalled the interlocutor of the Lord Ordinary, found the defenders liable to the pursuers in damages, and assessed the same at the sum of £2000.

MACANDREW, WRIGHT, & MURRAY, W.S.—MILLAR, ROBSON, & M'LEAN, W.S.—Agents.

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ANDREW DRYBURGH, Pursuer (Reclaimer).—*Clyde, K.C.—M'Clure, K.C.—MacRobert.*
FIFE COAL COMPANY, LIMITED, Defenders (Respondents).—*Campbell, K.C.—Graham Stewart.*

*Mines and Minerals—Mineral Lease—Subsidence—Liability of mineral tenant for damages to feuars—Large increase of feuing subsequent to date of lease—Jus quæsitum tertio.*—By a lease dated in 1877 Wemyss let an extensive coalfield to a company for thirty years, with a break every four years. The mineral tenants were taken bound to work the coal "by the longwall or other method of complete excavation, and so as to insure the greatest output," but were bound to leave solid unworked masses of coal where it might be necessary for the support of existing buildings on the lands. They further obliged themselves during the currency of the lease "to make compensation . . . for all ground" which they might "use or injure by any of their operations under this tack, and to make good and discharge all damages of what kind soever" which they "may in any way occasion to any lands, crops thereon, houses, or woods, or fences and drains, wells or watercourses, and whether such damage shall be due to the lessors of the colliery or to the landlord, or land tenants, feuars, or others."

In 1894 Wemyss feued off a piece of ground, taking the feuar bound to erect thereon a house of a specified value, but reserved to himself and his successors the whole minerals in the ground feued, declaring that the feuar should have no claim for any damage against him and his successors caused by the working of the minerals, but reserving to the feuar all claims which might be competent to him in respect of any such damage against the "tenants or tacksmen of the minerals and others . . . in so far as such tenants or tacksmen may be liable for such damage, without having any right of recourse or relief, or any other remedy" against Wemyss or his successors.

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At or about the date of this feu-disposition Wemyss gave off about thirty other feus in terms, *mutatis mutandis*, identical with the foregoing, and houses were built on each feu. The houses were all miners' houses or houses of a similar class.

In 1903 the feuar under the feu-disposition above set forth brought an action against the mineral tenants for damages on account of injury to the house on his feu admittedly occasioned solely by subsidence due to the complete excavation of the coal in terms of the mineral lease.

Held by Lord Low, Ordinary, that while the liability of the tenants in damages was not confined to injury to houses existing at the date of the lease, the number of houses actually erected was much in excess of what could reasonably have been supposed to have been in the contemplation of the parties at the date of the lease; that it would therefore have been against the good faith of the contract for Wemyss himself to claim damages from his tenants for injury to the houses, such damage having been occasioned by the method of working stipulated in the lease; and that the pursuer, as a feuar from Wemyss, had no higher right, and was not entitled to damages.

*Held* (*rev.* the judgment) (1) that under his feu-disposition the pursuer's common law right to support of the surface was reserved to him intact except as regarded the liability of the superior, Wemyss, directly or by way of relief; (2) that the defenders, being bound by their lease to make good all damage to "feuars," were liable in damages to the feuars directly and without right of relief against Wemyss; (3) that the fact that a large number of feus had been granted and houses erected thereon did not affect the liability of the defenders to the pursuer, as a feuar, whatever might have been the liability of the defenders in a question with Wemyss himself; and therefore (4) that the pursuer was entitled to damages from the defenders.

2D DIVISION. Lord Low.

IN March 1904 Andrew Dryburgh, who held a feu under Mr R. G. Erskine Wemyss, of Wemyss, of a piece of ground with buildings thereon (but reserving the minerals) at Crossroads, near Methil, Fifeshire, brought an action against the Fife Coal Company, Limited, who were the lessees under Mr Erskine Wemyss of certain coal on the Wemyss estates, including the coal underneath the pursuer's property. The summons concluded for declarator that the defenders as tenants of the coal or other minerals lying underneath or in the immediate neighbourhood of the pursuer's property, "are bound to work said coal or other minerals under such precautions and in such a way as not to injure said piece of ground, or the buildings belonging to the pursuer erected thereon, by depriving the same of support or causing subsidence of the ground, or otherwise: And further, that the defenders are bound, in the event of such injury being caused to said ground or buildings by the defenders' operations as tenants foresaid, and to the extent thereof, to make payment to the pursuer in respect of the loss, injury, and damage sustained by him"; and for decree for £500 as damages.

The pursuer's title was a feu-disposition dated in 1894, which was granted by certain trustees, who then held the Wemyss estates, in favour of Andrew Swinton, mason, Methil, and was acquired by the pursuer in 1903. By this feu-disposition Swinton was taken bound to erect and maintain on the ground buildings of a specified yearly value. Swinton erected such buildings, and they were acquired by the pursuer along with the ground. They consisted of a two-storeyed tenement of eight miners' houses, and were all let at the date of the action at the total yearly rental of £53, 10s.

The feu-disposition contained a reservation of minerals in the following terms:—"Reserving always to us and our successors in the

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said lands and others the whole metals and coal, limestone, freestone, and minerals, and fossils of every description within the piece of ground before disponed, with full power to us and our foresaids, or any person authorised by us or them, but without entering upon the surface of the said feu, to work, win, dig, and take away the same, declaring, as it is hereby expressly provided and declared, that the said Andrew Swinton and his foresaids shall have no claim whatever against us as trustees foresaid, or our successors as aforesaid, for any damage that may be done or caused to the piece of ground hereby disponed, and buildings erected or to be erected thereon, or to the water with which the same may be supplied, by any of the operations in time past or to come, of us or our predecessors or successors and tenants, in working and removing or draining the metals, coal, stone, minerals, and others hereby reserved, or in the neighbourhood of the piece of ground hereby disponed, or which may arise from or through the setting or crushing of any waste or other excavation presently existing, or which may hereafter exist, within or in the neighbourhood of the piece of ground hereby disponed: And declaring that, as regards us and our foresaids, all loss, risk, or damage in any of the events foresaid shall be borne and sustained by the said Andrew Swinton and his foresaids themselves: But reserving always to the said Andrew Swinton and his foresaids all claims which may be competent to them in respect of any such damage as aforesaid, against our tenants or tacksmen of the minerals and others in or near the said piece of ground, in so far as such tenants or tacksmen may be liable for such damage, without having any right of recourse or relief or any other remedy against us, as trustees foresaid, and our foresaids."

The pursuer in his condescendence founded on the feu-disposition, and quoted the clause of reservation of minerals. With reference to the defenders' lease of the coal the pursuer stated:—"The pursuer is not fully aware of the terms of said lease, and has, in point of fact, been refused all information regarding its terms. The defenders are called upon to produce the lease under which they work the said minerals." *

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* The lease was produced in the Outer-House after the record had been closed. It was dated April 1877, and was between Mr R. G. Erskine Wemyss, then a minor, with consent of his curators, and the trustees of the late Mr J. H. Erskine Wemyss, first parties, and the Fife Coal Company, Limited, second parties. The first parties let to the second parties the seams of coal specified for thirty years (in 1894 extended for a further period of fifteen years), with a break every fourth year. The lease contained, *inter alia*, the following clauses, which are, for convenience, here marked A and B:—A "With reference to the working of the coals and other minerals hereby let, the said lessees hereby bind and oblige themselves and their foresaids upon their own expenses to work the same in a regular and systematic manner, according to the rules and methods followed in well regulated collieries, and, in particular, to work the whole saleable coal of each seam from roof to pavement, by the longwall or other method of complete excavation, and so as to insure at once the greatest output and the present and future advantageous working of the coalfield . . . and the said lessees also oblige themselves and their foresaids to leave sufficient masses of coal to secure the shaft bottoms, and also to leave solid unworked masses of coal where it may be necessary for the support of the Kirkland Works, or of any other houses or buildings on the lands before specified: And it is hereby provided that where the longwall method of working is followed, the said

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The pursuer further, on record as originally closed,* averred;—(Cond. 4) "In the course of their working the defenders have for some time past been removing coal and other minerals from beneath the pursuer's feu and adjacent ground at Crossroads, near Methil. The result of the operations has been to cause subsidence of the surface of pursuer's feu, and very serious resulting damage to the buildings erected on the ground." Then followed specific details. (Cond. 5) "The loss and damage foresaid suffered by the pursuer has been caused by the fault of the defenders. In excavating the coal and other minerals leased to them they are bound to do so without causing subsidence of the surface of pursuer's feu, or doing damage to the buildings thereon; and they have in this respect neglected their duty towards the pursuer. But further, they took no precautions to mitigate the damage likely to be caused by their operations either by leaving the minerals undisturbed in the ground beneath said feu, and within such distance adjacently as would reasonably secure the surface, or by substituting artificial support of the surface for the natural support removed by them. This, in any event, they were bound to do, and they failed."

The defenders answered;—(Ans. 4) "Admitted that in the course of their workings the defenders have removed the coal and other minerals from beneath the pursuer's feu and adjacent ground at Crossroads. Admitted that there has been a certain amount of subsidence of the pursuer's feu, and some damage to the buildings on the ground. *Quoad ultra* denied." (Ans. 5) "Admitted that the defenders did not leave undisturbed the minerals beneath the said feu or adjacent thereto, and that the defenders did not give artificial support to the surface. Such support was not practicable. *Quoad ultra* denied."

The defenders in a statement of facts further averred;—(Stat. 3) "When the said lease was granted [*i.e.*, in 1877], the surface estate of the subjects thereby conveyed was mainly rural and agricultural in its character, and, in particular, no feus had been given off at the Crossroads, which includes the ground feued to the pursuer, and no buildings had been built thereon. Subsequent to the said lease, owing to the construction of Methil Dock, and the consequent attraction of people to the neighbourhood, said lessors or their successors gave off a large number of feus, including that to the said Andrew Swinton,

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lessees shall cause the gob or waste to be properly stowed so as to prevent unequal sits of the surface, and if the room and pillar method of working be adopted, the pillars shall be cut of sufficient dimensions in the first instance to insure their ultimate extraction." . . . B "And further, and over and above making payment of the said fixed rents or lordships or royalties, the said lessees bind and oblige themselves and their foresaids during the currency of this lease to make compensation to the land tenants where the land is let, or to the owner where the land is not let, for all the ground which the lessees under these presents may use or injure in any of their operations under this tack, and to make good and discharge all the damages of what kind soever which the said lessees or their servants in their lawful business under their control may in any way occasion to any lands, crops thereon, houses, or woods, or fences and drains, wells or water-courses, and whether such damage shall be due to the lessors of the colliery or to the landlord, or land tenants, feuars, or others, all as the same shall be determined by two neutral persons to be mutually chosen, or by an oversman to be named by these persons if they shall differ in opinion."

* For the amendment allowed in the Inner-House, see *infra*, p. 1097.

and buildings have been erected on said feus. The granting of these feus was not a natural incident to the ownership or occupancy of the surface estate as an agricultural subject, and was not in the contemplation of the parties at the granting of the said lease. It has had the effect of converting the surface estate from an agricultural subject into an urban subject."

The pursuer answered;—(Ans. 3) "Admitted that the surface was mainly rural in character when the lease of minerals was granted to the defenders, and that the feus at Crossroads, including pursuer's feu, have been given off since the date of the lease. Explained that the public school at Crossroads was erected before the mineral lease was entered into. *Quoad ultra* denied. Explained that the district is still rural in character, and that such buildings as have been erected on the grounds at Crossroads, being nineteen in all, have been erected almost entirely for the accommodation of the miners working in the defenders' pit. The building of miners' houses there, as an incident in the development of the coal field leased by the defenders, was in the contemplation of parties when said lease was granted, and the houses built are of the character appropriate for dwellers in a mining district."

The pursuer pleaded;—(1) The defenders, as tenants of the minerals condescended on, having no right so to work said minerals as to cause subsidence on the pursuer's property or so as to injure said property, the pursuer is entitled to declarator and damages, or, in any event, to damages as concluded for. (2) The pursuer being in virtue of his titles entitled to damages in respect of the subsidence complained of against the defenders as tenants of the minerals, the pursuer is entitled to decree in terms of the second conclusion of the summons. (3) *Separatim*, The defenders, as tenants of said minerals, being bound in the event of their operations causing subsidence in the pursuer's property to compensate or pay damages for the same, are liable to the pursuer in damages in respect of the subsidence condescended on. (4) The pursuer having suffered loss, injury, and damage to the amount sued for by the defenders' fault, decree should be pronounced in terms of the petitory conclusions of the summons.

The defenders pleaded, *inter alia*;—(1) No title to sue. (3) The operations of the defenders being within their legal rights, they are entitled to absolvitor. (4) The lessors (the pursuer's authors) having granted feus for building in excess of what was fairly in contemplation of the parties to the said lease, the pursuer is not entitled to decree.

Proof was allowed. The nature of the evidence led is disclosed in the opinion of the Lord Ordinary.

Neither party led evidence regarding the amount of the damage to the pursuer's property, the parties having agreed, by letters dated 24th October 1904, that in the event of it being proved to the satisfaction of the Court that the defenders were liable for the damage, the defenders should purchase the pursuer's property for £620.

On 6th December 1904 the Lord Ordinary (Low) assoilzied the defenders.*

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* "OPINION.—This is an action by the proprietor of a house near Leven in Fifeshire for damages for injury done to the house through subsidence of the surface caused by the coal workings of the defenders. It is admitted that the defenders have taken out a seam of coal under the house; that subsidence of the surface and consequent injury to the house have resulted;

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The pursuer reclaimed, and argued;—By the pursuer's feu-disposition the superior reserved right to the coal, with full power to work the same, under the declaration that he and his successor should not be liable for any damage to the ground or to buildings erected or to be erected thereon due to the working of the coal, whether by himself, his predecessors, successors, or tenants. If the feu-disposition had stopped there it might be that the pursuer would have parted with the common law right of support absolutely, *i.e.*, not only as against the superior, but also as against the mineral tenants. But the feu-disposition went on to reserve "all claims which may be competent" to the feuar, "in respect of any such damage as aforesaid,"—*i.e.*, to the ground or to buildings erected or to be erected thereon,—against the tenants of the minerals, in so far as such tenants "may be liable for

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that the subsidence would have occurred even without the additional weight of the house; and that there has been no fault or negligence or improper working on the defenders' part.

"The pursuer's house is built upon a piece of land forming part of the Wemyss estate, which his predecessor (Swinton) acquired from certain trustees who then held the estate, conform to feu-disposition granted by them. Mr Randolph Erskine Wemyss of Wemyss is now the superior. The defenders are lessees of the coal in the land upon which the house is built, under a lease granted in 1877 by Mr Erskine Wemyss and others.

"In the feu-disposition there is a reservation of the coal and minerals, and it is provided that the feuar shall have no claim against the superior for any damage which may be caused by the working of the coal. There then follows this clause:—'But reserving always to the said Andrew Swinton and his foresaids all claims which may be competent to them in respect of any such damage as aforesaid, against our tenants or tacksmen of the minerals and others in or near the said piece of ground, in so far as such tenants or tacksmen may be liable for such damage, without having any right of recourse or relief, or any other remedy against us, as trustees foresaid, and our foresaids.'

"I confess that I do not know what is referred to in the closing words of that clause, 'without having any right of recourse,' and so on, because so far as the then existing lease of the coal to the defenders was concerned, I cannot discover any damages for which the tenants would be liable, but in regard to which they would have recourse, or a right of relief, against their landlord, the superior of the feu. Perhaps the words were inserted because there might be future leases under which the tenants might have rights of relief against the superior, or simply with the intention of making it clear that under no circumstances should the feuar have any claim against the superior.

"That, however, is not material, because it is plain that the feu-disposition bars any claim upon the pursuer's part against Mr Erskine Wemyss, who was the superior and the proprietor of the minerals, but reserves to him any claim which he might have a title to enforce against the mineral tenants, that is, the defenders.

"Upon what ground then can the pursuer claim damages for the injury done to his house from the defenders? I am of opinion that damages cannot be claimed from them *ex delicto*, because it is admitted that they have worked the coal properly, and have done no more than they were not only entitled but bound to do under the lease. Indeed I did not understand the pursuer's counsel to base his claim upon delict, but solely upon an obligation undertaken by the defenders in the lease.

"The clause in the lease upon which the pursuer founds is in the following terms":—(His Lordship quoted clause B, *supra*, p. 1086, note.)

"The first question which arises is whether the pursuer has a title, in a

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such damage." Then came words the meaning of which was not plain— "without having any right of recourse or relief or any other remedy against the superior." Did that mean "without the feuar having any," &c., or "without the tenants having any," &c.? The pursuer said that the former was the sound reading, but probably the point was not of much importance, for the claims against the mineral tenants which were reserved to the feuar were claims in so far as "competent," which meant competent under the mineral lease, or in other words the feu-disposition gave the feuar a right to enforce the liability of mineral tenants under their lease for surface damage, and did not draw any distinction between damage from proper working in terms of the mineral lease and damage *ex delicto* from improper working. The pursuer admitted that the ground of action now presented was not stated by him in his condescendence. The lease was a ground of defence rather than a ground of action. The pursuer stood on his

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question with the defenders, to sue upon the lease, to which his author was not a party, nor in any way privy? I think that he has a title to do so, as a third party who is given a *jus quæsitum* by the lease. I read the clause which I have quoted, as obliging the defenders to settle for any damage which they may occasion directly with the party injured, and I think that the description of the parties whose claims they are to 'make good and discharge'—namely, the lessors of the colliery, the landlord, land tenants, and feuars—sufficiently designate the *tertii* in whose favour a *jus quæsitum* is conferred, to entitle anyone falling within the category specified to sue upon the contract.

"The next question is, whether the clause is applicable to the present case?

"The defenders' counsel did not contend that the language of the clause was not wide enough to include the present claim, but he maintained that, looking to the other stipulations of the lease, the clause must be construed as being confined, at all events in so far as houses were concerned, to those existing at the date of the lease.

"What was mainly founded upon was the obligation laid upon the defenders 'to work the whole saleable coal of each seam from roof to pavement by longwall or other method of complete excavation.'

"That obligation was only qualified by the provision that the defenders should leave sufficient masses of coal to support the shaft bottom, certain lands which had been feued and which were known as 'Kirkland Works,' and also any other 'houses or buildings on the lands before specified.'

"It was conceded that the houses and buildings there referred to were houses and buildings existing at the date of the lease, and therefore, with the exception of such an amount of coal as was required to support such buildings, the Kirkland Works, and the shaft bottom, the defenders were under an absolute obligation to take out the whole of the coal. To carry out that obligation involved—especially considering that there were eight separate seams let to the defenders—that the surface of the ground should, to a greater or less extent, be brought down. The parties must have known that that would be the case, and the lease seems to me to shew that they had it in view, because it is provided that the defenders 'shall cause the gob or waste to be properly stowed so as to prevent unequal sits of the surface.' The object of that provision seems to me to have been, not to prevent subsidence, which was inevitable, but unequal subsidence.

"While the lessees were thus taken bound to excavate the whole coal, the lessors were in no way restricted in the use they might make of the surface, but were left free to erect as many houses as they chose. In such circumstances I agree with the defenders that one would not expect to find liability imposed upon and accepted by the lessees to pay for all damage

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feu-disposition, which *prima facie* gave him a right to damages against the defenders, and it was for the defenders to produce their lease and to shew that under it they were not liable. The pursuer, however, was willing to amend his condescendence. The lease took the defenders bound to work by the longwall or other method of complete excavation, subject to this exception, that in the case of the Kirkland Works and of "any other houses or buildings on the lands," the tenants were bound to leave solid unworked masses of coal for support. The pursuer admitted that "houses or buildings," in this clause, meant "existing houses or buildings"; but the word "houses" in the subsequent clause dealing with damages was not subject to that restriction. That clause was not to be read as divided into two compartments—one dealing with compensation for injury caused by authorised working and the other with damages *ex delicto* for unauthorised or improper working. The clause took the defenders bound to make

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which might be caused to the surface and buildings thereon by subsidence arising in consequence of the proper working of the coal in terms of the lease. If, however, the defenders have accepted such liability, then, however improvident it may have been for them to do so, they must be held to their contract.

"In this case I do not think that they can escape liability on the ground that the clause only deals with matters as they existed at the date of the lease. The clause provided in the first place that 'during the currency' of the lease the defenders shall make compensation to the tenants or the owner of the land for all ground used or injured by them in any of their operations under the lease. That in terms refers not to the state of matters existing at the date of the lease, but to what may be done during its currency. Then the defenders are taken bound to 'make good and discharge' all damages of whatever kind they may occasion, *inter alia*, to 'crops.' I think that that plainly refers to crops which may be upon the ground during the currency of the lease, and the same may be said in regard to such things as fences and wells. In short, I think that the natural meaning of the language used is that the defenders shall make good all damage caused to subjects of the kind described which may be upon the ground during the currency of the lease, and that it is impossible to restrict the generality of the obligation as regards any of the subjects without reading into the clause words which it does not contain.

"There is, however, another possible construction of the clauses which would exclude the pursuer's claim, and which has occasioned me much difficulty.—[His Lordship considered and rejected this construction, which depended on specialties.]

"I am therefore of opinion that the clause obliging the defenders to make good all damage caused by their operations must be construed as covering and including the claim which the pursuer now makes.

"There remains, however, the question which is raised by the fourth plea in law for the defenders, which is as follows,—'The lessors (the pursuer's authors) having granted feus for building in excess of what was fairly in contemplation of the parties to the said lease, the pursuer is not entitled to decree.'

"Now, when the owner of both the surface and the minerals lets the latter, especially if, as here, he takes the tenant bound to completely excavate the minerals, I do not think that he retains any right to have the surface supported by the minerals unless, and to the extent to which, he reserves such right. Of course I am assuming that the tenant works the minerals in such a way as to cause as little injury as possible. If he works improperly a claim will arise *ex delicto*.

"If, however, the lessor takes the tenant bound to support the surface

good "all the damages of what kind soever" they "may in any way occasion to any lands, crops thereon, houses, woods," &c., and to make good such damages, *inter alios*, to "feuars." This wide general language could not be read as restricted to damages *ex delicto* from improper working, but the defenders endeavoured to reach the same practical result, in so far as the present question was concerned, by saying that "houses" was restricted to houses existing at the date of the lease, *i.e.*, to the houses for which, by the earlier clause, the defenders were taken bound to leave a sufficient support. To this argument the answer of the Lord Ordinary was conclusive, viz., that as the other things which were placed in collocation with "houses," *e.g.* "crops," could not be read as restricted to those existing at the date of the lease, so neither could "houses." It might be a very hard bargain for the defenders that they should be bound both to cause damage and to pay for it, but if that was their

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the burden imposed is of the nature of a servitude, because a long lease of minerals with an obligation to work them gives practically a right of property in the minerals. Now, it is a well-established rule that if a proprietor of lands dispones part of them, and burdens the part disponed with a servitude in favour of the part retained, he is not entitled so to use the latter as to increase the burden upon the former. I think that a similar principle applies to such a case as the present, where the tenant is upon the one hand bound to excavate the whole minerals, and upon the other to pay damages for any injury which may be done by his workings. In such a case the landowner is not, in my opinion, entitled so to use his land as materially to increase the onerosity of the obligation imposed upon the tenant, or perhaps it would be more correct to say that in such circumstances he cannot enforce the obligation. That principle has been frequently recognised, although I am not aware of any case in which it has actually been carried into effect.

"The question therefore appears to me to be whether Mr Erskine Wemyss has, by extensive feuing of his lands for building, increased the burden upon the defenders to such a material extent, that he, and those taking right from him, cannot claim compensation for injury caused to the buildings by the regular working of the minerals as required by the lease?

"I put the question in that form because Mr Erskine Wemyss was in no way restrained in his use of the surface, while the defenders were bound to make good any damage which they caused, and under somewhat similar circumstances the decision in the case of *Dunlop* v. *Corbet*, 20th June 1809, F. C., was to the effect that the owner of the minerals was not entitled to interdict the owner of the surface from erecting buildings, but that if the latter did so he might not be entitled to damages for injury to the buildings. No judgment, however, was given upon the latter question, although opinions to the effect which I have indicated appear to have been given.

"Again in *Neill's Trustees* v. *William Dixon, Limited* (7 R. 741), a similar view was taken. The circumstances were these: In 1802 the minerals in a piece of ground of fifty-eight acres in extent were sold to one person and the surface to another, power was given in the first disposition, and reserved in the second, to the purchaser of the minerals to win and work them on paying 'all surface damages if any shall be thereby done to the ground of the said lands.' In 1878 the pursuers, who were then owners of the surface, brought an action against the defenders, who were owners of, and were working, the minerals, for damages for injury caused to a dwelling-house and offices by subsidence consequent upon the mineral workings. It was proved that the house, which was of inconsiderable size and value, had been built subsequently to 1802, but about sixty years before 1878, but the judgment did not turn at all upon the fact that the house had been

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bargain they must abide by it; the Court was not entitled to read the clause out of the contract.[1] The Lord Ordinary, however, had ultimately decided in the defenders' favour by giving effect to their fourth plea in law, and in considering that plea the Lord Ordinary had taken into account not only the houses erected at Crossroads, but also the large increase of houses in Methil. The facts were that the pursuer's house was the seventh house erected at Crossroads since the date of the defenders' lease; that since the lease some thirty houses in all had been erected on feu-dispositions, *mutatis mutandis*, identical with the pursuer's, but not half of these houses were at Crossroads; and that Crossroads was not part of Methil. The question therefore came to be whether the erection of seven houses at Crossroads was such an excessive amount of building that it could not reasonably be held to have been within the contemplation of the parties to the lease. It was not. The houses were just such houses —miners' houses—as might have been anticipated from the opening

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in existence for more than the prescriptive period. The two questions which the Court had to determine were (1) whether injury to the house was 'surface damages' within the meaning of the dispositions; and (2) whether the fact that the house was erected subsequently to the date of the dispositions relieved the defenders from liability for damages? The first question was answered in the affirmative, and the second in the negative, but all the Judges based their opinions upon the latter point to a considerable extent upon the fact that the house was just such as it might have been anticipated would be built at the time when the dispositions were granted.

"Thus Lord Adam said,—'The buildings in this case are just such buildings as might naturally and reasonably be expected to be erected on the ground. If there was anything of an extraordinary or unusual nature about the buildings the result might be different.' In like manner the Lord Justice-Clerk (Moncreiff) said,—'I am very far from implying any opinion as to what the respective rights of the landowner and mineral owner might be in the event of the landowner altering substantially the use to which the surface was to be put at the date of the contract,' but 'the existing buildings at present on the surface are not of a greater extent nor of a more valuable character than are fairly suitable for the use of the ground at the date of the original separation of the surface and mineral rights.'

"There was not in *Neill's Trustees*, any more than in *Dunlop* v. *Corbet*, any judgment pronounced to the effect that if the landowner covered the ground with buildings in excess of what might reasonably be supposed to be contemplated at the date of severance, he could not recover damages for injury to such buildings; but it is clear that the learned Judges in these cases recognised that that might be the result. And I am humbly of opinion that that ought to be the result, because it is, as I have said, contrary to a well-established principle that one who has imposed an obligation upon his disponee or tenant should be allowed to substantially and materially increase the burden of that obligation for his own pleasure or profit, and should nevertheless be entitled to enforce it, to the loss and injury of his disponee or tenant.

"Whether there has been such a material increase of the burden as to deprive the landowner of his right to compensation for injury must, of

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[1] Shaw Stewart v. Macaulay, Nov. 3, 1864, 3 Macph. 16, 37 Scot. Jur. 7; Buchanan v. Andrew, March 10, 1873, 11 Macph. (H. L.) 13, 45 Scot. Jur. 172; Aspden v. Sedden, 1875, L. R., 10 Ch. App. 394; White v. William Dixon, Limited, March 19, 1883, 10 R. (H. L.) 45.

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up of this coalfield; there was no suggestion that the houses—and the pursuer's in particular—were of excessive weight or of excessive value. Therefore at the date of his feu-disposition the pursuer—or his author Swinton—had right to damages against the defenders if they caused injury to his house, and he could not be deprived of that right by the subsequent building operations of the superior, over which the pursuer had no control. If indeed the defenders' lease had taken them bound to pay damages to their landlord only, without mention of "feuars," it might be that an equitable plea which was good against the landlord would be good also against the pursuer on the principle *assignatus utitur jure auctoris*. But the pursuer was not suing as the assignee of his superior—the defenders' landlord—he was suing in his own right as a "feuar"—a right conferred on

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course, be a question of circumstances, and I shall accordingly consider what are the circumstances in this case.

"The subjects let to the defenders included the coal lying under the town of Methil, and extending for a considerable distance to landward. At the date of the lease in 1877 Methil was a small fishing town with a population of a little over six hundred persons, and the ground in the neighbourhood was entirely agricultural, although there appear to have been one or two small villages, and there was a spinning-mill on the Kirkland feu. Further, the export of coal from Methil by sea was then inconsiderable in amount, and was confined to small sailing ships. It was, indeed, contemplated that increased facilities for the export of coal by sea should be given, but, as the lease itself shews, it was thought that Leven and not Methil would be the suitable port for that purpose. The harbour of Leven was, in fact, improved, but it was a tidal harbour, and it was found that the entrance silted up, and accordingly the intention that it should be used for the export of coal could not be carried out.

"It was in consequence of that that works were entered upon, namely, the construction of docks at Methil, which largely changed the character of that town and its neighbourhood. There was first a dock constructed by Mr Erskine Wemyss at his own cost, which was opened in 1887. Then the North British Railway Company obtained an Act of Parliament authorising them to build further docks, which they did. The pursuer's witness, Mr Watson, says that the docks were opened in 1894, but Mr Carlow, the managing director of the defender's Company, says that they were not opened until 1897, and then only partially. I have no doubt that the latter is right upon that point, but I gather that the Act had been obtained and the works begun prior to 1894, when Swinton obtained his feu-disposition. The result of the construction of the docks was that a very large export trade in coal sprang up at Methil. It is now the port of export for the East of Fife coal, and it also shares with Burntisland the West of Fife trade. Naturally that increase of trade has been accompanied with a large amount of building in Methil and the neighbourhood. A glance at the map, No. 33 of process, shews that since 1895 streets and rows of new houses have been erected. I have already said that in 1877 the population of the town of Methil was about 600, but in 1901 it was 2686, and the increase in the number of houses has been in proportion. Thus, in the area marked B on No. 33 of process there were no houses in 1877, but 142 have been built since 1893. In like manner in the area marked C there was only one house in 1877 and there are now 212, the greater part of which have been built since 1893, while in the area marked D there was no house in 1877, but 64 have been built since 1893. I should explain that in these figures houses do not mean separate tenements, but distinct dwelling-houses of which several may be contained in one tenement.

"It is therefore plain that the character of Methil has entirely changed

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Argued for the defenders;—(1) The pursuer's case, as stated on record, was based entirely on the feu-disposition which formed his own title and on an averment (Cond. 5) of fault on the part of the defenders, the fault averred consisting of, in the first place, the fact that they had brought down the surface—an averment which implied that the common law right of support was reserved to the pursuer intact; and, in the second place, alternatively, an averment that the defenders were in fault in respect that they had neglected reasonable and proper precautions to prevent subsidence. The first branch of this averment was negatived by the pursuer's own feu-disposition, which, whatever it did, most certainly did not reserve the common law right of support intact; and the second branch of the averment failed on the facts, for it was admitted that the defenders

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since 1877. From being a small, and apparently not very prosperous fishing town, it has become the centre of a great export trade in coal.

"It seems to me that it is not reasonable to suppose that such a change in the character of the place could have been in the contemplation of parties in 1877. No one could then have foreseen that some fifteen years later a railway company would intervene and build extensive docks for the accommodation of the coal trade of Fife at Methil. I may add that there are various provisions in the lease which seem to me to shew that what the parties contemplated was that the land around Methil would continue to be in the future, as it had been in the past, entirely devoted to agricultural purposes.

"If the question had arisen in regard to a house in one of the new streets which have been added to Methil, and if it had been shewn that if the defenders were liable in damages for injury to that house, they would also (at all events in the absence of special circumstances) be liable for injury caused to all the new houses, I should have thought that the case was certainly one for the application of the principle to which I have referred.

"But the pursuer's house is not in Methil, but is situated at a place called Crossroads, distant about a quarter of a mile from Methil. Further, it is admitted that there are some of the new houses for injury to which the defenders would not be liable. It appears that up to 1898 or 1900 the form of feu-disposition which Mr Erskine Wemyss used was the same as that in Swinton's case, in which the feuar's right to claim damages from the defenders was reserved. Mr Wemyss, however, seems then to have recognised that it was not just to the defenders to continue to grant feu-rights in such terms, and recently he had taken his feuars bound not to claim damages for injury done by mineral workings from anyone. I do not know how many feus have been granted under the new form of charter, but I do not think that there can be many, because one witness said that the result of the new form being adopted was almost to put an end to feuing. But, however that may be, it was admitted by the pursuer's counsel that there have been at least thirty feus granted (and built upon) with titles in the same terms as that of Swinton. It seems to me that that is a material number, and shews that the question which is raised is a serious one for the defenders. It is no light matter for mineral tenants who are bound both to excavate the whole minerals, and to make compensation for any buildings which they may injure in so doing, to have thirty new tenements built upon the land, and it is to be remembered that there are several seams which the defenders are bound to work, and that with the working of each seam there will probably be fresh subsidence and fresh injury to the buildings.

"In regard to Crossroads, it is situated, as the name implies, at a place

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had not neglected any reasonable and proper precautions, they being bound to work according to a method of complete excavation. The pursuer's case as stated on record therefore failed, and had been abandoned by him. It was contrary to the rules of pleading to allow an action to proceed when the pursuer's true ground of action was not even suggested by him on record. (2) The case which the pursuer now made appeared to be this: that under the feu-disposition, taken along with the lease between the defenders and the superior, the pursuer had, not a right to damages *ex delicto* against the defenders, but a pactional right to compensation against them on the principle of *jus quæsitum tertio*. The first answer to that contention was that it was excluded by the clause of reservation of minerals in the pursuer's feu-disposition—by the concluding branch of that clause beginning "But reserving always to the said Andrew Swinton," &c. That branch of the clause reserved to the feuar all claims to "damage,"

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where four roads meet, and at the date of the lease there were only two buildings there, the parish school, and the schoolmaster's house. These were no doubt placed there because it was a convenient central position.

"The next building which was erected at Crossroads was a co-operative store in 1888. Even if all these buildings had been erected subsequent to the date of the lease I should not have thought that the defenders could have objected, because they were such as might have been anticipated for the use of the estate even if its character had not been altered. But in 1894 feus began to be taken at Crossroads, and buildings of a different kind erected. There were no fewer than six feus taken there in that year, the reason obviously being that the construction of the Methil docks had then begun. The taking of the feus seems to have been a speculation on the part of the feuars, because they built workmen's houses, in the expectation (which was justified) that the construction of the docks would raise a demand for such houses in the neighbourhood. And no doubt Crossroads was chosen just because it was in a central position and houses there would be available for men working in different parts of the district. The result has been that Crossroads from being simply the site of the parish school has become a village of workmen's houses. In 1877 the sole residents were the schoolmaster and his family, but now the population is 319, which is more than half the population of the town of Methil in 1877. I do not know precisely how many tenements have been erected, but there are sixty-five distinct dwellings.

"The pursuer founded upon the fact that some persons who reside at Crossroads are in the defenders' employment. Mr Carlow, however, says that the defenders have ample accommodation for all their workmen in houses which they have erected under the powers conferred in the lease, and that if they had required more houses they would not have built them above unworked coal as was the case at Crossroads, but at a place where they would not interfere with the working of the coal in regular course.

"If, however, the houses at Crossroads had been all the houses erected after the date of the lease, it would have been a comparatively small matter, and the defenders would not I think have been freed from their obligation to make compensation for injury done to the houses. It seems to me, however, that the building at Crossroads cannot be regarded as an incident separate from the very extensive building which has taken place at Methil. The building in both places was part of the same movement, and the cause was the same, namely, the construction of the docks, and the consequent increase of trade and population. If such extensive building could have been foreseen, or had been contemplated when the lease was made, I think that it is most unlikely that the defenders would have undertaken the obligation to give compensation for injury to buildings. As matters stood

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which meant damages *ex delicto*, arising from unauthorised or improper working by the tenants; it did not include compensation for injury caused by their authorised and proper working—*i.e.*, by their use of the longwall system. It could not reasonably be supposed that the superior intended to give the feuar a right to compensation against the defenders for injuries caused by the defenders doing the very thing they were by their lease required to do. But (3) if the reservation in the feu-disposition was not confined to damages *ex delicto*, it gave the pursuer right to compensation only in so far as the defenders were, under their lease, liable to the superior in compensation; to construe the feu-disposition as giving the feuar a higher right than the superior himself had would be to make the superior liable in relief, and the feu-disposition expressly excluded claims of relief against the superior. The clause of the lease beginning "and further, and over and above making payment," was composed of two distinct branches—the first dealing with "compensation," and the second with "damages." The first branch took the defenders bound to make "compensation" to the land tenants or to the land owner for all "ground" which the defenders might use or injure. That branch did not say anything about feuars or about injury to houses; that branch therefore did not help the pursuer. The second branch of the clause dealt with damages *ex delicto* caused by improper working. It took the defenders bound to make good "all damages" which they might in any way occasion, *inter alia*, to "houses," and "houses" meant "existing houses"—that was to say, the pursuers were to be liable in damages *ex delicto* if, contrary to the stipulation in the lease, they worked out the coal under the Kirkland Works and the "other houses" —here admittedly "existing houses"—mentioned in the earlier clause. To hold that the defenders were liable in damages *ex delicto* for injury to houses built during the currency of their lease (such injury being caused by working according to a method of complete excavation, and no other cause of injury was here suggested), either meant that the defenders were liable in damages *ex delicto* for doing the very thing that they were by their lease required to do—which was a contradiction in terms

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at the date of the lease, the obligation was not an onerous one, judging from the fact that apparently the defenders have never until now been called upon to pay any compensation under it. But in view of the changed condition of matters the obligation has become very onerous, and I do not think that it is a good answer to say that the amount of coal which would require to be left to support all the houses is small compared with the total amount in the mineral field. The defenders are bound to work out the whole of the coal, and are not entitled to leave a sufficient amount to support the buildings. That differentiates this case from the ordinary one in which the tenants are entitled to leave a sufficient amount of coal for the support of new buildings, and thereby to avoid becoming liable for compensation. Further, the fact that the defenders are bound to take out the whole of the coal, and also to pay compensation for injury to new buildings, seems to me to render the case peculiarly favourable for the application of the principle which I have stated; and as, in my opinion, building operations which could not have been in the contemplation of the parties when the lease was granted have been carried on to an extent which has materially increased the onerosity of the obligation laid upon the defenders, I do not think that that obligation could be enforced by Mr Erskine Wemyss; and if that is the case, it was not maintained that the pursuer was in any better position.

"I shall therefore assoilzie the defenders."

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—or it meant that they were bound to leave the coal unworked under every house that might be built, contrary to their express right and obligation under the lease to work by a method of complete excavation. But (4) if the lease was not strictly to be confined to liability for injuries to houses existing at its date, that did not mean that the mineral tenants were to be liable for injuries to any houses—however numerous and of whatever character—that the proprietor might choose to build. The pursuer argued that his rights under his feu-disposition could not be affected by the number or character of the other houses erected by the proprietor. But the pursuer, who was founding on the lease, could not be heard to say that it meant one thing as between the parties to it, and something different as between him and the defenders—the mineral tenants. The pursuer said that under the lease "feuars" had a direct right to compensation, but the question was what did "feuars" in the lease mean? If it meant that the landlord was entitled to give off as many building feus as he pleased, and to give every feuar a right against the defenders to compensation for injuries that were practically inevitable, then the pursuer was right; but if the lease did not mean that, then the pursuer as a "feuar" was in no better position than the superior. The latter was the sound reading of the lease. *Quoad* the mineral tenants, these houses were to be regarded as having been erected by the proprietor, and as being his property. The question, therefore, came to be whether the mineral tenants would have been liable to the proprietor for the injuries to all these houses. The defenders would not have been liable, upon the equitable principle that the landlord, notwithstanding the wide generality of the terms of the lease, was not entitled to impose serious burdens on his tenants which could not reasonably be supposed to have been in the contemplation of the parties at the date of the lease, and which, consequently, were against the good faith of the contract. This principle was recognised with reference to mineral leases,[1] and also with reference to damage caused to agricultural tenants by reason of the preservation of excessive stocks of game,[2] and it applied in the present case for the reasons explained by the Lord Ordinary. If, therefore, the defenders were wrong in the earlier branches of their argument, the interlocutor ought to be affirmed on the ground on which the Lord Ordinary had proceeded.

On 29th June 1905 the Court allowed the pursuer to amend his record, and for that purpose opened up the record, and the minute of amendment for the pursuer and answers for the defenders having been received, of new closed the record.

The pursuer's amendment consisted of the following addition at the end of cond. 5, "or alternatively, the defenders are only entitled to damage the pursuer's buildings by their operations upon paying compensation therefor. By their lease, which is now produced, it is provided that" [the pursuer then quoted clause B, *supra*, p. 1086, note.] "Under said provision, the pursuer is entitled to compensation as aforesaid."

[1] Dunlop v. Corbet, June 20, 1809, F. C.; Hamilton v. Turner, July 19, 1867, 5 Macph. 1086, 39 Scot. Jur. 621; Neill's Trustees v. William Dixon, Limited, March 19, 1880, 7 R. 741.

[2] Morton v. Graham, Nov. 30, 1867, 6 Macph. 71, 40 Scot. Jur. 37; Kidd v. Byrne, Dec. 19, 1875, 3 R. 255; Cadzow v. Lockhart, May 19, 1876, 3 R. 666.

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The defenders in their amended answers referred to the lease for its terms.

At advising,—

LORD KYLLACHY.—The first question in this case, the answer to which may go a long way towards solving the other questions, is as to the construction of the clause in the pursuer's feu-contract, which defines his position with respect to the minerals under his feu.

Apart from that clause and its special provisions, the pursuer's position as surface owner would have been clear enough. He would have been entitled at common law to stop by interdict any workings in the subjacent or adjacent minerals which brought down his surface or injured his buildings. He would also have been entitled to recover damages in respect of such workings. And those rights, thus belonging to him at common law, he could have enforced against the actual wrongdoer, whether the owner of the minerals or the mineral tenant.

But the question is whether, and to what extent, the pursuer, or rather his predecessor, did by the clause in question renounce or restrict his common law rights (*a*) as against the superior who retained the ownership of the minerals, and (*b*) as against the superior's mineral tenants—including the present defenders.

Now, there can be no doubt upon the construction of the clause that, as against the superior, the feuar's right of support was renounced. It was not so expressly. But it was so by plain implication. For the feuar was in terms taken bound to make no claim against the superior or his successors for any damage resulting to the feu by the excavation of the minerals; the excavation contemplated being plainly complete excavation, but of course excavation assumed to be executed in a proper manner.

On the other hand, it seems equally clear that as against third parties, and in particular the superior's mineral tenants, the feuar's common law rights were *not* renounced. They were, on the contrary, expressly reserved —reserved subject only to a single condition, viz., that they should not be asserted so as to involve as against the superior any right of recourse by his mineral tenants.

In short, as I understand it, the effect of the clause in the feu-contract was simply this: that the feuar retained unimpaired his whole common law rights as owner of the surface, except in so far as their enforcement affected, or might be made to affect, the superior or his successors. It is vain, I think, to suggest that the clause throughout relates only to *improper* workings; or that while the first part of it—that in favour of the superior —relates to *proper* workings, the second part—that in favour of the feuar —relates only to *improper* workings. Improper workings, it seems to me, are not *in intuitu* of the clause at all. Nor is it possible upon its language to draw any distinction between the kind of damage for which all claim was renounced, and the kind of damage for which all claim was reserved.

This being so, the next question is, whether to any, and, if to any, to what extent in existing circumstances, this exclusion of all claim by the feuar involving recourse against the superior, limits the feuar's rights as against the present defenders, who are mineral tenants of the superior, and were so since before the date of the pursuer's feu. It is admitted that

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these defenders have by their longwall workings brought down or at least injured the pursuer's buildings; but it is also admitted that they have done so working quite properly, and without negligence.

It is, I think, manifest that the answer to this question depends and must depend upon this: What, under the terms of the defenders' lease, is the extent of the *authority* which, with respect to their longwall workings, the lease confers on them? If the authority is absolute and unconditional, *cadit questio*. Any adverse proceedings by the pursuer must in that case involve the superior in a claim of recourse—recourse under the warrandice in his lease. And *ex hypothesi* that would at once exclude the title of the pursuer to take the proceedings. If, on the other hand, the authority is not absolute and unconditional, but is limited by stipulations as to payment of damages—payment of damages to the feuar—no claim of damages by the feuar could possibly involve any recourse. A demand for interdict might do so, but a demand simply for damages could not do so.

It becomes therefore necessary to examine the defenders' lease, and in particular the clause which may be called for shortness the "Damages Clause"—the clause which has been so much discussed. Several views have been presented to us as to the just construction of that clause.

The pursuer's view is short and simple. He says that the damages there mentioned include, *inter alia*, all damages caused to his (the pursuer's) feu by the defenders' operations—not merely damages caused by improper workings, but also and mainly damages caused by the complete excavation of the minerals—excavation by the longwall working which is authorised by the lease. In short, he contends that when the defenders' lease is examined it is made clear that so far from being unconditional, the defenders' right to work is expressly conditional—conditional on their paying to him (the pursuer) exactly what he (the pursuer) claims in this action. He admits that when the lease is examined it excludes his declaratory conclusions—conclusions which, if affirmed, would justify interdict. But he says that that is of no moment as he does not now press those conclusions, and indeed ceased to do so so soon as, in defence to his action, the defenders' lease was produced.

The defenders, on the other hand, maintain two points. They say (1) that the damages stipulated in the clause apply only to improper workings —workings unauthorised or improperly carried on. And then they say (2) that in any view the clause only applies to *existing* feus and to existing buildings, and not to feus and buildings like the pursuer's—feus granted and buildings erected *after the date of the lease*.

With respect to these opposing constructions, I think it enough to say that I agree with the Lord Ordinary, and do so upon the grounds which he has expressed. I am not able to hold (what would result from the opposite view) that the defenders, being *prima facie* liable to the pursuer as having invaded his common law rights, have elided that liability upon the ground that they have from the pursuer's superior *an unconditional* authority to work longwall—an authority which, by reason of the *recourse* which it carries with it, protects them against the assertion of the pursuer's rights. I do not consider that, upon the just construction of their lease, that is the defenders' position.

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It remains, however, to deal with what is the last question in the case, viz., whether the Lord Ordinary can be supported in holding—on a ground altogether different—that the pursuer's claim is excluded. That ground, as I understand it, is this, that since the date of the defenders' lease, and to a partial extent since the date of the pursuer's feu, there has been a great extension of feuing, and by consequence of building, upon the Wemyss estate—that that extension has gone greatly beyond what could have been contemplated at the date of the lease, and that therefore Mr Wemyss, the pursuer's superior and the defenders' lessor, is barred from demanding from the defenders, either directly or through his feuars, damages which, although stipulated in the lease, have been so enhanced by his subsequent action as practically to make the working of the leasehold impossible. That is, I think, speaking generally, the ground on which the Lord Ordinary, who is otherwise favourable to the pursuer, decides ultimately for the defenders.

I am afraid that there are several difficulties in the way of the Lord Ordinary's view.

In the first place, I have great difficulty in holding that the facts proved are really sufficient to raise the kind of case which the Lord Ordinary figures. The pursuer's feu is distant about a mile from the village of Methil; and there can be no doubt that of late years there has been, and is still proceeding, a very considerable extension of feuing and building in and about that village. Nor can it be doubted that if held liable to the pursuer and persons in his position in payment of damages as now claimed, the defenders' profits from the working of the coalfield will be at least materially reduced. But there are two points upon which, in this connection, I am not satisfied. The one is that, so far as the feuing has yet gone or is likely to go in the near future, it does not appear that worse will happen to the defenders than a reduction, perhaps material, of their profits. The other point is that I am unable to see how the defenders could have failed to anticipate, even in 1877, when they took their lease, that the success of their operations and the opening up and successful working of this great coalfield might, and probably would, have the effect of greatly adding to the importance of the harbour of Methil, and stimulating the growth of that village, and more or less of the neighbouring hamlets.

Further, and in the next place, I am unable to see why, even as against their lessor, it should be assumed that the defenders' remedy includes the right, while continuing to work under the lease, to refuse implement of the conditions which the lease provides. If by the accumulation of uncontemplated burdens the coalfield becomes unworkable to profit, the defenders' remedy would, *prima facie*, appear to be that they should throw up their lease, or rather, in the present case where there are "breaks" every four years, take advantage of one of those breaks. But how, even as between them and their lessor, they could claim to re-form the lease and go on with it minus essential provisions, I confess I as yet fail to see.

Lastly, and in any view, I am unable to understand what the present pursuer has to do with such questions and controversies. He is not here suing as an assignee of the superior to the latter's rights under the defenders' lease. He is suing, as I have endeavoured to shew, in his own right

as owner of the surface embraced in his recorded title. As already explained, he appeals to the defenders' lease not as constituting his title to sue but as affording *in gremio* a reply to a defence based on it. And how in such circumstances his position could be affected by disputes due to occurrences subsequent to his feu, arising between his superior and the latter's mineral tenants, has not been explained. It could only be so upon the theory that, as the result of the controversy, the defenders' lease must (as before indicated) be re-formed by the excision of the damages clause and its limitations. And as to that, it may, I think, be enough to say, first, that matters have not yet reached that stage; and next, that if they should do so, it will have to be then considered how far, even in that event, the pursuer could be prejudiced by modifications of the lease made after the date of his feu-contract, and after also his claim of damages had emerged.

LORD KINCAIRNEY.—The pursuer is a feuar of a piece of ground at Crossroads, near Methil, in Fife, lying above the extensive Wemyss coalfield, and he has raised this action for damages or compensation for injury done to his feu, and to a house built on it, by the subsidence of the surface caused by the workings of the defenders, the Fife Coal Company, tenants of the coalfield. The case involves questions of much general importance, and has been considered by the Lord Ordinary with very great care. The greater part of his opinion is in favour of the pursuer, and in that part of it I concur. At the close of his judgment the Lord Ordinary has proceeded on a special plea, in respect of which he has assoilzied the defenders, and in that conclusion I am not able to agree.

The agents for the parties have exchanged letters to the effect that it had been arranged that neither party would lead any evidence as to the amount of damage done to the pursuer's property by the defenders' operations, on the understanding that in the event of the pursuer being successful in the action, or (as the defenders express it) in the event of it being proved to the satisfaction of the Court that the Company is liable for damage done, the defenders would purchase the property at the price of £620. There seems to be no minute embodying this arrangement, but at the debate I understood that it was to be taken as settled.

The Lord Ordinary states in his note,—"It is admitted that the defenders have taken out a seam of coal under the house; that subsidence and consequent injury to the surface has resulted; that the subsidence would have occurred even without the additional weight of the house; and that there has been no fault or negligence or improper working on the defenders' part"; and I understood these points to be admitted. The case is to be considered on the footing expressed in these letters and in that part of the Lord Ordinary's note.

I think that the argument starts with a certain *onus* or presumption against the defenders arising from the principle that owners or lessees of minerals are not entitled in working them to injure the surface above if belonging to another person, and must justify their proceedings if they do so, or otherwise must pay compensation or damages.

The question therefore is, whether the defenders are liable for the admitted damage caused by their workings. Now, there seem to be only

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two deeds which bear materially on that question, namely, the lease of the minerals dated in 1877, and the disposition creating the feu dated in 1894; and the first question seems to be whether the injury done to the pursuer's property by the defenders' mineral workings can be justified by either of these deeds.

The feu-disposition which made the minerals and the surface separate estates was granted by the trustees of the Wemyss estate in 1894. In that feu-disposition the minerals were reserved under the declaration that the disponee (one Swinton, predecessor of the present pursuer) should have no claim against the disponers, as trustees of the Wemyss estate, or their successors "for any damage that might be done to the piece of ground disponed and buildings erected or to be erected thereon . . . by any of the operations in time past or to come of us or our predecessors or successors or tenants" in working the minerals reserved. But reserving "to the disponee and his foresaids all claims which may be competent to them in respect of any such damage as aforesaid against our tenants or tacksmen of the minerals and others in or near the said piece of ground in so far as such tenants or tacksmen may be liable for such damage without having any right or recourse or other remedy against us as trustees foresaid or our foresaids."

It thus appears that all claims competent to the present pursuer, Dryburgh, against the defenders for damages caused to his feu by their mineral workings are clearly reserved, and that the defence derives no benefit or assistance from the feu-disposition.

The lease which was granted in 1877 is a much more elaborate and complicated deed, and raises questions of construction not free from difficulty—(His Lordship here quoted clauses A and B, *supra*, pp. 1085-6, note).

These clauses seem to lay a considerable burden on the mineral tenants. For while they are laid under the obligation to work out the whole minerals, which could hardly be fulfilled without letting down the surface, they are also laid under stringent obligations to support the surface, and very distinctly engage to discharge all the damage which their works occasion.

The Lord Ordinary states the question whether the pursuer can plead this lease to which he was not a party, and which was granted thirty years before he took his feu; and he answers that question by expressing the opinion that he had a *jus quæsitum* in the lease. I do not dissent from that opinion, but concur in it. But it does not seem to be absolutely necessary to invoke the aid of a *jus quæsitum*. I think the true question is different, and is not whether the lease imposes obligations on the defenders, but rather whether it relieves the defenders from their obligations at common law; and I am of opinion that it does not. I concur, then, in the conclusion which the Lord Ordinary has reached, that the liability of the defenders for the damage they have occasioned is established by or is consistent with the documents founded on, and if there were no counter consideration, it follows that the condition has been fulfilled on which the agreement referred to at the outset would take effect, and the defenders would fall to purchase the pursuer's feu on the terms arranged.

But the Lord Ordinary has not come to that conclusion, because he holds that the defenders' fourth plea should be affirmed. That plea is that the pursuer is not entitled to the decree to which he would otherwise

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be entitled, because the pursuer's authors, the proprietors of the mineral field, have granted feus for building in excess of what the parties to the lease had in view at its date. Now, I do not think there are in the process materials for affirming that plea. There is very little proof on the subject. It is proved or admitted that the subsidence of which the pursuer complains was at least in part occasioned by the defenders' workings apart from the weight of the buildings placed upon it; indeed, it is admitted that it would have been caused although no building had been placed on the ground at all. Now, I think that it follows, both at common law and under the provisions of the feu-contract and of the lease, that the defenders are bound to compensate the pursuer for the damage they have themselves caused. The loss may have been increased by the erection of other buildings, but I am unable to see how that can afford a defence against a demand for payment of the damage previously incurred. There is no proof at all that the subsidence has been one whit increased in consequence of the erection of the new buildings. The amount of the loss caused by the subsidence may have been increased if the foundations of the new buildings were disturbed and they were rendered insecure; but I do not perceive how that could affect this question. If the weight of the new buildings had brought down the surface materially, that might have raised a different question, but that has not been proved.

Further, I do not find the evidence clear about the position of the new buildings. No doubt there have been a great many buildings put down in the immediate neighbourhood, but I am not able to see how that circumstance can affect the pursuer's right to recover the damages which the defenders' workings have caused to his property. He seems to have nothing to do with the damage to neighbouring properties.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be recalled, and that it should be found that damage has been done to the pursuer's property through the operations of the defenders in working the minerals under the pursuer's feu, for which damage the defenders are liable.

LORD STORMONTH-DARLING.—The Lord Ordinary has decided this case mainly upon the mineral lease granted to the defenders in 1877. He holds that while that contract would, if matters had remained in the situation contemplated by the parties when it was granted, have given the pursuer, whose feu was acquired in 1894, a right to claim damages for injury by subsidence on the principle of *jus quæsitum tertio*, there was subsequent to 1877 so great an increase in the number of feus for building purposes that the defenders' obligation to pay damages no longer remains binding. For this alteration of circumstances his Lordship holds the lessor responsible, and, as the pursuer's claim on the footing of *jus quæsitum* (being made by virtue of the lessor's contract) can give him no higher right than the lessor would have had, the result in the Lord Ordinary's view is absolvitor.

I do not find this a satisfactory ground of judgment. The pursuer's claim rests mainly on the terms of his own title, and when he came into Court he founded on nothing else. Now, what does the feu-disposition of 1894 provide? First, it reserves the minerals; second, it excludes all claims by the

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feuar against the granters for any damage that may be caused to ground or buildings, erected or to be erected, by past or future mineral operations by themselves or their tenants; third, it declares that as regards the granters all such damage shall be borne by the feuar himself; but fourth, it reserves to him all claims that may be competent to him "in respect of any such damage as aforesaid" against the mineral tenants in so far as such tenants may be liable for such damage without having (which plainly means without "their" having) any right of recourse or relief, or any other remedy against the granters. It is thus anxiously stipulated that the feuar is to have no claim of damages for injury arising out of mineral workings against the persons with whom he contracted, but that he may make what he can out of the mineral tenants so long as the success of such a claim does not raise a right of recourse against the granters of the feu. The existence of this clause of reservation, no doubt, gave the pursuer a right to call for exhibition of the mineral lease of 1877 to see what the rights and obligations of the tenants were under it. Probably the pursuer was entitled to see the lease, even apart from this clause.

When the lease was disclosed it was found to contain a clause obliging the tenants to work the whole saleable coal of each seam from roof to pavement by the longwall or other method of complete excavation, except in certain specified places where pillars were to be left under existing buildings, and a further clause obliging them to "make good and discharge all damages of what kind soever" which they or their servants might in any way occasion to any lands, crops thereon, houses or woods, fences or drains, wells or water-courses, and whether such damage should be due to the lessors of the colliery, or to the landlord or land tenants, feuars or others, all as the same should be determined by arbitration.

This is the clause in the lease which is now founded on as creating a *jus quæsitum* in the pursuer. It seems to me that its true effect as regards the pursuer is not positive but negative. In other words, it is consistent with, and therefore does not exclude, the claim of damages which the feu-disposition reserves; and in particular it does not shew that such a claim of damages can be excluded by reason of its inferring any right of recourse by the mineral tenants against the lessors.

There may be a certain hardship in the mineral tenants being at the same time taken bound to work out the whole saleable coal by complete excavation, and to make good and discharge all damages of whatever description which may result from such working. If the lessors were to insist in their own right on both of these obligations the tenants might have an answer. We are not called upon in this action to consider that question. This is an action by a feuar who is not interested in the complete excavation of the coal, but is interested in a claim of damages which his title reserves and the lease does not exclude.

When I say that the lease does not exclude the claim I am not overlooking the argument that the damages clause in the lease is, on its just construction, limited to houses existing at the date of the lease. The Lord Ordinary is, on that part of the case, with the pursuer, and I agree with him. The crop, woods, fences, and drains mentioned in the same clause cannot be so limited, and I see no reason why the houses should be.

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Again, when the word "damage" or "damages" is used in either the feu-disposition or the lease it is plainly used in the most general sense, and makes no distinction between damage arising *ex delicto* and damage for which, strictly speaking, "compensation" is due.

That only leaves to be considered the question on which the Lord Ordinary has found for the defenders. It appears that recently the superior, recognising the hardship to the mineral tenants to which I have referred, has altered the form of his feu-contracts so as to take his feuars bound not to claim damages from anybody. The result is that there are at present not more than about thirty feu-dispositions over a large area of surface, extending to 250 acres or thereby, in terms identical with the pursuer's. I suppose there is no assurance that this change of policy will continue, and nothing, therefore, can be founded on that. But, taking the situation as it stands, and admitting all that the Lord Ordinary says about the increase in size and importance of the port of Methil, I greatly doubt whether the change is such as to justify a Court of law in reading out of a contract one of its express stipulations, on the ground that when it was inserted a different state of things was in the contemplation of the parties. Such a principle can only be applied with the greatest caution, particularly to a contract like this, with frequent breaks in it. But the Lord Ordinary's ground of judgment assumes that the pursuer's claim of damages is wholly dependent on the *jus quæsitum* which the lease gives him. If I am right in holding that his claim is not so dependent, but is primarily founded on the terms of his own title, then the ground of judgment fails.

I am therefore of opinion that we should recall the Lord Ordinary's interlocutor, decern in terms of the second part of the declaratory conclusions, and, in respect of the conditional agreement between the parties set out in the letters of 24th October 1904, find it unnecessary to deal with the petitory conclusions of the summons. The pursuer does not now insist on the first part of the declaratory conclusions, which are plainly unsuitable to a case like this where the defenders cannot be restrained from complete excavation, but are liable in damages for bringing down the surface.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor [of 6th December 1904]: Find and declare that the defenders are bound in the event of any injury being caused to the ground or buildings mentioned in the summons by their operations as tenants of the mineral field referred to in the record, and, to the extent of said injury, to make payment to the pursuer in respect of the loss, injury, and damage thus sustained: Find further, that in respect of the agreement of parties embodied in the two letters both dated 24th October 1904 . . . it is unnecessary to deal further with the conclusions of the summons."

MACPHERSON & MACKAY, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

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DANIEL MACAULAY STEVENSON, Pursuer (Respondent).—*Clyde, K.C.—Hunter.*

NORTH BRITISH RAILWAY COMPANY, Defenders (Appellants).—*Guthrie, K.C.—Cooper, K.C.—G. G. Grierson.*

*Master and Servant — Shipping Agent — Engagement "for one year certain"—Tacit Relocation—Termination of contract.*—By letter, dated 29th December 1891, the manager of the North British Railway Company appointed Stevenson, a coal exporter, to be "agent for this Company as from 1st ulto. (for the purpose of attending to the Company's interests in connection with their shipping trade to Hamburg at Bo'ness, Burntisland, and Methil), at a salary of £450 per annum, for one year certain." Stevenson's duty as agent was to endeavour to get coal taken by the Railway Company's lines to the ports named and shipped thence to Hamburg. On 7th December 1892 the contract was renewed "for another year." Thereafter Stevenson continued to discharge the duties of agent until 1900 without formal reappointment. He always received his salary in one sum for each year ending 31st October. On 2d January 1901 the Railway Company gave Stevenson notice that his services would not be required after three months from that date.

In an action by Stevenson against the Railway Company for payment of the balance of his salary to 31st October 1901, *held*, after a proof, that the contract between the pursuer and the defenders was a yearly contract, and, therefore, that the defenders were not entitled to terminate it, after a year had begun, on three months' notice.

2D DIVISION. Sheriff of Lanarkshire.

IN 1886, D. M. Stevenson, coal exporter, 12 Waterloo Street, Glasgow, by letters entered into an agreement with the North British Railway Company, whereby he, in consideration of payments in proportion to the tonnage shipped, was to endeavour to get coal taken by the Railway Company's lines to Bo'ness, a port on the Forth in which the Railway Company were interested, and shipped thence to Hamburg. In 1890 the agreement was extended to Methil and Burntisland, ports in Fife, in which also the Railway Company were interested.

This agreement was acted on from about 1888 until December 1891, when Stevenson was appointed "agent" of the Railway Company at a "salary" in terms of the following letters, viz.:—

On 29th December 1891 the general manager of the Railway Company wrote to Stevenson,—"With reference to our interview to-day, I hereby appoint you agent for this Company as from 1st ulto. (for the purpose of attending to the Company's interests in connection with their shipping trade to Hamburg at Bo'ness, Burntisland, and Methil), at a salary of £450 per annum, for one year certain. If at the end of that year the services which you have undertaken to render to the Company are such as to justify an increase in the salary, the additional value of such services shall be taken into account in fixing any salary which may be attached to a further engagement.

"In the event of any material reduction taking place in the rates charged by the Company, consequent on the revision now being made by Parliament, the Company reserve the right to take the effect of such reduction into account as from 1st November 1892."

On 30th December 1891, Stevenson replied,—"I have your letter of y'day, which is in order, and for which I am much obliged."

On 7th December 1892, Stevenson's appointment as agent was

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renewed in terms of the following letter from the Railway Company's manager,—"Confirming the arrangement made at Bo'ness yesterday, I have pleasure in renewing for another year from 1st ultimo your appointment as agent to this Company for the purposes described in my letter of 29th December 1891 on the same terms and conditions. Please acknowledge receipt."

Stevenson replied on 8th December,—"I am favoured with your letter of yesterday, which is in order."

Thereafter the agreement was acted on for eight years (*i.e.* until 1900), without formal reappointment. The year was taken to end on 31st October. Payment of the salary (latterly raised from £450 to £550) was made in one sum annually by cheque sent after (usually a considerable time after) the termination of the conventional year, the letters enclosing the cheques bearing that the amount was "in payment of your salary as shipping agent for the Company for the year ending 31st October last." Stevenson simply granted a receipt for the cheques for the earlier years, but his receipts for the years ending 31st October 1899, and 31st October 1900, bore that the amount was "in payment of my salary as shipping agent to the Company." The last payment of £550 as salary was made on 3d December 1900 for the year ending 31st October 1900.

On 2d January 1901 the Railway Company's manager wrote to Stevenson as follows:—"I beg to intimate that we will not require your services as shipping agent for this Company after three months from this date. Kindly acknowledge receipt."

Stevenson replied on 3d January 1901 declining to accept notice of the termination of his agreement with the Company.

On 23d April 1901 the Company's manager wrote to Stevenson enclosing a cheque for £229, 3s. 4d., "being the amount of salary due to you up to 31st ulto., when you ceased to hold the appointment of shipping agent for the Company."

Stevenson kept the cheque but intimated that he could only accept it as partial payment, and in July 1902 the Company having declined to make any further payment, Stevenson raised an action in the Sheriff Court at Glasgow for decree for £320, 16s. 8d., being the balance of £550 alleged by the pursuer to be due to him as his salary for the year ending 31st October 1901.

The pursuer averred;—(Cond. 1) "The defenders entered into negotiations with the pursuer in 1885 regarding the shipment of coal to Hamburg, and suggested to him that the coal should be shipped from ports or docks over which they had control, or into which their lines ran, in preference to sending the coal by a rival railway company." (Cond. 2) "At that time there were no coal vessels plying between Hamburg and any port in Scotland except Grangemouth, and the suggestion was that the pursuer should arrange, in connection with the Hamburg coal trade, for vessels to run between Bo'ness Harbour, which belongs to the defenders, and Hamburg, in order to inaugurate the trading between these ports, and so increase the defenders' traffic. This the pursuer was able to do, being himself an exporter of coal, and on 6th January 1886 the defenders agreed with the pursuer that in consideration of his opening up a new trade from Bo'ness to Hamburg, and shipping at Bo'ness in vessels bound to Hamburg a minimum quantity of 30,000 tons per annum, he was to be paid £250 for every 30,000 tons shipped. This payment was to continue so long as the defenders received the service stipulated for,

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the belief being that the pursuer's trade would result in other coal exporters adopting the same trade route, and large benefits thereby accruing to the defenders, and the services so to be rendered by the pursuer being of such a nature that the benefits to the defenders would be permanent." (Cond. 3) "In February 1890 the agreement was extended to Fife, it being then arranged that in the event of the pursuer succeeding in getting a regular service of boats from the defenders' harbours at Methil or Burntisland to Hamburg, he was to be paid an extra sum for every 30,000 tons shipped to Hamburg from these ports in each year." (Cond. 4) "The pursuer's arrangements resulted in a large portion of the Hamburg trade being transferred to Bo'ness, Methil, and Burntisland . . ." (Cond. 5) In 1891 the defenders' manager "suggested, with the object of making the arrangement more regular and legal, that pursuer should be formally appointed a shipping agent, with remuneration based on the average quantity of coal shipped by him from North British ports in past years. It was accordingly arranged about the end of 1891, and formally confirmed on 29th December 1891, that the pursuer should receive the sum of £450 per annum, and some time later this sum was increased to £550 per annum, and has remained at that figure ever since." (Cond. 6) The pursuer on 2d January 1901 "received a notice from the defenders terminating his agreement with them as at 31st March 1901. He declined to accept such notice of termination because the services rendered to the defenders, and for which his remuneration was stipulated, were continuous in their nature and could not be terminated by the pursuer on a few months' notice even if he had made the attempt. To undo the advantages derived by the defenders from the pursuer's intervention would involve the diverting of the traffic not only of himself but also of other traders. . . ." (Cond. 7) ". . . The pursuer's claim for the year's remuneration, due on 31st October 1902, and for remuneration in future years, is reserved."

The pursuer pleaded;—The defenders being due the pursuer the sum sued for, in terms of their agreement with him, decree should be granted as craved.

The defenders referred to the letters of December 1901, and pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant, and insufficient to support the prayer of the petition. (2) The pursuer's employment by the defenders having been duly terminated at 31st March 1901, the defenders should be assoilzied. (3) The agreement alleged by the pursuer can only be proved by writ.

A proof was allowed and led. The import of the evidence sufficiently appears from the Sheriff-substitute's note and from the opinions of the Court.

On 6th January 1901 the Sheriff-substitute (Mitchell) pronounced this interlocutor:—"Finds (1) that from about 1888 up to 31st October 1900 pursuer rendered services to defenders in connection with the shipping of coals from one or more ports on the Forth to Hamburg, for which he received from them an annual payment rising from £250 in 1889 to £550 in 1894 and until 1900, said annual payment being latterly for the period ending on 31st October of each year; (2) that from 1st November 1900 till 2d January 1901 he continued to render services of the same character, and was willing to continue said services for a further period, and in particular till 31st October 1901; (3) that on 2d January 1901 pursuer received notice from defenders purporting to dispense with his said services

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at 31st March 1901; (4) that on 23d April 1901 £229, 3s. 4d. was paid by defenders to pursuer as the proportion of £550 due to him for services between 1st November 1900 and 31st March 1901: Further, finds that the contract as at 2d January 1901 was a yearly one, and that the defenders were not entitled to put an end to it by three months' notice: Finds that defenders are liable to pursuer in the balance of the usual yearly payment of £550: Decerns," &c.*

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* "NOTE.—The Sheriff-substitute has found this a difficult case. . . .

"The defenders' contention, as he understood, is that the relations of parties are fixed by the terms of the letters of 29th and 30th December 1891, and that these letters, with the renewal of the arrangement for another year, under the letters of 7th and 8th December 1892, made the relations to be, on the expiry of that year, terminable at pleasure on three months' notice as reasonable notice. Pursuer's contention is that the whole history of the relationship, as proved . . . must be looked at, and that in the circumstances he is entitled to maintain the relationship at least till the end of the year current when notice was given, being 31st October 1901, or to be paid damages till then.

"Considering first the terms of these letters, the Sheriff-substitute is unable to hold that they can be safely interpreted without reference to what preceded and to what followed. The term 'agent' is of vague import; the 'services' to be rendered are not fully defined; and while 'salary' is spoken of in one paragraph, the other indicates *prima facie* another species of employment. The nature of the service or employment must be thoroughly inquired into. The proof shews an element of confidentiality which demonstrates the need of this inquiry.

"The proof and productions, when carefully examined, seem to the Sheriff-substitute to shew that the work or employment originally undertaken by pursuer for defenders was the opening up, with co-operation on the part of the Railway Company, of a new trade, first from Bo'ness to Hamburg, and later from Fife to Hamburg, with payment by way of a specific sum on so many thousand tons shipped, the arrangement being expressed in letters of 6th January 1886, 27th December 1887, and 19th February 1891. The period of the Bo'ness arrangement was a definite one, three years, but it was being continued at 29th December 1891, and the Fife arrangement was also for 'three years from the first sailing,' but it appears to have been incorporated in the arrangement of 29th December 1891. . . . The agency or service itself after 1891 seems to have covered practically as before only pursuer's own traffic, he being by trade a coal exporter, and neither securing import trade nor inducing others to compete with himself in this export coal trade, nor in fact being expected to do either. After February 1893 defenders call pursuer shipping agent, but he never himself recognises this name till February 1900. Further, the arrangement of 1891, according to a fair reading of the letter of 29th December, seems to contemplate the probability of its extension or renewal. . . .

"The arrangement was renewed 'for another year' on 7th and 8th December 1892, on the same terms and conditions. It had technically terminated on 31st October 1892, but was carried continuously on. After 31st October 1893, when the second year's employment ran out, the relations of parties continued as they had been, without any written renewal of agreement, for eight successive years, that is, until the notice given in defenders' letter of 2d January 1901. . . . Each year a statement of the extent of the traffic (*i.e.*, tons shipped) was sent, or asked for and sent, and payment was expressly given and received, as for each past year, up to each 31st October. . . .

"Besides the correspondence, the parole evidence on the whole supports

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The defenders appealed, and argued;—The pursuer was either a salaried official who could be dismissed on reasonable notice, or he was an agent whose contract of agency could be terminated at any time without notice. If the pursuer was entitled to notice, three months' notice was reasonable notice.[1] But the pursuer was not entitled to notice. He had been engaged for one year; that engagement had been renewed for a second year; and since then there had not been renewal of the yearly engagement. Where there was an engagement for a definite period that meant an engagement for that period and no longer; thereafter the employment was terminable on either side without notice; there was no room for tacit relocation;[2] especially where, as here, the employment was only incidental to the employee's main business.[3] The pursuer was an agent, not a servant of the defenders, and an agency could be terminated at any time

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the view above given of the relations of parties, and of the continuous character of the relationship. . .

"The correspondence, and the pursuer's evidence, uncontradicted by defenders and supported by the probabilities of the case, shew, further, actings and obligations in Hamburg on the part of the pursuer incidental to this trade, viz.:—That at first, at least, he paid commissions or made allowances there, and that he made arrangements for sales for a year ahead. The difficulty of diverting the traffic, so far as established, to a rival Scottish railway is clearly stated by pursuer, and his statements seem probable, and it is admitted for defenders. That other traders followed his line of business seems also very probable. . . .

"What then, in such circumstances, was the position on 2d January 1901, with regard to the duration of the contract? The Sheriff-substitute holds that pursuer had right, by way of tacit relocation, to a year's tenure (as from 1st November 1900), or, in any event, that three months' notice was not sufficient.

"The Sheriff-substitute thinks that in a large sense the relationship between defenders and pursuer may be regarded as that of master and servant, his service partaking also of the character of agent for a principal, with elements in it also of perhaps joint adventure. The defenders call him 'agent' and 'shipping agent,' but they pay him a 'salary,' and introduce him as 'one of our shipping agents, and a salaried official of our Company,' action which at least seems to bar them from denying any legal results of proper service. Pursuer's employment was a special work . . . his employment was solely in the Company's interest and his own as a coal exporter. As between these parties the relationship, though special, was a simple one, arising naturally out of circumstances. Defenders did not, in fact, direct pursuer in his work for them, when he did it, as usually, to their satisfaction, but they watched results, and once, at least, asked for explanations.

"Whether the employment or service of pursuer was most largely as a servant or as an agent, there was in it, the Sheriff-substitute thinks, an element of continuance, or the contemplation of renewal from year to year for an indefinite time. It may be difficult to say when the original opening up of the trade ceased to weigh with the parties, or would have ceased to weigh had Mr Walker [at one time the defenders' manager] lived

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[1] Morrison v. Abernethy School Board, July 3, 1876, 3 R. 945; Forsyth v. Heathery Knowe Coal Co., June 9, 1880, 7 R. 887; Mollison v. Baillie, Jan. 10, 1885, 22 S. L. R. 595.

[2] Lennox v. Allan & Son, Oct. 26, 1880, 8 R. 38.

[3] Brenan v. Campbell's Trustees, Jan. 14, 1898, 25 R. 423.

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without notice.[1] The cases of *Dowling*[2] and *Houston*[3] referred to by the Sheriff-substitute were special.

The pursuer supported the interlocutor on the grounds stated by the Sheriff-substitute.[4]

At advising,—

LORD JUSTICE-CLERK.—I agree with the Sheriff-substitute in thinking that this is a case of a rather difficult character, but giving it the best consideration I have been able to apply to it, I am of opinion that the judgment of the Sheriff-substitute is right and ought to be adhered to.

There can be no doubt that the arrangement under which the pursuer was employed by the North British Railway was of a somewhat complex character, the purpose of the Company being to secure that certain coal traffic should pass over its own line and not that of a rival company. It

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longer; but we may take it that after 29th December 1891 opening became rather extension or expansion, represented in tonnage and recognisable by a larger payment. . . . From that time the main consideration of parties seems to have been the current actual service in traffic (in coals), and it suited both parties to look at it, and they did look at it, from the annual point of view. Year by year things went on as before; and thus each year the annual character of the engagement was established more firmly. . . . In this particular employment it would be difficult at an early stage, and perhaps not less but more difficult as time passed, for the pursuer, if called upon, to drop this exclusive service, alter his arrangements with third parties, and create a like monopolist trade elsewhere. As was well argued for him, it would take a full year for one party to see whether the traffic was to be kept up, and for the other to make different connections.

"In the whole circumstances, the Sheriff-substitute thinks the employment (whatever it may be best called) in 1901, as probably at 1892 and 1893, was not of a temporary character and during pleasure, but in its nature continuous—at least from year to year—and that it was subject, under the principle of tacit relocation, when another year (1901) had begun to run, to renewal during that year. No larger question is raised in this record . . .

"The case of *Brenan* v. *Campbell's Trustees*, 1898, 25 R. 423, was founded on for defenders, to shew that tacit relocation is not applicable here, because (1) of the absence of the relation of master and servant, and (2) of the limited term and nature of the employment. The Sheriff-substitute, agreeing with the agent for the pursuer, besides and beyond the argument from personal bar, thinks, on grounds suggested above, that the cases essentially differ in both respects—the tie between the parties—and the absence here of the peculiar conditions, affecting also the matter of a precise period or continuity, which were present in *Brenan*. He would refer to *Dowling* v. *Henderson & Son*, 1890, 17 R. 921, first, for the application of the doctrine of tacit relocation in circumstances resembling the present in certain respects, treated as a case of principal and agent, and next for the significance of the employer's knowledge of his employee's claim, and for

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[1] London, Leith, Edinburgh, and Glasgow Shipping Co. v. Ferguson, Nov. 13, 1850, 13 D. 51, 23 Scot. Jur. 4.

[2] Dowling v. Henderson & Son, June 11, 1890, 17 R. 921.

[3] Houston v. Calico Printers Association, Limited, Jan. 8, 1903, 10 S. L. T. 532.

[4] Neilson v. Mossend Iron Co., March 4, 1886, 13 R. (H. L.) 50.

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involved this, as I read the evidence, that the pursuer had to make arrangements, not for the moment, but for a long period ahead, as the contracts he entered into had to cover a period a long way in advance of the time for the transit and shipment of the coal.

The difference between the parties is that the pursuer maintains that if the defenders desired to bring the contract to an end he was entitled at least to his agreed-on payment up to the end of the year current. The Company on the other hand maintain that the engagement was terminable whenever they chose, only three months' notice or three months' payment in lieu of notice being given.

The Sheriff-substitute is, I think, right in holding that in the special circumstances of the case it cannot be decided by looking at the two letters of 7th and 8th December 1892 alone, for these letters do not in any distinct manner define the position. The proof is useful as shewing what was the character of work which the pursuer did for the Company from the time he first came into relations with them in 1886. There had been a three years' arrangement at first both as regarded Bo'ness and Fife, but it was carried on for some years, and was in operation till 1891, when a "salary" arrangement was made, the basis of which was the expected traffic, and might therefore be varied according to circumstances. It was to be for "one year certain" as expressed, and in view of a further engagement. It was thereafter renewed, and thereafter tacitly continued for many years.

There can be no doubt on the evidence that the pursuer made arrangements a year ahead, and it is not easy to see how, looking to the competition which existed, he could have been successful in bringing on to the defenders' line the traffic which he did, without such arrangements being made in advance. Indeed, this is conceded by Mr Jackson, the defenders' manager.

In doing what he did the pursuer was held out in introductions as being a "salaried official of the Company," thus plainly treating him as in their service in the work he was doing, although it might also have the character of an agency. I do not attach much importance to the fact that the expression "agent" is used in the correspondence. It is so done in express relation and juxtaposition to a statement that the pursuer is rendering "services," and as it is expressed in the letter of 29th December 1891 "additional value of services" is a matter to be taken into account in fixing

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the Lord Ordinary's view about a yearly contract; also to Lord Low in *Houston* v. *The Calico Printers Association, Limited*, 1903, 10 S. L. T. 532. . . .

"Even should the doctrine of tacit relocation be held inapplicable to this case, the Sheriff-substitute is inclined to think that, in view of the element of continuity implied in the fostering of a new trade, pursuer's arrangements with third parties, his own thirlage so far to defenders' interest (no doubt for advantage only to himself), the difficulty of finding a sphere for similar enterprise elsewhere, and the length of time during which the arrangement had been acted on, three months' notice was not sufficient. . . . Defenders did not offer more than three months, and it seems difficult to draw the line within the year. . . ."

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any salary which may be attached to a further engagement. I may also notice in passing that the name "agent" is quite familiar in railway nomenclature as referring to one who is a servant of the Company, *e.g.*, the person in charge of a station is called "station agent," and is so announced to the public by placard at the station. There was in this case definite reference to continued engagement. The consideration of the arrangement was made from time to time on a footing referable only to work carried on from year to year, and it was undoubtedly a business of such a nature that the breaking of it off during the currency of a year might be very injurious to the pursuer. Indeed, it is difficult to see how any such business could be taken up by a prudent man if it might be abruptly closed at any time.

The question seems to be whether, as it is expressed in the case of *Houston* v. *The Calico Printers Association*,[1] there "was an intention to make him a yearly servant, and that neither party contemplated that the service or the conditions of it should terminate" without the pursuer having a claim as under a yearly contract.

On the whole matter I agree with the findings of the Sheriff-substitute and the grounds he has given for them, and would move your Lordships to affirm his judgment.

LORD KINCAIRNEY concurred.

LORD STORMONTH-DARLING.—When a contract of service or quasi-service, originally for a definite period, has been continued from year to year, and then has been terminated on three months' notice, it is always a question of circumstances, depending on the nature of the service and the conduct of parties, whether tacit relocation has taken place. I know of no rule of law which affords a certain guide to the solution of such a question, and prior cases are only useful where they correspond very closely in their circumstances with the case in hand.

The written contract between the pursuer and defenders took formal shape in December 1891, when a letter was addressed to the pursuer by Mr Conacher, the defenders' then manager, appointing him agent for the Company as from 1st November of that year, for the purpose of attending to the Company's interests in connection with their shipping trade to Hamburg, at Bo'ness, Burntisland, and Methil, at a salary of £450 per annum for one year certain. Some prospect of an increase of salary at the end of the year was held out in the letter if the value of his services should be such as to justify it. The letter was acknowledged by the pursuer, who declared it to be in order. He was some months later described in a circular letter of introduction granted by the Company as "one of our shipping agents and a salaried official of our Company." The appointment was renewed for another year as from 1st November 1892, "on the same terms and conditions," and this letter was also declared by the pursuer to be in order. The salary of £450 was raised to £550 for the year to 31st October 1893; and at this rate it continued down to 31st October 1900, without formal

[1] 10 S. L. T. 532.

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reappointment and without any change being made in the terms and conditions of the service, though there were attempts by the pursuer in 1894 and again in 1899 to have these modified in his own favour. Payment of salary was usually made in one sum some months after the expiry of the year for which it was due. On 2d January 1901 the defenders intimated that they would not require the pursuer's services as their shipping agent after three months from that date. This notice the pursuer declined to accept, and sometime thereafter he raised this action for £320, 16s. 8d., being the balance of his salary from 31st March 1901 (the date down to which he had in the meantime been paid) to 31st October 1901.

The nature of the services rendered is not very well defined, and perhaps is not capable of exact definition. They apparently consisted in the pursuer (who was himself a large exporter of coal) giving his assistance in getting Scotch coal for Hamburg shipped at ports in which the defenders were interested. This system began so far back as 1886, and at first the payments, which were calculated on the amount of shipments, were described as a "bonus." But after a few years it seems to have occurred to the railway officials that it would be more regular to appoint the pursuer one of the Company's shipping agents, though the nature of the services did not suffer any change. The pursuer in his evidence complains of his having been appointed a shipping agent, and put as he calls it "on the pay-sheet." He protests that he was not a servant of the Company, and had no communication with them beyond once a year getting his cheque for the "bonus or commission" on the annual traffic. But he accepted the appointment of shipping agent, and regularly granted receipts in which the payment was described as "salary" in that capacity. The curious result is that the pursuer, whose interest it is to make out the contract was one of service and not terminable till the expiry of a year, loudly protests that he was *not* a servant, while the defenders, whose interest is the opposite, have declared by every writing under their hand that he was. In this state of matters I think it is safest to rely on the written documents, and certainly the defenders cannot complain of being taken at their word.

Dealing then with the case on the footing that the pursuer was a "salaried official" of the defenders, the question comes to be whether his employment was in each year after 31st October 1892 renewed by tacit relocation for the full period of one year, or was terminable at any time on three months' notice. I agree with the Sheriff-substitute that the former is the true view of the relations between the parties. The length of time during which the engagement has lasted, the fact that the salary was paid in a lump annual sum only after returns of shipments for the year had been made, and especially the circumstance (spoken to by the pursuer and not traversed by the defenders) that in the Hamburg trade "contracts must be fixed before the 1st of January," and that when the defenders gave their notice on 2d January 1901 "they had already secured the business for a year," all point, I think very clearly, to the conclusion that when the 31st October 1900 passed without the defenders making any sign of terminating the contract, the pursuer was entitled to rely on its being renewed for another year. I therefore think that the Sheriff-substitute's conclusion is right and ought to be affirmed.

LORD KYLLACHY not having been present at the hearing, did not deliver an opinion. No. 189. July 20, 1905. Stevenson v. North British Railway Co.

THE COURT dismissed the appeal and affirmed the interlocutor appealed against.

DOVE, LOCKHART, & SMART, S.S.C.—JAMES WATSON, S.S.C.—Agents.

MRS MARY G. C. NISBET HAMILTON OGILVY, Complainer (Reclaimer). No. 190.
—*C. N. Johnston, K.C.—J. Duncan Miller.*
WALTER ELLIOT, Respondent.—*Rankine, K.C.—M'Lennan.* July 20, 1905.* Hamilton Ogilvy v. Elliot.

*Lease—Improvements—Compensation—Arbitration—Statutory Arbitration—Agreement in Writing—Agricultural Holdings Act*, 1900 (63 *and* 64 *Vict. cap.* 50), *Second Schedule, Part II., secs.* 1 *and* 4.—*Held* (*rev.* the judgment of Lord Kincairney) that a clause in an agricultural lease referring to two arbiters certain questions of compensation under the lease applied only to claims under the lease, and was not an agreement in writing in the sense of sec. 1 of the Second Schedule, Part II., of the Agricultural Holdings Act, 1900, authorising the Board of Agriculture to appoint, under sec. 4 of the same Part, an arbiter to act along with another arbiter appointed by one of the parties to the lease, in pursuance of an arbitration under the Act.

*Lease—Improvements—Compensation—Arbitration—Statutory Arbitration—Provision for arbitration in lease—Agricultural Holdings Act*, 1900 (63 *and* 64 *Vict. cap.* 50), *sec.* 2.—An agricultural lease gave the tenant right on the termination of the lease to compensation for manure and feeding stuffs purchased by the tenant and applied to the lands, the amount of compensation to be determined by arbitration in the manner and according to the rules set forth in the lease.

On the termination of the lease the tenant lodged a claim under the Agricultural Holdings Act, 1900, in which he claimed, *inter alia*, compensation for manure and feeding stuffs.

*Held* by Lord Kincairney (Ordinary), and *opinion per* Lord Trayner, that in so far as the claim was for compensation for manure and feeding stuffs, arbitration under the Agricultural Holdings Act was excluded in respect that such compensation fell to be determined by arbitration under the lease.

*Lease—Improvements—Compensation—Statute—Retrospective Effect—Agricultural Holdings Act*, 1900 (63 *and* 64 *Vict. cap.* 50), *First Schedule, Part III.*—The Agricultural Holdings Act, 1900, gives tenants right to compensation, *inter alia*, for "laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy."

*Held* by Lord Kincairney (Ordinary) that a tenant whose tenancy terminated less than two years after the date of the Act was entitled to compensation under this enactment.

*Lease—Improvements—Compensation—Notice—Dispensation with notice—Agricultural Holdings (Scotland) Act*, 1883 (46 *and* 47 *Vict. cap.* 62), *sec.* 4.—The Agricultural Holdings (Scotland) Act, 1883, enacts that compensation for improvement in drainage shall not be payable "unless the tenant has not more than three months and not less than two months before beginning to execute such improvement given to the landlord or his duly authorised agent, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work. . . . The landlord and tenant may, if they think fit, dispense with any notice under

* Decided Nov. 3, 1904.

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this section, and come to an agreement in terms of the lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given."

*Held* by Lord Kincairney (Ordinary) that an agreement to dispense with notice need not be in writing.

2D DIVISION. Lord Kincairney.

BY lease, dated July 1892, Walter Elliot became the tenant of the farm of Pitcox, belonging to Mrs Hamilton Ogilvy of Belhaven and Dirleton, for the period of nineteen years from Martinmas 1892.

The lease contained, *inter alia*, this provision:—"And with respect to such manure and feeding stuffs as are not produced on the lands and others hereby let, but purchased by the tenant and applied thereto and consumed thereon, the tenant shall, on leaving the farm at the termination of his tenancy, receive compensation for the same from the proprietor or incoming tenant, in terms of the Schedule annexed and signed as relative hereto,* the amount of such compensation, failing agreement, to be ascertained by arbitration in manner before mentioned: And it is stipulated and agreed, with reference to Part 3 of the Schedule annexed to the Agricultural Holdings (Scotland) Act, 1883, that the compensation for unexhausted manures and feeding stuffs before mentioned and specified in the said Schedule hereto annexed (which is agreed on as fair and reasonable compensation, having regard to existing circumstances) shall be and is accepted by the tenant as full compensation in lieu and place of the compensation that would, but for these presents, be claimable by him in

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SCHEDULE REFERRED TO IN THE LEASE.

"1. Lime applied to land.

"Eight-tenths of cost after first crop has been taken, five-tenths after second crop, three-tenths after third crop, and one-tenth after fourth crop.

"2. Crushed bones, bone dust, police manure, and other manures of equivalent value.

"One-half of cost where one crop has been taken, and one-fourth where two crops have been taken.

"3. Dissolved bones, bone phosphate and guano.

"One-fourth after one crop has been taken.

"4. Feeding stuffs.

"For linseed, cotton cakes, or other substances of equal manurial value, which have been consumed on the farm by cattle or sheep during the last year of the lease, one-third of the value shall be paid, provided the quantity shall not exceed the average of the preceding three years.

*Notes.*

"(1) Vouchers in all cases to be produced, and also an analysis by a competent analytical chemist if it can be procured by the tenant.

"(2) In case of arbitration the arbiters to be entitled in fixing the compensation to make such deductions as they may think fit if in their opinion the manurial value of the substances has been reduced through the tenant's fault or negligence, or if through his fault or negligence the land is in such a state of cultivation as to prevent the substances having their proper beneficial effect on the soil.

"(3) No allowance to be made to the tenant for the cartage of lime, manure, or feeding stuffs, or for the cost of applying the manure to the land.

"(4) No compensation will be allowed for nitrate of soda, sulphate of ammonia, or other such stimulating manures, these being held to be exhausted in the year they are applied."

respect of all or any of the improvements specified in Part third of the Schedule annexed to the said Agricultural Holdings Act." *

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* The Agricultural Holdings (Scotland) Act, 1883 (46 and 47 Vict. cap. 62), enacts:—

Sec. 4. "Compensation under this Act shall not be payable in respect of any improvement specified in the second part of the schedule hereto, and executed after the commencement of this Act, unless the tenant has not more than three months and not less than two months before beginning to execute such improvement, given to the landlord, or his duly authorised agent, notice in writing of his intention so to do, and of the manner in which he proposes to do the intended work . . .

"The landlord and tenant may, if they think fit, dispense with any notice under this section, and come to an agreement in terms of the lease or otherwise between themselves in the same manner and of the same validity as if such notice had been given."

The Agricultural Holdings Act, 1900 (63 and 64 Vict. cap. 50), enacts:—

Sec. 2, *inter alia*, "(1) If a tenant claims to be entitled to compensation, whether under the principal Act or this Act, or under custom, agreement, or otherwise, in respect of any improvement comprised in the First Schedule to this Act, and if the landlord and tenant fail to agree as to the amount and time and mode of payment of such compensation, the difference shall be settled by arbitration in accordance with the provisions, if any, in that behalf in any agreement between landlord and tenant, and in default of and subject to any such provisions, by arbitration under this Act in accordance with the provisions set out in the Second Schedule to this Act."

"(3) Where any claim by a tenant for compensation in respect of any improvement comprised in the First Schedule to this Act is referred to arbitration, and any sum is claimed to be due to the tenant from the landlord in respect of any breach of contract or otherwise in respect of the holding, or to the landlord from the tenant in respect of any waste wrongfully committed or permitted by the tenant, or in respect of breach of contract or otherwise in respect of the holding, the party claiming such sum may, if he thinks fit, by written notice to the other party given by registered letter or otherwise not later than seven days after the appointment of the arbiter or arbiters, require that the arbitration shall extend to the determination of the further claim, and thereupon the provisions of this section with respect to arbitration shall apply accordingly, and any sum awarded to be paid by a landlord or tenant shall be recoverable in manner provided by the principal Act for the recovery of compensation."

"(5) An arbitration shall, unless the parties otherwise agree, be before a single arbiter."

The First Schedule to the Act of 1900 was divided into three Parts, Part I. giving a list of "Improvements to which the consent of the landlord is required"; Part II. of "Improvements in respect of which notice to landlord is required"; Part III. of "Improvements in respect of which consent of or notice to landlord is not required."

The Schedule to the Act of 1883 was arranged on a similar principle, but the number of improvements in Parts I. and III. was considerably smaller.

The only improvement in Part II. of both Acts was "Drainage."

Part III. of the Act of 1900 included—

"26. Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy."

There was no corresponding improvement in Part III. of the Act of 1883.

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The "arbitration in manner before mentioned" was defined in a clause which provided that the amount of surface damages due by the landlord to the tenant on account of underground workings should be ascertained "by two arbiters, one to be chosen by each party, or by an oversman to be named by the arbiters before entering on the reference, in case of their differing in opinion."

The lease came to an end by mutual consent at Martinmas 1902.

In November 1902 Mr Elliot sent the following notice of claim under the Agricultural Holdings Acts to Mrs Hamilton Ogilvy:—

"Madam,—In terms of the Agricultural Holdings (Scotland) Acts, 1883 to 1900, I hereby give you notice that it is my intention to claim on quitting my holding of Pitcox at Martinmas next the sum of £1317 or thereby as compensation for unexhausted improvements, viz.:—(First) £240, being the ⅛ value of feeding stuffs not produced on the said holding consumed thereon by cattle, sheep, &c., during the last year of my tenancy; (2nd) £12 or thereby, being the amount which represents the value to an incoming tenant of the improvement made by me on the said holding by the application of lime; (3rd) £150, being the amount which represents the value to an incoming tenant of the improvement made by me on the said holding by the application of purchased artificial or other purchased manures; (4th) £315 or thereby, being the amount which represents the value to an incoming tenant of the improvement made by me on the said holding by laying down temporary pasture; and (5th) £600, being the amount which represents the value to an incoming tenant of improvements effected by me on the said holding during my lease, over and above the values claimed for above, by the extensive and continuous consumption of feeding stuffs and application of manures, by my having limed the greater part of said holding, by the erection by me of walls at the cattle courts and stackyard, by the cementing of floor in cart shed, and by expenditure in approved drainage, all during my lease, and by generally increasing the crop and stock bearing capacity of the holding.—I am," &c.

Mrs Hamilton Ogilvy and Mr Elliot having failed to come to an agreement as to the matters set forth in the claim, Mr Elliot applied to the Board of Agriculture to appoint an arbiter.

The Board of Agriculture were of opinion that looking to the clause in the lease relative to arbitration two arbiters fell to be appointed.

Mr Elliot accordingly appointed John Wilson, Edinburgh, as one arbiter, and called on Mrs Hamilton Ogilvy to appoint another.

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The Second Schedule to the Act of 1900 contained "Rules as to Arbitration."

Part I., "Arbitration before a single Arbiter," contained, *inter alia*, the following:—

"(1) A person agreed upon between the parties, or, in default of agreement, nominated by the Board of Agriculture on the application in writing of either of the parties, shall be appointed arbiter."

Part II., "Arbitration before two Arbiters or an oversman," contained, *inter alia*, the following:—

"1. If the parties agree in writing that there be not a single arbiter, each of them shall appoint an arbiter.

"4. If for fourteen days after notice by one party to the other to appoint an arbiter, or another arbiter, the other party fails to do so, then, on the application of the party giving notice, the Board of Agriculture shall appoint a person to be an arbiter."

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She declined to do so, and the Board of Agriculture, on the application of Mr Elliot, appointed Mr James I. Davidson, Edinburgh, to be the other arbiter.

Mrs Hamilton Ogilvy then presented this note of suspension and interdict against Mr Elliot, the two arbiters, and the Lord Advocate as representing the Board of Agriculture, praying the Court to interdict and prohibit all proceedings in the arbitration.

Mr Elliot lodged defences, and the Lord Ordinary (Pearson) having passed the note and granted interim interdict, a record was made up.

Mrs Hamilton Ogilvy's objections to the arbitration were in substance the following:—(1) That the arbitration was disconform to the Agricultural Holdings Act, 1900, in respect that two arbiters had been appointed and not one; (2) that Mr Elliot's claim to compensation was barred or excluded as regarded its first, second, and third heads, by the lease and the clause of arbitration in the lease; and (3) that the fourth and fifth heads of the claim were incompetent and unfounded.

The contentions of the parties under each of these heads fully appear from the opinion of the Lord Ordinary (Kincairney).

With respect to the claim to compensation for drainage under the fifth head of the claim, the parties made the following averments:—

Mrs Hamilton Ogilvy averred:—"With reference to the drainage operations, the complainer never agreed to dispense with the notice required by section 4 of the Agricultural Holdings Act, 1883, nor was any such notice given by the said respondent in terms of the statute. The said respondent is called upon to produce the agreement founded upon dispensing with said notice."

Mr Elliot answered:—"With reference to the claim for expenditure on drainage it is explained that shortly after entry to the farm the respondent found that the drainage of certain of the fields on said farm was defective, and that the levels of the drains required to be altered, and a new outlet for the drainage obtained. He consulted the complainer's factor regarding these matters, and was authorised by the said factor to improve the said drainage system. He performed all the work in connection with the said improvement, the complainer supplying and paying for the drain pipes used therein. The complainer, through her said factor, came to an agreement with the respondent to dispense with the notice required by section 4 of the Agricultural Holdings Act, 1883, with reference to said drainage, and in respect of said agreement the respondent's claim for compensation in terms of Part II. of the schedule to said Act of 1900 is of the same validity as if formal notice had been given."

On 2d March 1904 the Lord Ordinary (Kincairney) pronounced this interlocutor:—"Finds (1) that the first, second, and third heads of the notice of claim by the respondent, No. 7 of process, are included in the clause of reference in the lease between the complainer and respondent and the schedule annexed thereto; (2) that claims for the improvements embraced in the said heads fall to be determined under the lease and clause of reference therein; (3) that heads four and five of the claim do not fall under the lease; (4) that head four and the claim for improvement by drainage embody competent claims under the statute: Finds it unnecessary to dispose otherwise of the other claims in head five of the notice of claim: *Quoad ultra* continues the cause." *

* "NOTE.— . . . The complainer has stated a great number and

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On 27th May 1904 the Lord Ordinary pronounced this further interlocutor:—"Having heard counsel for the parties on the application of the findings contained in interlocutor of 2d March last, interdicts, prohibits, and discharges the respondent Walter Elliot junior from insisting in or prosecuting and following further items and particulars 1, 2, and 3 of claim by said respondent, No. 7 of process, and set forth in the prayer of the note; and also interdicts, prohibits, and discharges the respondents, John Wilson and James I. Davidson, as arbiters mentioned in said note, from entertaining or dealing with or awarding any sum in respect of said items 1, 2, and 3 of said claim: Refuses the prayer of the note so far as regards items 4 and 5 of said claim, and recalls the interim interdict granted by interlocutor of 18th July 1903 with reference thereto: Finds no expenses due to or by either party, and decerns."

Mrs Hamilton Ogilvy reclaimed.[1]

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variety of pleas, but I think they resolve mainly into these propositions,—(1) That this arbitration is disconform to the Agricultural Holdings Act because two arbiters have been appointed and not one; (2) that the claim is barred or at least excluded as regards the first, second, and third heads of it by the lease and the clause of arbitration for determination of the amount of the tenant's compensation contained in the lease; (3) that the fourth and fifth heads of the claim are incompetent and unfounded; and (4) that the claim is invalid in respect it is not sufficiently specific. This contention I understand to apply chiefly to the fifth head.

"1. The objection that the reference is incompetent because two arbiters have been nominated by the Board of Agriculture rests on subsection 5 of section 2, which provides, 'An arbitration shall, unless the parties otherwise agree, be before a single arbiter.' Article 1 of Part II. of Schedule II. provides that 'if the parties agree in writing that there be not a single arbiter, each of them shall appoint an arbiter'; and Article 4 provides that if after due notice one party fails to nominate an arbitrator that shall be done by the Board of Agriculture.

"The question whether, in the circumstances stated, the Board had power to appoint two arbiters is a question relating to the constitution of the tribunal for the determination of these differences between landlord and tenant. It depends on the construction of the statute, and it is clear that it must be determined by the Court now, and cannot be left to the decision of the arbiters nominated—*Sinclair* v. *Clyne's Trustee*, Dec. 7, 1887, 15 R. 185.

"In this case the Board of Agriculture seems to have taken the view that the provision in the lease for an arbitration before two arbiters was equivalent to the written agreement of the parties that there should not be a single arbitrator. I agree in that view, and I repel the complainer's plea against the competency of the arbitration on that ground; and I think there is no relevant objection to the constitution of the tribunal.

"2. The complainer's second and most important contention is based on the lease. The lease was for nineteen years from Martinmas 1892, but came to an end by mutual consent at Martinmas 1902. It is provided by the

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[1] *Cited at the hearing*:—Caledonian Railway Co. v. Morrison, June 10, 1898, 25 R. 1001; Sinclair v. Clyne's Trustee, Dec. 17, 1887, 15 R. 185; Mull District Committee v. Local Government Board, Feb. 28, 1902, 9 S. L. T. 484; Hunter v. Barron's Trustees, May 13, 1886, 13 R. 883; Callender v.Smith, July 7, 1900, 2 F. 1140, aff. May 9, 1901, 3 F. (H. L.) 28; Glasgow, Yoker, and Clydebank Railway Co. v. Lidgerwood, Nov. 27, 1895, 23 R. 195; Bennets v. Bennet, Jan. 31, 1903, 5 F. 376.

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LORD TRAYNER.—The object of this note is to have the respondents interdicted from proceeding with an arbitration instituted for the purpose of determining the right of the respondent, Walter Elliot, to receive compensation from the complainer for various improvements made by him on a farm belonging to the complainer of which he was recently the tenant. The claim presented by the respondent is before us, and bears to be one under the Agricultural Holdings Acts, 1883 to 1900. It consists of five separate heads. The Lord Ordinary has held that with regard to the first three there can be no procedure before the statutory tribunal, because the parties have under the lease provided already for arbitration upon the matters comprised under these heads. I am of opinion that the Lord Ordinary is

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lease that the tenant on leaving the farm shall receive compensation in terms of the schedule annexed to the lease, and that the amount of such compensation, failing agreement, shall be ascertained by arbitration in the manner provided by the lease, that is by two arbiters and an oversman appointed in the usual manner.

"The lease proceeds thus:—'And it is stipulated and agreed with reference to Part III. of the Schedule annexed to the Agricultural Holdings Act, 1883, that the compensation for unexhausted manures and feeding stuffs before mentioned and specified in the said schedule hereto annexed, which is agreed as fair and reasonable compensation having regard to existing circumstances, shall be and is accepted by the tenant as full compensation in lieu and in place of the compensation that, but for these presents, would be claimable by him in respect of all or any of the improvements specified in Part III. of the Schedule annexed to the said Agricultural Holdings Act.' . . .

"The schedule annexed to the lease here referred to . . . includes compensation for (1) lime; (2) crushed bones and similar manure; (3) dissolved bones, bone phosphate and guano; (4) feeding stuffs; and it specifies the proportions of the values of each of these subjects to be allowed to the tenant. It is framed in a totally different manner from the claim.

"I think that parties were practically agreed that the first, second, and third heads of the tenant's claim are substantially covered by the items of compensation specially mentioned in the schedule attached to the lease; that the improvements claimed for in these heads of the claim are those embodied in the schedule annexed to the lease, although there is a material difference in the mode in which these improvements are valued; but that the claim for temporary pasture under head four is new, and is not included in the schedule in the lease, and that the greater part of the miscellaneous claims in article five was not included in the schedule in the lease, and that these claims cannot to that extent be barred by the lease.

"Assuming these points as undisputed, the first question appears to be whether the statutory arbitration is excluded in whole or in part by the clause of reference in the lease. That is a general and important question, although not of much practical consequence in this case, but no authority was cited which gives much or any assistance in solving it. I think it depends on subsection 1 of section 2 of the Act of 1900. . . . I think that the provision in the subsection comes to this,—that in the event of landlord and tenant failing to agree as to compensation at the end of the lease the differences between them shall be settled by arbitration in accordance with the clause of reference in the lease, if there be one, and if there be no clause of reference in the lease, then, and then only, by arbitration under the Act. I think that if the claim under the Act and the claim allowed by the lease were identical, it would be difficult to hold that it was

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right. The parties having agreed to leave the determination of their rights and liabilities under the lease to a particular tribunal, that tribunal must, in my opinion, be left to deal with them.

The more important question in the case, however, is whether the tribunal, consisting of two arbiters nominated—one of them by the respondent Elliot and the other by the Board of Agriculture—for dealing with the points involved under heads four and five of the claim, is a competent one. On the one hand it is said that in the circumstances here disclosed the Board of Agriculture had no power to nominate any other than a single arbiter, on the other that in nominating one arbiter to act along with the arbiter nominated by the respondent the Board was acting within its powers.

Now, in determining this question, regard must be had to the terms and

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intended by the statute to provide for a case for which the parties had provided.

"But the tenant maintains that his claim is not confined to the first, second, and third heads, but that he has additional claims which are not covered by the lease, namely, the fourth and fifth heads of his claim, and he points out that if he cannot establish these claims under the Act, he must lose them altogether. The complainer maintains that these claims are wholly groundless and not warranted by the Act, and that they cannot be submitted to arbitration.

"Article 4 of the Notice of Claim is thus expressed:—'£315 or thereby, being the amount which represents the value to an incoming tenant of the improvement made by me on the said holding by laying down temporary pasture.' Is this a good claim in the circumstances? There is no such ground of compensation mentioned in the lease, and no compensation was allowed on that score by the Agricultural Holdings Act, 1883. It is a new ground of compensation introduced in Part III. of Schedule I. of the Act of 1900. It is No. 26 of the Schedule, which is thus expressed:—'Laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy.'

"It is very difficult to deal with this new ground for compensation. The statute only says that compensation is to be allowed for laying down temporary pasture. It does not seem to take into account the pasture which would fall to be left by the tenant according to the rotation under the lease, and to the ordinary rules of good husbandry; nor is it indicated whether the amount of compensation would to any extent depend on the length of time during which the land was left in pasture. But if any questions such as these had arisen they would no doubt be proper for determination by the arbiter. But no such points have been raised. The question is whether in the circumstances a state of matters has arisen which admits of this claim at all. The tenant states that the seed was sown in 1895 and 1896, and if that was so, which must at present be assumed, then the condition that the land should lie in pasture for two years before the close of the lease was undoubtedly fulfilled, and the tenant maintains that his right to compensation for temporary pasture is plainly expressed, and that he has stated a relevant claim which must be submitted to arbitration under the statute.

"The complainer reads this 26th Article of the Schedule differently, and I understand the argument on her behalf to be to the effect that a tenant could have no claim for temporary pasture unless the ground had been under pasture for two years after the date of the Act, 1st January 1901, which was in this case impossible, because the time which elapsed from

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provisions of the statute. The Act of 1900, section 2, provides that when differences arise between landlord and tenant as to compensation claimed by a tenant under the provisions of the Act (and the fourth and fifth heads of the respondent's claim are of that character) such differences are to be settled by arbitration, and "the arbitration shall, unless the parties otherwise agree, be before a single arbiter." But the Second Schedule, Part II., sec. 1, provides that "if the parties agree in writing that there be not a single arbiter, each of them shall appoint an arbiter." The statute then proceeds to provide (Second Schedule, Part II., 4) that if for fourteen days after notice by one party to the other to appoint an arbiter the other party fails to do so, then, on the application of the party giving notice, the Board of Agriculture shall appoint a person to be arbiter. The respondent having named an arbiter, and the complainer having refused

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the date of the Act to the close of the lease, Martinmas 1902, was short of two years. It is maintained that to read the words otherwise would give the statute a retroactive effect, seeing that there was no claim for compensation on this ground under the Act of 1883. The contention of the complainer may have much to recommend it, and perhaps it expresses what was really intended, but the language of the 26th Article appears unambiguous; I think I am not entitled to add to it the condition for which the complainer contends, and which is not expressed, and I am not prepared to affirm that it does not warrant the tenant's claim.

"It was further objected by the complainer that the claim involved a breach of the rotation under the lease, which was six shift, and therefore a breach of the lease, and that a claim ought not to be allowed which was founded on a breach of the lease. I am not prepared to assent to that argument. I do not think that the deviation from the course of rotation involves what could be designated as a breach of the lease seeing that it was wholly in the landlord's favour, and is treated in the 26th Article of the Schedule as an improvement meriting compensation.

"On the whole I have been unable to see that the respondent's claim under head 4 can be disallowed.

"This point is of great importance, because it involves the conclusion that there must be a statutory arbitration if the tenant insists on it; and if the questions under heads 1, 2, and 3 must be tried under the lease, it might follow that two arbitrations were necessary unless the parties agree otherwise.

"The respondent contends that if there is to be a reference under the Act he is entitled under section 2, subsection 3, to extend the scope of the reference to heads 1, 2, and 3 of the claim, and that by that means the whole questions might be tried under one reference, namely, the statutory reference. This point is involved in very great difficulty, and it is not easy to reconcile the provision in the Act, that questions must be tried under the lease when there is a clause of reference, with this section empowering either party to procure extension of the scope of the reference, and I have been unable to see how the section can apply to a reference which the lease has excluded, nor is it easy to see how the section can be held to extend to heads which are in the claim although they have been disallowed.

"The question remains whether the tenant is entitled to insist that the claims under head 5 be remitted to the statutory arbitration. The claim under that head is for £600, and that sum is demanded as due on various vague, indefinite, and heterogeneous grounds. There is first a claim for compensation for consumption of feeding stuffs, application of manure and lime. These are stated without any specification of place, time, or amount, and seem open to the complainer's 7th plea. It may be, however, that this

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or delayed to name another, the Board of Agriculture, on the view that there was a written agreement in the lease to refer to two arbiters, nominated (at the request of the respondent) another arbiter "to act on behalf of the landlord." The question here, therefore, resolves itself into whether there was an agreement in writing within the meaning of section 1, Part II. of the Second Schedule, that the respondent's claim should *not* be submitted to a single arbiter. The Lord Ordinary (agreeing with the view acted upon by the Board of Agriculture) has held that there was. He is of opinion that the provision in the lease providing for arbitration before two arbiters and an oversman is a written agreement "that there be not a single arbiter." In this opinion I am unable to concur. The provision for arbitration contained in the lease applies only to such claims as may arise under and by virtue of the lease, and has no reference to claims which

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vagueness and indefiniteness in the claim might be cured if the items were investigated and scrutinised by the arbiters, but my difficulty is in seeing that that part of claim 5 is anything but a repetition of the 1st, 2d, and 3d heads of the claim.

"Head 5 includes, besides, claims for compensation for . . . drainage. . . .

"Drainage is an improvement falling under the second part of the Schedule. It is the only improvement in the second part of the Schedule in either Act. To make a proprietor liable for drainage effected by the statutes requires written notice to the proprietor. The 4th section of the Act of 1883 provides that such compensation shall not be payable for drainage executed by the tenant unless he has 'not more than three months and not less than two months before beginning to execute such improvement' (viz., drainage) 'given to the landlord or his duly authorised agent notice in writing of his intention so to do and of the manner in which he proposes to do the intended work.' It is to be observed that the notice here required seems not to be general notice of an intention to improve the system of drainage, but notice of an intention to do a particular piece of drainage work. Here there is no averment at all of written notice, and it is clear that the statutory requirement as to notice has not been satisfied. The knowledge of the proprietrix or her factor of the drainage operations is, indeed, averred, but such knowledge does not satisfy the express provisions of the statutes; although it may possibly be hard that the tenant should suffer by merely neglecting a statutory requirement, which in nine cases out of ten would be quite superfluous, that he should give notice to the proprietrix or her factor of what was going on under their eyes. Still the requirement of the 4th section seems imperative and must be complied with, unless it be dispensed with by the parties. About this part of the tenant's claim it is to be observed that it is perfectly general and vague. The time, place, and extent of the operations are not alluded to. But the tenant has averred that the complainer, through her factor, came to an agreement with the respondent to dispense with the notice required by section 4. When or where or in what form this agreement was made is not said. But it is true that it is provided by section 4 that the landlord and tenant may, if they think fit, dispense with notice under the section, and the question comes to be whether there is a relevant averment that there was such an agreement to dispense with written notice. It is not provided that this agreement to dispense with the requirement of written notice should itself be in writing or should not be susceptible of proof except by writ or oath, and I do not see that I can put these qualifications in the provision in the statute. It is a very odd thing, no doubt, that the statute should require written notice, and then provide that the requirement may

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may arise under the Agricultural Holdings Acts. Any claims which might arise under the statute were not provided for, and the mode for determining such claims must be found in the statute itself. That mode is, as I have pointed out, by a single arbiter unless the parties otherwise agree. In reference to claims arising under the statute there was no such agreement either in the lease or elsewhere. The Board of Agriculture erroneously thought that there was and acted accordingly. In nominating an arbiter to act with the arbiter named by the tenant I think they went beyond their powers. They set up a tribunal of two arbiters in circumstances in which the statute required that there should be only one.

We have heard a long argument upon the relevancy and competency of claims 4 and 5. These are questions upon which at present it is unnecessary to say anything, because for the reasons I have stated I am of opinion that the interlocutor reclaimed against should be recalled and interdict granted as craved. When an arbitration tribunal has been competently constituted it will be time enough to consider the relevancy or competency of any claim presented to it by the respondent Elliot.

LORD YOUNG.—I agree. The only matter we are determining now is that

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be dispensed with. But such is the provision in the statute. The averment is very indefinite, no doubt, but it is quite explicit, and I do not see that it can be treated as wholly irrelevant, and, if it were true, then probably the claim for drainage expenditure must be held competent.

"It appears to me that this statutory claim is not excluded by the lease. I have not found anything in the lease about drainage, and, while it is provided by the lease that the compensation under the lease should be in place of all that could be claimed in Part III. of the Schedule in the Act, which does not include drainage, it is not said that it shall be in full of claims under Part II., which are for drainage, and hence I think that the tenant's claim for it, allowed by the statute, is not excluded. He may, it is true, fail in his claim entirely if he does not succeed in proving his averment that the requirement of written notice in section 4 was dispensed with.

"The case, therefore, seems to stand thus—Claims 1, 2, and 3 cannot be allowed except of consent, and to make good his claims on these heads the tenant must proceed under the arbitration clause in the lease. I think, though with hesitation, that head 4 and the claim for drainage are, as they stand, relevant claims and must be admitted. I am not prepared to disallow these claims. I think that as regards them the statutory reference must be allowed to proceed. Had I not come to the conclusion that a statutory arbitration could not be avoided, I would have proceeded to consider whether the claims for buildings, manures, and feeding stuffs under head 5 could be admitted. But as there must, according to my view, be a statutory arbitration, including head 4 of the agreement and head 5 so far as it contains a claim for drainage, I think that consideration of the other parts of head 5 may be deferred and left to be dealt with in the arbitration. On this point I refer to *Glasgow, Yoker, and Clydebank Railway Co.* v. *Lidgerwood*, 27th November 1895, 23 R. 195; *Caledonian Railway Co.* v. *Morrison*, 10th June 1898, 25 R. 1001; and *Bennets* v. *Bennet*, 31st January 1903, 5 F. 376, where that course was adopted. It would follow, no doubt, from the views I have expressed, that the findings in my interlocutor should be followed by an interdict against prosecuting heads 1, 2, and 3 of the claim, but I have thought it as well to allow the case to lie over for a few days in order to see whether further proceedings might be avoided before pronouncing interdict."

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the Board of Agriculture fell into error in appointing a second arbiter. We decide nothing else.

LORD JUSTICE-CLERK.—I concur.

LORD MONCREIFF was absent.

THE COURT recalled the judgment reclaimed against and granted interdict as craved.

JACK & BRYSON, S.S.C.—DALGLEISH & DOBBIE, W.S.—Agents.

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Cases decided in the House of Lords are printed in *Italics.*


ACQUIESCENCE. See *Mora—Superior and Vassal*, 7.

ADMINISTRATION OF JUSTICE. *Judge—Declinature—Court of Session Act*, 1821, *sec.* 4.

1. In a note of suspension and interdict at the instance of the Free Church of Scotland, the Lord Ordinary on the Bills orally reported to the First Division that the case was one connected with a series of litigations in which he had acted throughout as counsel for the Free Church of Scotland and for the local parties connected with it, and that in these circumstances he thought it proper to decline, but in respect it was a Bill-Chamber case, he could not do so without their Lordships' assistance under the statute. The Court in respect of this report *sustained* the declinature, and *remitted* the case to another Lord Ordinary. Free Church of Scotland v. M'Rae, May 30, 1905, p. 686.

*Advocate.*

2. *Right of peer to be heard as counsel in appeal cases to the House of Lords. In re* Lord Kinross, July 4, 1905 (H. L.), p. 138.

*Law-Agent—Misconduct—Forgery—Readmission to the Roll.*

3. In 1894 an enrolled law-agent was convicted of forging and uttering a pretended interlocutor of a Lord Ordinary, finding him entitled to £35, and was sentenced to fifteen months' imprisonment. In 1896 his name was, on his own application, removed from the Register of Enrolled Law-Agents. In 1901 he presented a petition for readmission, which was refused. In 1905 he presented another petition for readmission. The petition was opposed by the Incorporated Society of Law-Agents in Scotland, and it did not appear that, apart from the lapse of time, there was any change of circumstances since the refusal of the previous petition. The Court *refused* the petition. C D v. Incorporated Society of Law-Agents in Scotland, July 11, 1905, p. 936.

*Contempt of Court—Enforcement of Decree to deliver document—Warrant to open lockfast places.*

4. The curator bonis of an incapax obtained a decree in absence against the wife of his ward, ordaining her to deliver to the curator a certain policy of insurance on his ward's life. A charge upon this decree having expired without result, the curator, being in a difficulty, presented a note to the Junior Lord Ordinary, in which, on the narrative that he believed that the execution of a warrant to imprison would not be effectual to enforce production, he craved for a warrant to messengers-at-arms to search for and recover the document, and if necessary, to open all shut and lockfast places. The Junior Lord Ordinary having reported the matter to the Inner-House, the Court *granted* the warrant asked for. Ferguson's Curator Bonis, July 4, 1905, p. 898.

ADVERTISEMENT. *Titles to Land Consolidation (Scotland) Act*, 1868, *sec.* 119. The holder of a bond and disposition in security exposed the subjects under the power of sale on 23d March 1904. The first advertisement had appeared on the morning of 10th February 1904. *Held* that, as forty-two days had elapsed between the morning of the first advertisement and the morning of the exposure, the provisions of the Titles to Land Consolidation (Scotland) Act, 1868, sec. 119, in regard to advertisement had been complied with. Roscoe v. Mackersy, June 8, 1905, p. 761.

ADVOCATE. See *Administration of Justice*, 2.

AGENT AND CLIENT. *Agent's Rights—Liability of trust-estate to law-agents for expense of unsuccessfully defending an action.* In an action against the sole trustee under a testamentary trust, the final interlocutor decerned against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate." The trust-estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law-agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses. *Held* that as the law-agents for the trustee were presumably acquainted with the whole circumstances of the trust, they were not entitled to rank for their account. Ferme, Ferme, & Williamson v. Stephenson's Trustee, July 6, 1905, p. 902.
See *Administration of Justice*, 3.

AGENT AND PRINCIPAL. *Termination of Contract—Shipping Agent—Engagement "for one year certain"—Tacit Relocation.*
1. By letter, dated 29th December 1891, the manager of the North British Railway Company appointed Stevenson, a coal exporter, to be "agent for this Company as from 1st ulto. (for the purpose of attending to the Company's interests in connection with their shipping trade to Hamburg at Bo'ness, Burntisland, and Methil), at a salary of £450 per annum, for one year certain." Stevenson's duty as agent was to endeavour to get coal taken by the Railway Company's lines to the ports named, and shipped thence to Hamburg. On 7th December 1892 the contract was renewed "for another year." Thereafter Stevenson continued to discharge the duties of agent until 1900 without formal reappointment. He always received his salary in one sum for each year ending 31st October. On 2d January 1901 the Railway Company gave Stevenson notice that his services would not be required after three months from that date. In an action by Stevenson against the Railway Company for payment of the balance of his salary to 31st October 1901, *held*, after a proof, that the contract between the pursuer and the defenders was a yearly contract, and, therefore, that the defenders, were not entitled to terminate it, after a year had begun, on three months' notice. Stevenson v. North British Railway Co., July 20, 1905, p. 1106.

*Agent's Responsibilities—Liability to account—Unexplained deficiency.*
2. The manager of a branch shop was supplied by his employer with goods marked and invoiced at selling prices. Receipts for the goods so received were signed by the manager. At a stock-taking there was a deficiency to the amount of £62. In an action by the employer against the manager for this amount a proof was taken, in which there was no evidence of dishonesty or negligence on the part of the manager, but no explanation of the cause of the deficiency. *Held* that the employer was entitled to decree for £62, the retail price of the goods not accounted for. Tyler v. Logan, Nov. 23, 1904, p. 123.

AGENT AND PRINCIPAL—*Continued.*

*Agent's Responsibilities—Negligence—Patent Agent—Damages for loss of patent—Defence of invalidity of patent.*

3. In an action of damages against patent agents, the pursuer averred that the defenders had charge of two patents held by him, and that they had allowed them to lapse by failing to give him notice that certain payments were necessary to keep them in force. The defenders pleaded that there was no loss, as the patents were invalid by reason of anticipation by prior patents specified. *Held* that the defence was irrelevant. Alexander Turnbull & Co., Limited, v. Cruickshank & Fairweather, June 23, 1905, p. 791.

*Agents' responsibilities—Misrepresentation by agent to principal that contract concluded—Shipbroker—Measure of Damages.*

4. *A shipbroker who had been employed by a foreign shipowner to find a cargo for his vessel, in the expectation of completing a contract with a coal merchant (for whom he did not act as agent) informed his principal that he had completed a contract on certain terms. No contract was completed, and the principal raised an action of damages against his agent for the profit he would have gained if the contract had been completed.* Held (alt. *judgment of Second Division*) *that the pursuer was entitled to the actual damage he had sustained by being led to believe that a contract had been completed, but had no claim for loss of profit.* Salvesen & Co. v. Rederi Aktiebolaget Nordstjernan, April 14, 1905 (H. L.), p. 101.

ALIMENT. See *Parent and Child.*

ALIMENTARY PROVISION. See *Marriage-Contract*, 1.

APPEAL TO HOUSE OF LORDS. *Interim Execution pending appeal—Expenses—Modification—Court of Session Act*, 1808, *sec.* 17.

1. In an action of damages for breach of contract the pursuer was found entitled to damages and to expenses, "reserving consideration as to modification" until the approval of the Auditor's report. After the expenses had been taxed, but before the Auditor's report had come up for approval, the defenders appealed to the House of Lords. In a petition presented by the pursuer for interim execution pending the appeal, including interim execution for the taxed expenses, the Court *refused* the petition *quoad* the expenses, in respect that after the appeal had been presented it was incompetent to deal with the question of modification of the expenses. Williamson v. Macpherson & Co., Dec. 8, 1904, p. 231.

*Petition to apply judgment—Discretion of Court to delay.*

2. In an appeal the House of Lords reversed the decision of the Court of Session, and remitted the case to them with a direction to declare in terms of certain declaratory conclusions. On a motion in the Single Bills to apply the judgment the respondents stated certain objections to the motion being granted, and moved that the case should be sent to the Summar Roll. The Court *refused* the motion, and applied the judgment, holding that their functions in the matter were purely ministerial. General Assembly of the Free Church of Scotland v. Lord Overtoun, Dec. 6, 1904, p. 202.

*Advocate.*

3. *Right of peer to be heard as counsel in appeal cases to the House of Lords. In re* Lord Kinross, July 4, 1905 (H. L.), p. 138.

ARBITRATION. *Accident Insurance by Newspaper—Payment to person adjudged by editor to be next of kin.*

1. A weekly periodical named *Answers* contained a statement that in the event of any person being killed by an accident to any train in which he was travelling as a passenger with a copy of the current number in

ARBITRATION—*Continued.*

his possession, £1000 would be paid to "the person adjudged by the editor to be the next of kin of the deceased." It was added that "The person or persons who shall be adjudged by the editor to be the next of kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." H was killed in an accident to a train in which he was travelling, having in his possession a copy of the current number of *Answers*. He was survived by three brothers and a sister. After inquiry, the editor adjudged the sister to be his next of kin, and paid £1000 to her. In an action by the brothers against her, *held* that they had no right to share in the sum so paid. Hunter v. Hunter, Nov. 24, 1904, p. 136.

*Arbitration Clause in Principal Contract incorporated in Subcontract.*

2. A contractor, who had contracted with a railway company for the construction of certain works, entered into a subcontract for the execution of part of the work. In the contract between the principal contractor and the subcontractor it was stipulated that the work was to be executed "according to plans and specifications," which included a "general specification," forming part of the contract between the principal contractor and the railway company. This "general specification" contained a clause providing that disputes were to be submitted to arbitration. *Held* that the arbitration clause of the general specification—while it was incorporated in the subcontract to the effect of making the decisions of an arbiter in questions between the railway company and the principal contractor binding upon the subcontractor—was not incorporated in the subcontract *quoad* matters which concerned only the rights *inter se* of the principal contractor and the subcontractor. Goodwins, Jardine, & Co., Limited, v. Brand & Son, July 19, 1905, p. 995.

See *Lease*, 3, 4.

ARRESTMENT. *Arrestment on dependence—Sist of action to preserve arrestment on dependence.*

1. In an action by one Englishman against another who had estate in Scotland, a plea of *forum non conveniens* was sustained. The pursuer, however, moved the Court to sist the action to enable him to preserve arrestments on the dependence till he should raise and follow forth an action in England. The Court *refused* the motion, and *dismissed* the action. Atkinson & Wood v. Mackintosh, March 17, 1905, p. 598.

*Arrestment jurisdictionis fundandæ causa—Amendments.*

2. Arrestments *jurisdictionis fundandæ causa* found jurisdiction not only in the action as originally laid, but as competently amended. Hope v. Derwent Rolling Mills Co., Limited, June 27, 1905, p. 837.

ASSOCIATION (VOLUNTARY). See *Church*, 3—*Reparation*, 9—*Revenue*, 8.

BANK. See *Local Government.*

BANKRUPTCY. *Effect—Illegal Preference—New security granted in substitution for prior invalid security—Act* 1696, *c.* 5—*Sale of Goods Act*, 1893, *sec.* 47.

1. In June 1903, Neilson lent £3000 to M'Dowall & Company, and in security took from M'Dowall & Company delivery-orders for timber belonging to them stored in Connal & Company's timber-yard. The orders were in favour of Neilson, and were addressed to Haggart & Company, licensed timber-measurers, employed by M'Dowall & Company to measure and store the timber. The orders were intimated by Neilson to Haggart & Company, who replied acknowledging that they held the goods to his order. The duties of Haggart & Company in regard to storing timber were to measure it, to stack it in the yard selected by their employers, by whom they were paid, and to arrange for its removal when sold. The yard belonged to Connal & Company,

BANKRUPTCY—*Continued.*

by whose servants it was watched, and by whom books were kept in which were noted the quantities of the timber stored and the names of the owners, who paid rent for storage. According to the practice of the timber trade in Glasgow, the measurers were allowed by the proprietors of the yard to have practically complete control over timber stored by them. They could remove the timber as and when they chose, and delivery-orders for the removal of timber were addressed to them. On 23d September 1903, Neilson at the request of M'Dowall & Company granted delivery-orders signed by him and addressed to Haggart & Company in favour of M'Dowall & Company for the timber in exchange for the bills of lading of a cargo of timber purchased by M'Dowall & Company from Dobell, Beckett, & Company then on its way to Glasgow. On the arrival of the cargo at Glasgow four days later, it was stopped *in transitu* by Dobell, Beckett, & Company. On 1st October M'Dowall & Company were sequestrated. In a question between Dobell, Beckett, & Company, and Neilson, *held* (1) that the delivery-order addressed to Haggart & Company by M'Dowall & Company, and duly intimated to them by Neilson, did not operate as constructive delivery of the timber to Neilson, Haggart & Company being the servants of the granters of the order and not independent custodiers of the timber; (2) that Neilson therefore had not a valid security at the date when the bills of lading were transferred to him, and that the transfer was struck at by the Act 1696, c. 5. Dobell, Beckett, & Co. v. Neilson, Dec. 16, 1904, p. 281.

*Sequestration—Awarding—Warrant to cite Debtor—Objections to sufficiency of vouchers produced—Act* 1856, *sec.* 26.

2. A petition for a debtor's sequestration presented without his consent was objected to by the debtor on the ground that the only voucher produced was under suspension. The Lord Ordinary on the Bills sustained the objection and dismissed the petition. The petitioner having reclaimed, the Court *held* that the direction in sec. 26 of the Bankruptcy Act, 1856, to grant a warrant to cite the debtor was peremptory, and remitted to the Lord Ordinary to grant the usual order and proceed. Train v. Steven, Nov. 12, 1904, p. 47.

*Sequestration — Trustee — Election — Notice of meeting to elect trustee —Nobile Officium—Expenses—Act* 1856, *secs.* 48 *and* 67.

3. On 8th May 1905, on the petition of creditors, estates were sequestrated. The deliverance appointed a meeting of the creditors for the election of a trustee to be held on 18th May. The petitioners having failed to insert the statutory notice of this meeting in the *London Gazette* of 9th May, it became necessary to have another date fixed for the meeting. The petitioners having presented an application for this purpose the Court *appointed* the meeting to be held on 27th May, and *remitted* to the Sheriff to proceed, with a declaration that the expenses of the application and procedure connected therewith were not to be allowed against the estate. Somerville & Co., Limited, May 16, 1905, p. 651.

*Sequestration—Vesting of estate in trustee—Crofter—Forfeiture of tenancy —Crofters Holdings (Scotland) Act,* 1886, *secs.* 1, 3, 7, *and* 8—*Act* 1856, *sec.* 81.

4. The Crofters Holdings (Scotland) Act, 1886, secs. 1 and 3, enacts that a crofter who shall do any act whereby he becomes notour bankrupt shall forfeit his tenancy and shall be liable to be removed by the landlord under sec. 4 of the Act of Sederunt, 14th December 1756. Secs. 7 and 8 enact that a crofter shall be entitled, after one year's notice to his landlord, to renounce his tenancy, and upon such renunciation, or upon his being removed from his holding, shall be entitled to compensation for permanent improvements. Where the estates of a crofter had been sequestrated, but his landlord had taken no steps to remove

BANKRUPTCY—*Continued.*

him, *held* that the crofter having been made notour bankrupt his tenancy was forfeited under section 3 of the Crofters Act, and consequently that he could not be called upon by the trustee to renounce a tenancy which no longer existed. Mackenzie's Trustee v. Mackenzie, Feb. 17, 1905, p. 505.

*Sequestration—Vesting of estate in trustee—Abandonment of asset by trustee and creditors.*

5. In March 1898 Macdonald, a butcher, granted a trust-deed for behoof of his creditors in favour of Mackintosh as trustee. In December 1899 the trust was superseded by the sequestration of Macdonald's estates under the Bankruptcy Acts. In April 1902 Macdonald was discharged, but not retrocessed. The trustee in the sequestration was also discharged. In July 1904 Macdonald brought an action against Mackintosh for decree ordaining him to account for his intromissions as trustee under the trust for creditors and for payment to the pursuer of such balance as might be found to be due. The pursuer, who admittedly sued for his own behoof, averred that the defender, while trustee under the trust for creditors, had illegally purchased or appropriated the pursuer's business; that the defender had never accounted therefor to the trustee in the sequestration; that the defender had never been discharged as trustee; and that "the trustee and creditors in the sequestration abandoned any right they had to recover any assets of the pursuer's estates in the hands of the defender as trustee foresaid." The Court *dismissed* the action, holding that there was no relevant averment of abandonment. Macdonald v. Mackintosh, June 9, 1905, p. 771.

*Sequestration—Claims—Transaction of Claims—Compromise by Trustee of Action against Bankrupt—Right of dissentient creditor to defend—Indemnity to Trustee—Act* 1856, *secs.* 169 *and* 176.

6. A trustee in a sequestration, with consent of the commissioners, resolved to compromise on certain terms an action which had been brought against the bankrupt before his sequestration, and a joint minute by the trustee and the pursuer stating the terms of compromise was lodged in the action. Thereafter one of the creditors lodged a minute in which he submitted that he was entitled to take up the defence of the action in his own name on paying the trustee the sum due to him under the compromise, and granting a bond of indemnity with approved caution for £500 in security of any damages or expenses which might be awarded to the pursuer. The Lord Ordinary refused the crave of the creditor's minute, and interponed authority to the joint minute by the pursuer and the defender's trustee settling the action. The creditor reclaimed. The Court *adhered*, on the grounds (1) that the resolution to compromise not having been appealed against by the dissentient creditor was final; and (2) that the limited guarantee offered was not an adequate sum to secure indemnity to the trustee and the trust-estate. Edgar v. Kennedy and Hutton's Trustee, Jan. 18, 1905, p. 452.

*Sequestration—Claims—Ranking—Preference—Adjudication by Trustee—Rectification of Claim—Act* 1856, *sec.* 51.

7. A creditor on a sequestrated estate, who was entitled to a preferential ranking for arrears of wages, lodged a claim, which bore that the debt was for wages, but did not demand a preferential ranking. In a letter to the trustee on the sequestrated estate, accompanying the claim, the creditor stated, "As this is a preferable claim I shall be glad to have it settled at once." In acknowledging the claim the trustee wrote, "You need not, however, expect to get payment in full, as in any case the preference is limited." Eventually the trustee intimated to the creditor that he could not regard his debt as preferable, as it was not claimed as preferable in his affidavit and claim. The creditor there-

BANKRUPTCY—*Continued.*

upon offered to rectify his oath, and expressly state that he claimed a preference. The trustee refused to entertain this proposal and proceeded to adjudicate on the claim, treating it as a claim to an ordinary ranking. The creditor thereupon appealed to the Sheriff, who allowed him to lodge an amended affidavit and claim. Against this interlocutor the trustee appealed and maintained that he was right in ranking the claim as an ordinary debt, and that it was incompetent to rectify a claim after it had been adjudicated on. *Held* that the creditor should have been allowed to rectify his claim, and interlocutor appealed against *affirmed.* Crerar v. Clement's Trustee, July 11, 1905, p. 939.

*Sequestration — Claims — Ranking — Testamentary Trust — Agent and Client—Expenses—Liability of trust-estate to law-agents for expense of unsuccessfully defending an action.*

8. In an action against the sole trustee under a testamentary trust, the final interlocutor decerned against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate." The trust-estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law-agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses. *Held* that as the law-agents for the trustee were presumably acquainted with the whole circumstances of the trust, they were not entitled to rank for their account. Ferme, Ferme, & Williamson v. Stephenson's Trustee, July 6, 1905, p. 902.

*Sequestration—Discharge of Bankrupt—Composition—Reasonable Offer—Spes successionis—Act* 1856, *secs.* 138, 139.

9. *Held* that an offer of composition by a sequestrated bankrupt which did not take into account a valuable interest in a succession which, although not vested in the bankrupt, would accrue to him in the event of his surviving his mother, who was eighty years of age, was not a reasonable offer in the sense of section 138 of the Bankruptcy (Scotland) Act, 1856. Bradshaw v. Kirkwood & Sons, Dec. 10, 1904, p. 249.

*Sequestration—Discharge of Bankrupt—Appeal—Printing and Boxing—Caution.*

10. A bankrupt, whose petition for discharge had been refused by the Sheriff, which refusal was affirmed on appeal, presented a year later another application for discharge. This application having been refused by the Sheriff, the bankrupt lodged an appeal, but for more than two months thereafter did not print or box to the Court the note of appeal and other documents relative thereto. Thereupon the respondents in the appeal presented a note craving the Court to ordain the appellant to print and box the note of appeal and relative documents, and also to find caution for the expenses of the appeal. The Court *ordained* the appellant to print and box within ten days, under certification that, if he failed to do so, the appeal would be dismissed, but *refused* to order him to find caution. Melrose-Drover, Limited, v. Heddle, June 28, 1905, p. 852.

See *Cessio Bonorum.*

BETTING. See *Justiciary Cases*, 5, 6, 7, 8.

BILLS OF EXCHANGE. *Acceptance—"Approved Acceptance"—Custom.*

1. An "approved acceptance" in a mercantile contract means an acceptance to which no reasonable objection can be taken, and it is not competent to prove that by the custom of a particular trade it means an acceptance to which no objection has in fact been taken. M'Dowall & Neilson's Trustee v. J. B. Snowball Co., Limited, Nov. 8, 1904, p. 35.

BILLS OF EXCHANGE—*Continued.*

*Liability of parties—Proof—Parole—Competency—Bills of Exchange Act*, 1882, *sec.* 100.

2. A bill of exchange, dated 15th February 1904, drawn by Ferguson on and accepted by his firm of Ferguson & Company, was indorsed by Ferguson to the Industries Company, by whom it was indorsed to the Manchester Bank. In December 1904 the Manchester Bank brought an action against Ferguson & Company for payment of the sum in the bill. Ferguson & Company in defence averred that the pursuers, the Manchester Bank, having made advances to the Industries Company, Ferguson & Company, at a date specified, agreed to give the bill in security of the advance on the condition, agreed to by the pursuers, the Manchester Bank, that payment of the advance was not to be demandable until sufficient working capital had been raised by the Industries Company. Ferguson & Company therefore pleaded that they were not liable on the bill, sufficient working capital not having been raised by the Industries Company. The defenders did not state the amount of working capital to be raised, nor any limit of time within which it was to be raised. *Held* that the defenders' averments were not relevant to be remitted to probation under the 100th section of the Bills of Exchange Act, 1882. Manchester and Liverpool District Banking Co., Limited, v. Ferguson & Co., June 28, 1905, p. 865.

BUILDING REGULATIONS. See *Police.*

BUILDING RESTRICTION. See *Superior and Vassal*, 7.

BURGH. *Magistrates—Jurisdiction—Jurisdiction in Police Burgh—Licensing Offences—Licensing (Scotland) Act*, 1903, *sec.* 91.

1. *Held* that the Justices of the Peace of a county have concurrent jurisdiction along with the Magistrates of a police burgh situated within the county to try offences under the Licensing (Scotland) Act, 1903, where such offences are committed within burgh by persons residing therein. Tasker v. Simpson, Dec. 21, 1904 (J. C.), p. 33.

*Magistrates—Powers—Ice-cream Vendor's Licence—Unauthorised Conditions—Ultra vires—"Lawful day"—Edinburgh Corporation Act*, 1900, *sec.* 80.

2. *By sec.* 80 *of the Edinburgh Corporation Act*, 1900, *as amended by sec.* 57 *of the Edinburgh Corporation Order Confirmation Act*, 1901, *it is enacted, that any person selling ice-cream (except in a duly licensed hotel) without a licence from the Magistrates, "who are hereby empowered to grant the same," for the house, building, or premises where such ice-cream is kept for sale or sold, shall be liable to a penalty, provided that such licence shall run from the date of issue until the 15th May ensuing, and upon renewal, from the date of expiry of the licence so renewed to the 15th May succeeding, "unless the same shall be sooner forfeited, revoked, or suspended," and that "every person licensed . . . to sell ice-cream under the provisions of the Act who shall . . . sell ice-cream except during the hours between"* 8 A.M. *and* 11 P.M. *"on any lawful day, or at such extended hour at night as the Magistrates may by special regulation, in particular cases and for reasons assigned, permit," shall be liable in a penalty. The statute did not provide a form of licence. The Magistrates proposed that the licences to be issued by them to ice-cream vendors should contain the following conditions:—"* 1. *That the said licencee shall not keep open said premises, or sell or permit the sale of ice-cream therein on Sunday, or on any other day set apart for public worship by lawful authority.* 2. *That the said licencee shall not keep open said premises, or sell or permit the sale of ice-cream therein before eight o'clock in the morning or after eleven o'clock at night.* 3. *That the said Magistrates, or any of them, may at any time suspend or revoke the licence."* Held (rev. *judgment of Second Divi-*

BURGH—*Continued.*

*sion) that it was* ultra vires *of the Magistrates to insert these conditions in the licences issued by them.* Rossi v. Magistrates of Edinburgh, Nov. 21, 1904 (H. L.), p. 85.

*Town-clerk—Salary—Extension of burgh—Discretion of Town-Council as to fixing salary.*

3. A royal burgh having been extended by the inclusion of a neighbouring burgh, the town-council raised the town-clerk's salary from £100 to £120. The town-clerk brought an action against the town-council for declarator that the defenders were bound to pay him a reasonable and suitable salary as fixed by the Court. The pursuer averred that the increased salary as fixed by the town-council after the extension was quite inadequate looking to the increase of the town-clerk's duties. The Court *assoilzied* the defenders, holding that the question of an increase in the amount of the salary of a town-clerk was a matter for the discretion of the town-council, with the *bona fide* exercise of which the Court would not interfere. Sutherland v. Magistrates of Wick, Jan. 11, 1905, p. 374.

*Town-clerk—Burgh Register of Sasines—Authentication of Minutes.*

4. Authority granted to the town-clerk of a royal burgh to authenticate and subscribe minutes in the minute-books of the Burgh Register of Sasines which had not been authenticated by his predecessors, and to record the petition and warrant in the Burgh Register of Sasines. Hepburn, Feb. 3, 1905, p. 484.

*Property and Rights—Declarator of patrimonial right in burgh lands by Freemen—Burgh Police (Scotland) Act,* 1892, *sec.* 27.

5. *Held* that section 27 of the Burgh Police (Scotland) Act, 1892, did not give the Sheriff jurisdiction in an action brought by the freemen of a burgh of barony, which had been formed into a police burgh, for declarator that the freemen had a private and patrimonial right in the property of the burgh of barony. Freemen of Prestwick v. Provost, Magistrates, and Councillors of Prestwick, March 17, 1905, p. 602.

*Property and Rights—Register of Voters—County Assessor—Remuneration—"Expense of making up register"—Town-Councils (Scotland) Act,* 1900, *secs.* 26, 27, *and* 67.

6. *Held* that under sec. 67 of the Town-Councils (Scotland) Act, 1900, a burgh was liable only for the actual outlay of the county assessor in preparing the municipal register of voters, and not for anything by way of remuneration to the assessor for his personal services. Maxtone v. Magistrates of Dunoon, Dec. 16, 1904, p. 276.

See *Police.*

BURSARY. See *Charitable and Educational Bequests and Trusts,* 2, 3, 5, 7, 12.

CESSIO BONORUM. *Process—Instance—Withdrawal of Petitioning Creditor—Interlocutor pronounced without sisting party.*

In a petition for cessio the Sheriff pronounced a deliverance ordaining the bankrupt to appear on a specified day for public examination. On the day appointed the petitioning creditor withdrew from the process, and the bankrupt did not appear. M., an agent for other creditors, appeared in Court, but none of them was sisted or otherwise made a party to the process. On M.'s motion the Sheriff pronounced an interlocutor, by which he held the failure of the bankrupt to appear to be wilful, appointed a trustee in the cessio, and ordained the bankrupt to execute a disposition *omnium bonorum* in his favour. In an appeal, the Court *recalled* the interlocutor of the Sheriff, on the ground that at the date it was pronounced there was no party in the process at whose instance a decree could be pronounced. M'Lauchlan v. M'Lauchlan's Trustee, March 8, 1905, p. 542.

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS. *Constitution—Construction—Bequest for building church—Conditions impossible of fulfilment.*

1. A testator directed his trustees to expend two sums of £20,000 each upon the erection of two Roman Catholic churches or "such smaller sum or sums as may be necessary . . . my intention being merely to have such church . . . completed although it may be at a less cost than £20,000 each"; any unexpended balance to revert to the residue of his estate. Except for a provision of £10,000 for the endowment of one of the two churches, the trust-disposition and settlement contained no provision for endowment. Upon the completion of the buildings the trustees were directed to convey them, on certain specified conditions, to trustees to be appointed respectively by the Bishop of the Roman Catholic Diocese in which the churches were to be situated. In a multiplepoinding raised after the death of the testator the Bishops stated they were unable to accept the bequests under the conditions specified, on the ground that owing to want of endowment the conditions could not be implemented. They proposed that the testamentary trustees should either accumulate the funds till they amounted to a sum sufficient to build and endow the churches, or that the funds should be applied in accordance with a scheme to be approved by the Court. *Held* that either proposal was contrary to the truster's intention, and that the bequests having lapsed owing to the refusal of the Bishops to accept them on the conditions specified by the testator the sums in question fell into residue. Marquess of Bute's Trustees v. Marquess of Bute, Nov. 16, 1904, p. 49.

*Constitution—Construction—University—Bursary—Bursary to "one or other of the Colleges of St Andrews"—Subsequent affiliation of another college with the University of St Andrews.*

2. A Dundee lady, who died in 1880, by her trust-disposition and settlement, dated in 1878, conveyed a fund to trustees "for the purpose of establishing one or more bursaries in either one or other of the colleges of St Andrews," as her trustees might determine. In 1880 the University of St Andrews consisted of two colleges—the United College and St Mary's College. In 1897 the University College of Dundee (instituted in 1881) was affiliated to and became part of the University of St Andrews. *Held*, on a construction of the settlement, that the bequest was conceived in favour only of the two colleges of St Andrews existing at the date of the testator's death, and that her trustees were not entitled to extend the benefit of the bequest to the University College of Dundee. Blyth Scholarship Fund Trustees v. University Court of St Andrews, June 28, 1905, p. 855.

*Constitution—Construction—University—Bursary—Female Students.*

3. A testator, who died in 1880, by her trust-disposition and settlement left a fund to trustees for the establishment of bursaries for "students" in the University of St Andrews. In 1880 the University of St Andrews was open to male students only, but in 1892, under the Universities (Scotland) Act, 1889, it was opened to female students also. *Held* that under the settlement the trustees had authority to admit female students in St Andrews to the benefits of the trust, there being nothing in the settlement to shew that the testator intended that female students should be excluded. Blyth Scholarship Fund Trustees v. University Court of St Andrews, June 28, 1905, p. 855.

*Constitution—Construction—Ragged School—Identity of Institution—Change in methods of attaining objects—School sold and funds devoted to providing clothes and books for destitute children.*

4. A bequest was made to a Ragged Industrial School which had been established in 1857 by an association "to rescue" destitute children, "and to fit them for the duties of life by imparting to them a good,

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS—*Continued.*

common, and Christian education." The members of the society had power to alter the constitution. Originally, and till after the testator's death, the society conducted a school of its own. Owing to the provision of free education it closed and sold its school, and thereafter devoted its funds under an amended constitution to providing destitute children with clothing and books to enable them to attend the board school. Vesting of the legacy was postponed until an event which occurred after these changes had been introduced. *Held* that the bequest had not lapsed by failure of the legatee, the institution not having lost its identity, although it had altered its methods of attaining its objects. Playfair v. Kelso Ragged Industrial School, June 6, 1905, p. 751.

*Constitution—Construction—Uncertainty—"Bursary Fund of University"—Scheme.*

5. By his will a testator left the residue of his estate "to the Bursary Fund of the University of Aberdeen to help in the education of poor and struggling youths of merit," and "in order to carry out and give effect to my wishes" he appointed two persons as executors. The various bursary endowments of the University were not merged in one general bursary fund, but each endowment was kept separate and devoted to the special purpose for which it was founded. By the Universities (Scotland) Act, 1889, the University Court were given power to administer funds mortified for bursaries. *Held* (1) that the bequest was valid and not void from uncertainty, and (2) that the University Court were entitled to receive and discharge the residue, on condition of submitting to the Court and obtaining approval of a scheme for the administration thereof as a bursary fund. Milne's Executors v. Aberdeen University Court, May 16, 1905, p. 642.

*Constitution—Uncertainty—"Charitable or Religious Institutions and Societies."*

6. A *testator by his trust-disposition and settlement directed his trustees to divide a portion of the residue of his estate "to and among such charitable or religious institutions and societies as my trustees or the survivors or survivor of them may select, and in such proportion to each or any as they may fix."* Held (rev. *judgment of Second Division*) *that the bequest was void from uncertainty.* Grimond or Macintyre v. Grimond's Trustees, March 6, 1905 (H. L.), p. 90.

*Constitution—Construction—Church—Union of dissenting churches—Ex officio trustees—Bursary.*

7. A minister of the United Presbyterian Church, who died in 1869, by his settlement appointed certain trustees to hold and administer the residue of his estate as an endowment for bursaries for students who were studying for the ministry of the United Presbyterian Church. Among the trustees appointed were the ministers of certain churches in the United Presbyterian Church and their successors in these several churches *ex officio*. In 1900 the United Free Church was formed by the union of the United Presbyterian Church with a majority of the Free Church. In a petition for the settlement of a scheme for the administration of the trust, *held* (1) that the ministers of the churches named by the truster, and since 1900 belonging to the United Free Church, and their successors in office, were entitled to act as trustees; and (2) that the bursaries fell to be awarded to students for the ministry of the United Free Church. Mailler's Trustees v. Allan, Dec. 21, 1904, p. 326.

*Constitution—Failure of trust purposes—School Sites Act*, 1841.

8. In 1858, by disposition bearing to be granted under the authority of the School Sites Act, 1841, H., a fee-simple proprietor, conveyed to certain persons as trustees four acres of land "to be applied as a site

for a school for the district of . . . for children of the labouring, manufacturing, and other poorer classes . . . and for a residence for the teacher or teachers, and for no other purposes whatever." A school was erected. In 1903 the trustees closed the school, and intimated that they were no longer able to maintain it. The heir of H. brought an action against them, concluding for declarator that the site had reverted to him. *Held* (1) that the provisions of the School Sites Act were incorporated in the trust, although the site granted exceeded one acre, and (2) that the pursuer was entitled to decree on the ground that the irritancy provided by the Act had been incurred, or (*per* Lord Young) on the ground that, apart from the Act, the property of the trust reverted to the donor because the trust purposes had failed, and no legitimate scheme for the use of the property for analogous purposes had been suggested. Houldsworth v. School Board of Cambusnethan, Dec. 16, 1904, p. 291.

*Settlement of Scheme—Trustees—Meetings—Voting—Quorum.*

9. A proposed scheme for the administration of a charitable trust, under which there were four *ex officio* trustees, contained this article,—"At all meetings two of the trustees shall be a quorum. . . . All questions to be determined by a majority of those present. The chairman to have a second or casting vote in addition to his deliberative vote." The Court *sanctioned* the article, but *altered* the word "two" into "a majority," in respect that if the clause were sanctioned as it stood the chairman might do what he liked if only two trustees were present. Mailler's Trustees v. Allan, Dec. 21, 1904, p. 326.

*Settlement of Scheme—Accounts—Audit.*

10. The Court *refused* to sanction an article in a proposed scheme for the administration of a charitable trust under which the trust accounts were to be audited by the trustees themselves. Mailler's Trustees v. Allan, Dec. 21, 1904, p. 326.

*Settlement of Scheme—Trustees—Powers.*

11. The Court *refused* to sanction an article in a scheme for the administration of a charitable trust conferring extensive powers of selling, leasing, borrowing, &c., on the ground that the trustees either had the power at common law or must make special application to the Court when circumstances made the exercise of the power necessary. Mailler's Trustees v. Allan, Dec. 21, 1904, p. 326.

*Settlement of Scheme—Bursary.*

12. A truster left the residue of his estate for the endowment of bursaries restricted to students born in the counties of Perth or Kinross. The Court *refused* to sanction an article in a proposed scheme for the administration of the trust under which the trustees were to be empowered to confer the bursaries on students not born in Perth or Kinross, should there be no applicant who was born in either of these counties. The truster further provided,—"No student when he gains a bursary shall be entitled to hold it longer than one year, and in order to retain it he must compete and gain it in each year." The proposed scheme contained an article under which the bursaries were to be tenable for the whole of the student's curriculum, provided that in each year he passed certain of the University examinations for the degree of M.A. The Court *refused* to sanction the article. Mailler's Trustees v. Allan, Dec. 21, 1904, p. 326.

*Settlement of Scheme—Endowment and proceeds of sale of school—Religious Education—Technical Instruction—Evening Classes.*

13. In a deed of trust, the truster, upon the narrative of his "being sensible of the benefit of extending religious education to the children of the working classes," provided for the endowment of a school at G., and directed that the Bible should be read daily in the school. Owing to

CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS—*Continued.*
modern educational requirements it was ultimately found impossible to carry on the school, and it was sold under authority of the Court. The committee of management then presented a scheme for the application of the endowment. The Court *approved* of the scheme in so far as it proposed to devote the funds to providing technical instruction in manufactures, agriculture, and dairy work and ambulance work; but *refused* to sanction their application to promoting instruction in Scripture knowledge in G., and maintaining a Sunday school library and providing prizes for the Sunday school at G., and to establishing evening classes in the Board School there. Sutherland, May 12, 1905, p. 634.

CHEQUE. See *Local Government.*

CHURCH. *Glebe—Designation of Glebe—Excambion of Glebe—Decree of Presbytery.*

1. Where a glebe is excambed, the title to the new glebe flows from the excamber, and the decree of the Presbytery completing the title is not a judicial determination, but merely gives the sanction of the Presbytery to the transaction, and impresses the land given to the minister with the character and status of a glebe. Cadell v. Allan, March 17, 1905, p. 606.

*Glebe—Boundary—Foreshore—Minerals under Foreshore—Property—Title—Competition of Title.*

2. In exchange for an old glebe, a new glebe bounded by the sea was acquired by excambion in 1817. The new glebe had originally formed part of a portion of the barony of Grange, known as the 24 acres. In 1613 the 24 acres bounded by the sea had been feued by the proprietor of Grange to Bruce, the coal being reserved by the granter. In 1643 the granter obtained a Crown charter of resignation which contained a grant of the coal in the foreshore as a separate estate. In 1673 the proprietor of Grange, in consideration of a money payment, granted a charter of novodamus conveying the 24 acres (without reservation of the coal) to Bruce's successor, who in the same year took infeftment upon a precept contained in the charter. In 1904 the right of the minister to the coal in the foreshore *ex adverso* of the glebe was challenged by the proprietor of Grange in a process of interdict brought by him against the minister's mineral tenants. The complainer founded on the Crown charter of resignation of 1643, which contained a grant of the minerals in the 24 acres as a separate tenement, and contended that the charter of novodamus of 1673 merely gave of new what was given in the feu-contract of 1613. The mineral tenants in answer founded on the novodamus of 1673 as conveying the coal in the 24 acres from the proprietor of Grange to Bruce's successor. *Held* that the charter of novodamus of 1673 included the coal, and contained a valid grant by the proprietor of Grange of the 24 acres, without reservation, and that therefore the proprietor of Grange had no title to challenge the minister's right to the coal in the foreshore *ex adverso* of the glebe. Cadell v. Allan, March 17, 1905, p. 606.

*Dissenting Church—Union of two dissenting Churches—Abandonment of fundamental principle—Property claimed by minority.*

3. *In* 1843 *a majority of the General Assembly of the Church of Scotland (consisting of ministers and elders elected by the Presbyteries), in consequence of certain decisions of the Civil Courts which they considered to interfere with the constitution and spiritual independence of the Church, protested and withdrew from the Establishment, maintaining in other respects the doctrines, polity, and discipline of the Established Church, and claiming to be the Church of Scotland free from State control. They along with others adhering to them formed the Free Church.*

CHURCH—*Continued.*

*Large sums were, at the Disruption and subsequently, contributed for the purposes of the Free Church. On 30th October* 1900 *the General Assembly of the Free Church, with consent of a majority of the Presbyteries, passed an Act agreeing to a union with the United Presbyterian Church, and relative Acts followed transferring the property of the Free Church to trustees for the new United Church. A small minority of the Assembly of the Free Church, regarding the Acts as incompetent, protested against and dissented from them, and professed to act as the Assembly of the Free Church. On 14th December* 1900 *they raised an action in name of the General Assembly of the Free Church against the General Trustees of the Free Church and the General Trustees of the United Free Church and its Assembly, concluding for declarator that the United Free Church had no right to the lands, property, or funds of the Free Church, and that the pursuers were and lawfully represented the Free Church, and were entitled to its property and funds. Evidence upon which* held (rev. *judgment of the Second Division*) (1) *that the Free Church of* 1843 *held as one of its fundamental and distinctive doctrines the duty of the State to maintain and support an establishment of religion in accordance with God's word;* (2) *that the Free Church Assembly, with consent of a majority of the Presbyteries, was not entitled to depart from this doctrine and to make it an open question, and to share the funds of the Free Church with another Church which did not hold this doctrine, and, further, was not entitled to deprive the minority of their rights in the funds because they refused to hold the doctrine an open question and to enter into the United Church; and therefore* (3) *that neither the United Free Church nor any of its members had right to any part of the property belonging to the Free Church.* Free Church of Scotland v. Lord Overtoun—Macalister v. Young, Aug. 1, 1904 (H. L.), p. 1.

See *Charitable and Educational Bequests and Trusts*, 1, 6, 7—*Interdict*, 2.

CITATION. See *Bankruptcy*, 2—*Justiciary Cases*, 22—*Sheriff*, 6.

COMMON PROPERTY. See *Property*, 1.

COMPANY. *Management—Dividend or Conversion into capital—Bonus paid out of reserve fund—Fee and Liferent.*

1. The directors of a limited company, who had power to divide as dividend part of its reserve fund (accumulated from undivided profits), resolved to divide a portion of its reserve fund among the shareholders in the shape of a bonus of 50 per cent on the amount paid up, and at the same time to increase the capital of the company by issuing, concurrently with the payment of the bonus, preference shares of an amount equal in value to the bonus. A circular was sent to each shareholder intimating the sum to which he was entitled as bonus and the number of preference shares he was entitled to, and enclosing an application form for the new shares. Subsequently warrants for the bonus dividend were sent to the shareholders payable on the day on which payment of the new shares was due. The trustees of a deceased shareholder, who were directed by the trust-deed to hold certain shares in the company for one person in liferent and for others in fee, took up their quota of the new shares, and applied the bonus in payment thereof. In a question between the liferenter and fiars of the original shares, *held* that the operation was a payment of dividend, and not a conversion of profits into capital, and that the liferenter was entitled to have the bonus dividend paid to her. Blyth's Trustees v. Milne, June 23, 1905, p. 799.

*Winding-up—Compulsory—Intimation of petition for winding-up—Just and equitable—Act* 1862, *sec.* 79.

2. Certain holders of fully paid-up preference shares, representing less than one-thirteenth of the share capital of a company, presented a petition

COMPANY—*Continued.*

for its compulsory winding-up, on the ground that in the circumstances it was just and equitable that it should be wound up. On a motion being made in the Single Bills for an order for intimation, advertisement, and service, appearance was made for the company, for the holders of first and second debentures, and for almost all the creditors whose respective claims exceeded £50. Their counsel moved the Court to dismiss the petition without pronouncing an order, and stated that the intimation craved would be prejudicial to the credit of the company. The Court, after considering minutes lodged by the petitioners and by the objectors, and coming to the conclusion that the winding-up of the company would be detrimental to all concerned, and having regard to the wishes of the creditors and of the great majority of the shareholders, refused to order intimation, and *refused* the prayer of the petition. Black v. United Collieries, Limited, Oct. 28, 1904, p. 18.

*Winding-up—Voluntary—Title to object—Contributories but not Members of Company—Trustees of deceased shareholder—Act* 1862, *sec.* 76.

3. Testamentary trustees were, under sec. 76 of the Companies Act, 1862, contributories but not members of a company in which the deceased held shares at the time of his death. *Held* that the trustees had a good title to challenge the validity, on the ground of non-compliance with the articles of association, of a special resolution of the Company for voluntary liquidation and the appointment of a liquidator. Howling's Trustees v. Smith, Jan. 14, 1905, p. 390.

*Winding-up—Voluntary—Resolution to wind up—Validity—Articles of Association—Construction.*

4. Art. 61 of the articles of association of a company incorporated under the Companies Acts provided :—"No business shall be transacted at any general meeting, except the declaration of a dividend, unless there shall be personally present at the commencement of the business ten or more members." Art. 130 provided :—"On the dissolution of the Company the affairs of the Company shall be wound up in terms of the Acts of Parliament under which the Company is incorporated." *Held* that at a meeting for the passing of a special resolution for the voluntary winding-up of the Company, there must be at least ten members personally present in terms of art. 61 of the articles of association, and that it was not sufficient that the meeting satisfied the provisions of the Companies Acts as to the passing of special resolutions. Howling's Trustees v. Smith, Jan. 14, 1905, p. 390.

*Winding-up—Voluntary—Interdict—Competency.*

5. *Question, per* Lord Kyllachy, whether a note of suspension and interdict to have the respondent interdicted from acting as liquidator of a company under an *ex facie* valid special resolution of the Company for voluntary liquidation, and the appointment of the respondent as liquidator, was competent. Howling's Trustees v. Smith, Jan. 14, 1905, p. 390.

*Winding-up—Liquidator—Conduct of Liquidation—Compromise with debtor—Refusal of Liquidator to apply for sanction of Court—Locus Pœnitentiæ—Personal Exception—Act* 1862, *sec.* 160.

6. In an action by a company, which was being wound up subject to the supervision of the Court, and its liquidator against an alleged debtor of the company, the defender pleaded that the liquidator having agreed to a compromise of the claim sued for, and having failed to apply to the Court for its sanction, was barred *personali exceptione* from insisting in the action. The Court *repelled* this plea upon the ground that there was *locus pœnitentiæ* until the sanction of the Court had been obtained, and that the liquidator was not bound to apply for the sanction of the

COMPANY—*Continued.*

Court or to recommend the compromise to it; and *per* Lord Kinnear also upon the grounds (1) that the liquidator could not be barred from insisting in an action brought on behalf of the company and its creditors by an exception personal to himself; and (2) that, apart from the absence of sanction by the Court there was in fact no finally concluded agreement between the parties. Reid & Laidlaw, Limited, v. Reid, Jan. 26, 1905, p. 457.

*Winding-up—Note for authority to liquidator to pay—Objection by preferable claimant—Title or interest to defend—Preference—Poor-Rates—Poor-Law (Scotland) Act*, 1845, *sec.* 88.

7. In a note by the liquidators of a company for authority, *inter alia*, to take credit for their remuneration, as fixed by the Court, and to pay the law expenses, and to pay the preferable claims as set forth in a schedule, among which was included a claim for poor-rates due by the company, answers were lodged by a collector of poor-rates, who maintained that the liquidators should be ordained to pay the claim for poor-rates preferably to the liquidators' remuneration and their law expenses. The liquidators stated that their accounts shewed a balance in their hands more than sufficient to pay in full all the preferable claims, after payment of the liquidator's remuneration and law expenses, and that the respondent had been informed of this before he lodged answers. *Held* that, in respect the liquidators had admitted the claim for poor-rates to a preferential ranking and tendered payment thereof in full, there was no proper question presented to the Court for adjudication on the answers, and note *remitted* to the Lord Ordinary to proceed. Liquidators of Scottish Drug Depot, Limited, v. Fraser, May 16, 1905, p. 646.

*Winding-up — Poor-Rates — Preferential Payments in Bankruptcy Act*, 1888, *sec.* 1, (1) (3).

8. *Opinion, per* Lord Low, Ordinary, (1) that the provisions of the Preferential Payments in Bankruptcy Act, 1888, are applicable to Scotland, in so far as they deal with the case of companies which are being wound up under the Companies Acts, and (2) that under section 1, subsections (1) and (3), of that Act, poor-rates due by a company at the commencement of the winding-up thereof do not fall to be paid preferably to the liquidator's fees and the law expenses incurred by him in the liquidation. Liquidators of Scottish Drug Depot, Limited, v. Fraser, May 16, 1905, p. 646.

COMPENSATION. See *Master and Servant.*

CONFIDENTIALITY. See *Contract*, 4.

CONQUEST. See *Marriage-Contract*, 3, 4.

CONTEMPORANEA EXPOSITIO. See *Property*, 2.

CONTRACT. *Consensus in idem—Sale or Hire—Hire Purchase Agreements—Construction of verbal contract.*

1. A, a piano merchant who was in the practice of disposing of his pianos in one of three ways—1st, in sales for cash; 2, in hire purchase agreements; 3, in letting them for hire—made an oral offer to B of a piano "at the value of £26, payable 15s. per month." B accepted the offer, and after the lapse of a month paid certain instalments. B having subsequently failed to continue the payments, A raised an action in the Sheriff Court for re-delivery of the piano, alleging that it had been let on hire to B. It appeared from a proof that A in making his offer had intended the transaction to be on the hire-purchase system, while B understood it to be a sale for a price payable by instalments. The Sheriff held that as there had been no *consensus in idem*, there was no valid contract between the parties, and that A was entitled to have the

CONTRACT—*Continued.*

piano restored. In an appeal, *held* that B understood, and was entitled to understand from the terms of A's offer, that the transaction was an immediate sale for a price payable by instalments, and that a contract of sale had been completed by B's acceptance. Muirhead & Turnbull v. Dickson, June 1, 1905, p. 686.

*Locus Pœnitentiæ—Personal Exception—Company—Winding-up—Conduct of Liquidation—Compromise with debtor—Sanction of Court—Companies Act*, 1862, *sec.* 160.

2. In an action by a company, which was being wound up subject to the supervision of the Court, and its liquidator against an alleged debtor of the company, the defender pleaded that the liquidator having agreed to a compromise of the claim sued for, and having failed to apply to the Court for its sanction, was barred *personali exceptione* from insisting in the action. The Court *repelled* this plea upon the ground that there was *locus pœnitentiæ* until the sanction of the Court had been obtained, and that the liquidator was not bound to apply for the sanction of the Court or to recommend the compromise to it; and *per* Lord Kinnear also upon the grounds (1) that the liquidator could not be barred from insisting in an action brought on behalf of the company and its creditors by an exception personal to himself; and (2) that, apart from the absence of sanction by the Court there was in fact no finally concluded agreement between the parties. Reid & Laidlaw, Limited, v. Reid, Jan. 26, 1905, p. 457.

*Arbitration Clause—Arbitration Clause in Principal Contract incorporated in Subcontract.*

3. A contractor, who had contracted with a railway company for the construction of certain works, entered into a subcontract for the execution of part of the work. In the contract between the principal contractor and the subcontractor it was stipulated that the work was to be executed "according to plans and specifications," which included a "general specification," forming part of the contract between the principal contractor and the railway company. This "general specification" contained a clause providing that disputes were to be submitted to arbitration. *Held* that the arbitration clause of the general specification—while it was incorporated in the subcontract to the effect of making the decisions of an arbiter in questions between the railway company and the principal contractor binding upon the subcontractor—was not incorporated in the subcontract *quoad* matters which concerned only the rights *inter se* of the principal contractor and the subcontractor. Goodwins, Jardine, & Co., Limited, v. Brand & Son, July 19, 1905, p. 995.

*Breach of Contract—Confidentiality—Breach of confidence by medical practitioner.*

4. The question whether a breach of medical confidence is actionable depends on the character of the disclosure made.

In an action of damages against a medical adviser for breach of confidentiality, *held* that the pursuer was not entitled to the general issue whether the defender, to the pursuer's damage, disclosed matters relative to her state of health ascertained in the course of confidential employment. A B v. C D, Nov. 18, 1904, p. 72.

*Breach of Contract—Measure of Damages—Misrepresentation by agent to principal that contract concluded—Shipbroker.*

5. *A shipbroker who had been employed by a foreign shipowner to find a cargo for his vessel, in the expectation of completing a contract with a coal merchant (for whom he did not act as agent) informed his principal that he had completed a contract on certain terms. No contract was completed, and the principal raised an action of damages against his agent for the profit he would have gained if the contract had been com-*

CONTRACT—*Continued.*

*pleted.* Held (aff. *judgment of Second Division*) *that the pursuer was entitled to the actual damage he had sustained by being led to believe that a contract had been completed, but had no claim for loss of profit.* Salvesen & Co. v. Rederi Aktiebolaget Nordstjernan, April 14, 1905 (H. L.), p. 101.

*Breach of Contract — Measure of Damages — Ship — Charter-party — Failure to provide ship.*

6. *Manufacturers of wood pulp at Stocka, Sweden, in January* 1900 *entered into a charter-party with a British shipowner for the carriage of two cargoes of wood pulp from Stocka to Cardiff, the first to be lifted at Stocka "May (f.o.w.), (first open water), and the second in August/September, owners' option." The ordinary length of the voyage was twenty-two days. In an action by the charterers against the shipowner for damages for an admitted breach of the contract by the failure of the shipowner to send a ship to Stocka for the second cargo before the last day of September, it was proved that the shipment was intended by the charterers for delivery at Cardiff in implement of a contract of sale between the charterer and Owen, Cardiff, which set forth as the "mode and place of delivery—c.i.f., Cardiff. Time of delivery—in two cargoes first open water and August/September* 1900." *The delivery of the first cargo was duly made, but on* 29*th September Owen having ascertained that the ship for the second cargo could not sail from Stocka before* 12*th October, bought in against the charterers the remainder of the wood pulp contracted to be delivered. The charterers paid Owen the loss he had thus sustained, and claimed this sum from the shipowner as the damage sustained by him.* Held (rev. *the judgment of the First Division*) *that when the charterers ascertained that the ship could not leave Stocka before* 12*th October they were entitled to buy in, or to allow their purchaser to buy in, other goods to replace those which could not be delivered in terms of the charter-party, and that the measure of damages for the shipowners' breach of contract was the extra cost thus occasioned.* Ströms Bruks Aktie Bolag v. Hutchison, Aug. 4, 1905 (H. L.), p. 131.

*Breach of Contract—Penalty or Liquidate Damages.*

7. *By two contracts dated respectively in June and December* 1896 *the Spanish Government contracted with a Clyde shipbuilding firm for the building of four torpedo boat destroyers at the price under one contract of* £67,180, *and under the other of* £65,650 *for each vessel, delivery to be within periods varying from six and a half to seven and three quarter months from the date of the contract. The contracts provided that "The penalty for late delivery shall be at the rate of* £500 *per week for each vessel." At the date of the contracts the Spanish Government was endeavouring to suppress the insurrection in Cuba, and feared the armed intervention of the United States. All the vessels having been delivered many months after the stipulated dates of delivery the Spanish Government brought an action against the shipbuilders for* £500 *for each week of late delivery of each vessel. The defenders pleaded that the sum of* £500 *stipulated in the contracts was penalty, not liquidate damages.* Held (aff. *judgment of Second Division*) *that the sum of* £500 *a week was to be regarded as liquidate damages and not as penalty, and that the Spanish Government were entitled to the full sum of* £500 *a week as damages.* Clydebank Engineering and Shipbuilding Co., Limited, v. Don Jose Ramos Yzquierdo y Castaneda, Nov. 17, 1904 (H. L.), p. 77.

*Breach of Contract—Payment of price without reservation of claim of damages—Personal Objection—Waiver.*

8. Circumstances *in which* held (aff. *judgment of Second Division*) *that payment, without reservation, of the last instalment of the price of a ship*

CONTRACT—*Continued.*

*and acceptance of delivery by the purchaser after the date stipulated for delivery did not import a waiver by the purchaser of his right under a clause in the contract entitling him to a specified sum as damages for late delivery.* Clydebank Engineering and Shipbuilding Co., Limited, v. Don Jose Ramos Yzquierdo y Castaneda, Nov. 17, 1904 (H. L.), p. 77.

See *Insurance—Limitation of Actions.*

COUNTY COUNCIL. See *Local Government.*

CROFTER. *Bankruptcy—Forfeiture of tenancy precluding renunciation—Compensation for improvements—Crofters Holdings (Scotland) Act,* 1886, *secs.* 1, 3, 7, *and* 8—*Bankruptcy (Scotland) Act,* 1856, *sec.* 81.

1. Where the estates of a crofter had been sequestrated, but his landlord had taken no steps to remove him, *held* that the crofter having been made notour bankrupt his tenancy was forfeited under section 3 of the Crofters Act, and consequently that he could not be called upon by the trustee to renounce a tenancy which no longer existed. Mackenzie's Trustee v. Mackenzie, Feb. 17, 1905, p. 505.

*Interdict between crofters on same estate as to taking seaware—Landlord not called—Crofters Holdings (Scotland) Act,* 1886.

2. In 1903 crofters, who were in the occupation of their crofts at the passing of the Crofters Holdings (Scotland) Act, 1886, and whose rents were fixed by the Commissioners under the Act in 1889, brought an action against certain neighbouring crofters who held of the same landlord, for interdict against the defenders infringing rights which the pursuers averred that they possessed, as pertinents of their crofts, of taking seaware from the seashore (belonging to the common landlord) in the neighbourhood of the crofts. The defenders' crofts were not in existence at the passing of the Crofters Holdings Act, 1886, but were formed out of two farms under the powers of the Congested Districts (Scotland) Act, 1897. The pursuers averred that they were entitled to take seaware to the extent to which they had been in use to take it at the date when their rents were fixed; and that the defenders were not entitled to take it to any greater extent than the two tenant farmers had been in use to take it at that date. They averred that the defenders were now taking more than the farmers had been in use to take. The pursuers did not produce any written contract, estate regulation, or finding of the Crofter Commission defining the extent of seaware to which they were entitled. The defenders stated that they had the authority of the landlord for taking seaware as they had taken it, and pleaded "All parties not called," in respect that the landlord had not been called as a defender. The Court *sustained* the plea and *dismissed* the action. Mackinnon v. Macdonald, March 16, 1905, p. 589.

CROWN. *Volunteer Regiment—Reparation.*

In an action for damages against a regiment of volunteers and against the officer commanding the regiment, as representing the regiment, and as an individual, by the father of a child, who was killed on the public street by an ammunition waggon, the horses of which had bolted, the pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The Lord Ordinary (Kyllachy) *dismissed* the action as against the regiment and its commanding officer as representing it, on the ground that the funds of the regiment belonged to the Crown, and that the Crown could not be sued for damages caused by the wrongful acts of its officers. Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers, Nov. 30, 1904, p. 168.

CUSTOM. See *Bill of Exchange*, 1—*Ship*, 7, 8.

CY-PRÈS. See *Charitable and Educational Bequests and Trusts*, 13.

DECREE. See *Diligence.*

DILIGENCE. *Enforcement of Decree—Warrant to open lockfast places.*
The curator bonis of an incapax obtained a decree in absence against the wife of his ward, ordaining her to deliver to the curator a certain policy of insurance on his ward's life. A charge upon this decree having expired without result, the curator, being in a difficulty, presented a note to the Junior Lord Ordinary, in which, on the narrative that he believed that the execution of a warrant to imprison would not be effectual to enforce production, he craved for a warrant to messengers-at-arms to search for and recover the document, and if necessary, to open all shut and lockfast places. The Junior Lord Ordinary having reported the matter to the Inner-House, the Court *granted* the warrant asked for. Ferguson's Curator Bonis, July 4, 1905, p. 898.

DISCHARGE. *Discharge on Compromise—Discharge conditional on truth, accuracy, and completeness of statement of assets—Mora.*
*The City of Glasgow Bank went into liquidation in* 1878, *under the supervision of the Court, and in* 1879, *Bain, one of the contributories, settled with the liquidators and was discharged by them of his liabilities to the bank on payment of a sum of money, being the value of his property as disclosed in a written state, which he solemnly declared to be true and correct to the best of his knowledge and belief. The state was submitted by him to the liquidators in answer to certain printed queries addressed to him by them, one of which was,—"What property do you possess, and what is its nature and value to the best of your knowledge and belief?" The discharge, which followed on a compromise approved by the Court, bore to be "on the basis, and on condition of the truth, accuracy, and completeness" of the said state. In* 1901 *the Assets Company, Limited, who were in right of the whole assets of the bank, raised against Bain's trustees an action of reduction of the interlocutor approving of the compromise and of the discharge by the liquidators, on the ground that two promissory-notes granted in Bain's favour by his sons previous to his discharge were not disclosed in the state of his affairs upon which the discharge proceeded. In an appeal* held (rev. *the judgment of Second Division*) (1) *that it was not a condition of the discharge that the contributory's disclosure of his assets should be in writing,* (2) *that as twenty years had elapsed since the date of the discharge the* onus *lay upon the pursuers of proving that Bain had not made a full disclosure of his assets either in writing or orally,* (3) *that the pursuers had failed to discharge this* onus, *and that the defenders were entitled to absolvitor.* Bain v. Assets Co., June 4, 1905 (H. L.), p. 104.
See *Succession*, 2.

DOCK. See *Master and Servant*, 3, 7.

EJECTION, SUMMARY. See *Sheriff*, 4.

ELECTION. See *Master and Servant*, 4.

ELECTION LAW. *Ownership Franchise—Property situated in one and Residence within seven miles of another Parliamentary Burgh in the same district of burghs—Representation of the People (Scotland) Act*, 1832, *sec.* 11—*Representation of the People (Scotland) Act*, 1868, *sec.* 59.
1. The owner of heritage situated in one of the burghs forming a Parliamentary district of burghs has not resided within seven miles of the burgh in the sense of sec. 11 of the Representation of the People Act, 1832, by residing for the qualifying period within seven miles of

ELECTION LAW—*Continued.*

another of the burghs of the same district. Dunlop v. Mackenzie, Nov. 25, 1904, p. 155.

*Household Franchise — Defeasibility of Tenure — Representation of the People (Scotland) Act*, 1868, *sec.* 3—*Representation of the People Act*, 1884, *secs.* 2, 3, *and* 7 (4).

2. Where a workman has been an inhabitant occupier of a dwelling-house belonging to his employer, whether under his contract of service or under a contract of lease, for the twelve months necessary to give a qualification for the franchise, his qualification will not be affected by the fact that his occupancy might have been terminated by his employer at any time during the twelve months.

*Observed* that there is only one household franchise enacted by the Representation of the People Act, 1884—that of inhabitant occupier as owner or as tenant of a dwelling-house—and that all that a claimant for the franchise as tenant has to prove in order to establish his right is that he is of full age and has occupied the house for the qualifying period, whether under a contract of service or under an ordinary contract of lease. Urquhart v. Adam, Nov. 25, 1904, p. 157.

*Lodger Franchise—Erroneous declaration by claimant—Evidence of value of lodgings—Representation of the People (Scotland) Act*, 1868, *sec.* 4 *—Registration Amendment (Scotland) Act*, 1885, *sec.* 14.

3. A claimed to be enrolled in the register of voters of a burgh as a lodger in respect of "Bedroom and use of Public Room" in a house occupied by his mother. In the declaration annexed to his claim A declared that he had been "the occupier as lodger tenant of the above-mentioned lodgings" during the requisite period; and "that such lodgings are of the clear yearly value, if let unfurnished, of £10 or upwards." The Sheriff having after objection admitted the claim, the objector appealed. The case for appeal set forth that the claimant had for the qualifying period under contract with his mother the right to occupy as a lodger the said bedroom with board and use of the public room; and that for this he paid 20s. per week; that other members of the family used the public room; that no evidence was led as to the rental of the house, or as to the value of the bedroom and the use of the public room separately. The Court *sustained* the appeal on the ground that there was no evidence of the letting value of the bedroom alone. Barr v. Ireland, Nov. 25, 1904, p. 153.

See *Burgh*, 6.

ENFORCEMENT OF DECREE. See *Diligence.*

ENTAIL. *Revenue—Estate-Duty—Property passing on death of heir of entail—"Competent to dispose"—Estate-duty paid by deceased heir of entail and not charged on entailed estates—Finance Act*, 1894, *secs.* 2, 9, *and* 22.

*An heir of entail who had paid estate-duty due on the death of his predecessor died without having applied for a certificate or taken any steps to charge the sum so paid on the entailed estate. The Crown having claimed estate-duty on the sum so paid from his trustees*, held (rev. *judgment of First Division*) *that under sec.* 9, *subsec.* 6, *of the Finance Act*, 1894, *the heir of entail, being a person having a limited interest who had paid the estate-duty, had by the statute the same charge on the estate as if he held a mortgage over the estate for the amount of the duty, and that the charge being a vested transmissible interest belonging to the deceased at the time of his death, his trustees were liable for the duty.* Lord Advocate v. Earl of Moray's Trustees, Aug. 4, 1905 (H. L.), p. 116.

ESTATE DUTY. See *Revenue*, 1, 2, 3.

EXECUTOR. See *Succession*, 8.

EXPENSES. *Awarding—Modification—Interim Execution pending appeal—Court of Session Act*, 1808, *sec.* 17.

1. In an action of damages for breach of contract the pursuer was found entitled to damages and to expenses, "reserving consideration as to modification" until the approval of the Auditor's report. After the expenses had been taxed, but before the Auditor's report had come up for approval, the defenders appealed to the House of Lords. In a petition presented by the pursuer for interim execution pending the appeal, including interim execution for the taxed expenses, the Court *refused* the petition *quoad* the expenses, in respect that after the appeal had been presented it was incompetent to deal with the question of modification of the expenses. Williamson v. Macpherson & Co., Dec. 8, 1904, p. 231.

*Awarding—Modification—Jury Trial.—Small amount recovered.*

2. In an action for £500 of damages at common law, or £249 under the Employers Liability Act, for personal injuries, proof was allowed in the Sheriff Court. On appeal by the pursuer the Court of Session sent the case to trial by jury. The defenders did not move to have the case remitted to the Sheriff Court. The jury awarded £35 of damages. The defenders, who had made no tender, moved that expenses to the pursuer should be subject to modification in respect that the case, as tested by the amount of damages awarded, should properly have been tried in the Sheriff Court. *Held* that the pursuer was entitled to expenses without modification. Ridley v. Kimball & Morton, Limited, May 23, 1905, p. 655.

3. *Held* that a pursuer, who had appealed for jury trial and had obtained a verdict for £25 of damages, was entitled to expenses without modification, on the ground that, though the Court had power to relieve the losing litigant of any part of the expenses which might have been unnecessarily or unreasonably incurred by his successful opponent, no special reason for modification had been shewn in this case. M'Daid v. Coltness Iron Co., Limited, Nov. 4, 1904, p. 32.

4. In an action raised in the Court of Session by an inspector of police against a railway company for £500 of damages for assault, the jury awarded £10 of damages. The defenders had made no tender. The defenders moved that expenses to the pursuer should be subject to modification, in respect that the case should have been tried in the Sheriff Court. The Court *refused* the motion. M'Gilp v. Caledonian Railway Co., Oct. 26, 1904, p. 4.

*Awarding—Amendment of Record—Court of Session Act*, 1868, *sec.* 29.

5. In an action for damages raised by the Clippens Oil Company, Limited, against the Edinburgh and District Water Trustees a proof was led and judgment given in favour of the pursuers. Reclaiming notes having been lodged by both parties, the defenders craved leave to amend their record by adding a plea in law, founded on the Public Authorities Protection Act, 1893, which, if sustained, would have rendered the action incompetent. The pursuers objected to the amendment being allowed except on condition of payment of expenses since the closing of the record. The Court *allowed* the amendment, reserving all questions of expenses. Clippens Oil Company, Limited, v. Edinburgh and District Water Trustees, July 6, 1905, p. 914.

*Awarding—Action for implement of sale of heritage—Objections to title.*

6. The purchaser of subjects exposed to public roup under the powers of a bond who had objected to the title *found liable* in the expenses of an action for implement in respect that none of his objections were substantial. Roscoe v. Mackersy, June 8, 1905, p. 761.

EXPENSES—*Continued.*

*Liability for—Bankrupt Estate—Failure to insert notice in Gazette—Petition to fix another date for meeting—Bankruptcy (Scotland) Act, 1856, secs. 48 and 67.*

7. On 8th May 1905, on the petition of John Somerville & Company and others, creditors of Alexander Ross Mackenzie, Resolis, Mackenzie's estates were sequestrated by the Lord Ordinary on the Bills. The deliverance appointed a meeting of the creditors for the election of a trustee to be held on 18th May. The petitioners having failed to insert the statutory notice of this meeting in the *London Gazette* of 9th May, it became necessary to have another date fixed for the meeting. The petitioners having presented an application for this purpose the Court appointed the meeting to be held on 27th May, and remitted to the Sheriff to proceed, with a declaration that the expenses of the application and procedure connected therewith were not to be allowed against the estate. Somerville & Company, Limited, May 16, 1905, p. 651.

*Liability for—Trust-Estate—Liability of trust-estate to law-agents for expense of unsuccessfully defending an action.*

8. In an action against the sole trustee under a testamentary trust, the final interlocutor decerned against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate." The trust-estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law-agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses. *Held* that as the law-agents for the trustee were presumably acquainted with the whole circumstances of the trust, they were not entitled to rank for their account. Ferme, Ferme, & Williamson v. Stephenson's Trustee, July 6, 1905, p. 902.

*Taxation—Remit to English Taxing Officer—Account incurred to English solicitors in preparing case.*

9. Where in connection with the preparation of his case a party in an action, who was found entitled to expenses, had incurred an account to English solicitors, the Court found that this account fell to be taxed as between party and party according to English rules, and remitted it to the Taxing Officer of the Supreme Court of Judicature, London, with a request that he would examine and report at what figure the said account fell to be taxed as between party and party. Foreman v. Duke of Buccleuch, Dec. 24, 1904, p. 366.

*Taxation—Stated Case—"Expenses of stated case"—Adjustment of case—Fee to counsel—Workmen's Compensation Act, 1897.*

10. The respondent in an appeal under the Workmen's Compensation Act, 1897, was found entitled to "the expenses of the stated case." The Auditor taxed off all the items charged in the respondent's account of expenses in connection with the adjustment of the stated case, amounting in all to £7, 7s. 2d. The respondent having objected to the Auditor's report, the Court *held* that "the expenses of the stated case" included the legitimate expenses in connection with the adjustment of the case, and *allowed* £2, 2s. of modified expenses under this head.

Fee to counsel for revising the case *disallowed.* London and Edinburgh Shipping Co. v. Brown, Feb. 16, 1905, p. 488.

*Taxation—Fees to Skilled Witnesses—Certificate—Action settled before trial—A. S. 15th July 1876, V. iii. (2).*

11. *Held* that the provision of the Act of Sederunt of 15th July 1876, requiring the certificate of the Judge who tries a case to warrant an additional allowance to expert witnesses, does not apply where a case is settled before trial, and that in such cases a party entitled to

EXPENSES—*Continued.*
expenses is entitled to charge for reasonable remuneration to experts. Clements v. Corporation of Edinburgh, May 20, 1905, p. 651.
See *Trust*, 5.

EXPENSES (CAUTION FOR). See *Process*, 9.

FACTORY. See *Master and Servant*, 7, 8, 9.

FACULTIES AND POWERS. See *Succession*, 10, 17—*Trust*, 1, 2, 6.

FEE AND LIFERENT. *Rights of Liferenter and Fiar—Company—Bonus paid out of reserve fund—Simultaneous issue of new capital equal in amount to the bonus.*
The directors of a limited company, who had power to divide as dividend part of its reserve fund (accumulated from undivided profits), resolved to divide a portion of its reserve fund among the shareholders in the shape of a bonus of 50 per cent on the amount paid up, and at the same time to increase the capital of the company by issuing, concurrently with the payment of the bonus, preference shares of an amount equal in value to the bonus. A circular was sent to each shareholder intimating the sum to which he was entitled as bonus and the number of preference shares he was entitled to, and enclosing an application form for the new shares. Subsequently warrants for the bonus dividend were sent to the shareholders payable on the day on which payment of the new shares was due. The trustees of a deceased shareholder, who were directed by the trust-deed to hold certain shares in the company for one person in liferent and for others in fee, took up their quota of the new shares, and applied the bonus in payment thereof. In a question between the liferenter and fiars of the original shares, *held* that the operation was a payment of dividend, and not a conversion of profits into capital, and that the liferenter was entitled to have the bonus dividend paid to her. Blyth's Trustees v. Milne, June 23, 1905, p. 799.
See *Right in Security*, 3—*Succession*, 13, 14—*Trust*, 4, 6.

FISHING. See *Justiciary Cases*, 1, 12, 13—*Valuation Acts*, 1.

FOREIGN. See *Jurisdiction—Justiciary Cases*, 1—*Process*, 16—*Reparation*, 1, 7—*Succession*, 6.

FORESHORE. See *River, Loch, Sea*, 3, 4.

FORUM NON CONVENIENS. See *Jurisdiction*, 4, 5.

FRANCHISE. See *Election Law.*

FRAUD. *Misrepresentation—Sham Antiques—Res ipsa loquitur.*
1. A wholesale dealer sold certain articles of jewellery, which he had got made to resemble antiques, to a retail dealer. In an action of rescission of the sale on the ground of misrepresentation the buyer gave evidence to the effect that the seller had stated that the articles were the antiques they appeared to be. The evidence of the seller was that he said nothing about them. The Court, preferring the evidence of the buyer, *held* (*aff.* judgment of Lord Low) that the pursuer was entitled to rescind the sale. *Opinion* (*per* Lord Kyllachy) that the offer of articles appearing to be antiques was in itself a misrepresentation, on the principle of *res ipsa loquitur*, and that the seller was not entitled to leave the articles to speak for themselves, but was bound to displace the inferences which to his knowledge their appearance was calculated to suggest. Patterson v. Landsberg & Son, May 24, 1905, p. 675.

*Loss arising by fraud on two innocent parties—Sale on Approbation—Goods pawned by retail dealer.*
2. Ehrmann, a wholesale jeweller, was in the habit of sending goods to Anderson, a retail jeweller, with the wholesale prices marked, with power to sell and deliver on his own account and for his own profit

FRAUD—*Continued.*

any articles he might sell, Anderson being liable only for the wholesale price. At the same time Ehrmann sent a printed notice headed "approbation note," stating that the goods were to remain the property of the sender till invoiced by him to Anderson. Anderson having retained a diamond necklace for several months, Ehrmann in April 1903 urged Anderson to purchase the necklace himself, and offered to take bills for the price. Anderson agreed to do so, and the necklace was invoiced to him, and the bills were granted by him. Anderson having subsequently become bankrupt, Bryce, a pawnbroker, with whom Anderson had in December 1902, without Ehrmann's knowledge, pledged the necklace, raised an action of multiplepoinding to determine the right thereto. Claims were lodged by Ehrmann, by Bryce, and by Anderson's trustee, but the claim by the last was not insisted in. *Held* (1) that as in December 1902 Anderson had been put by Ehrmann in a position to give a good title to a purchaser, he could validly pledge the necklace, and had validly pledged it to Bryce; (2) that as Anderson's trustee did not insist in his claim Ehrmann was entitled to delivery of the necklace after satisfying Bryce's claim. Bryce v. Ehrmann, Oct. 28, 1904, p. 5.

3. *Discharge on compromise—Discharge conditional on truth, accuracy, and completeness of statement of assets—Written statement incomplete—Presumption—Mora—Reduction.* Bain v. Assets Co., June 4, 1905 (H. L.), p. 104.

See *Interdict*, 1.

GAME. See *Justiciary Cases*, 10, 11.

GAMING. See *Justiciary Cases*, 5, 6, 7, 8.

GOODWILL. See *Heritable and Moveable.*

HARBOUR. *Boundary—Foreshore—Rights of owners of foreshore included in harbour—Musselburgh Harbour Act*, 1840, *secs.* 2, 49, 76.

*The Musselburgh Harbour Act*, 1840, *sec.* 2, *enacts that the word "harbour" shall be understood to mean the "Harbour of Fisherrow," and shall include the whole precincts thereof as after specified. Sec.* 76 *enacts that for the purposes of this Act, and for no other purpose whatever, the said harbour shall be deemed to extend "along the shore" from the M. Burn on the west to the R. Burn on the east, and to seaward to the extent of one hundred yards beyond low-water mark opposite the shore between the aforesaid burns. The distance between the two burns was about two miles. Sec.* 49 *makes it unlawful for "any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones," except with the authority of the Harbour Commissioners. In an action by the Harbour Commissioners against persons claiming to be the proprietors of part of the foreshore between the two burns*, held (aff. *judgment of Second Division*) (1) *that the harbour and its precincts included the whole foreshore between the two burns, rejecting a plea for the defenders that the words "along the shore" in sec.* 76 *of the Act excluded the foreshore; and* (2) *that the defenders, although owners of part of the foreshore, were not entitled to remove sand from their part without the authority of the Harbour Commissioners.* Musselburgh Real Estate Co. v. Magistrates of Musselburgh, July 31, 1905, (H. L.) p. 113.

HERITABLE AND MOVEABLE. *Goodwill—Public-House—Terce—Jus relictæ.* The question whether the goodwill of a public-house is heritable or moveable depends on the circumstances of each case. Muirhead's Trustees v. Muirhead, Feb. 17, 1905, p. 496.

See *Succession*, 3.

HIRE PURCHASE AGREEMENT. See *Sale*, 1.

HIRING. See *Lease*, 2.

HOUSE OF LORDS. *Practice—Peer appearing as counsel in Appeal Cases.*
Resolved that *according to present practice there is no reason why a Peer should not be heard as counsel on an appeal at the Bar of the House of Lords, but that this resolution is not intended to apply to the appearing of barristers who are Peers before Committees of the House, or before the House when sitting under the presidency of the Lord High Steward on a criminal case. In re* Lord Kinross, July 4, 1905 (H. L.), p. 138.

HUSBAND AND WIFE. *Constitution of Marriage—Consent de præsenti—Written declaration before witnesses—Mental reservation.*
1. In a declarator of marriage it is not sufficient for the pursuer to produce a writing signed by the parties stating that they have taken each other as husband and wife. The pursuer must also shew the circumstances in which the writing was completed, and shew that they were consistent with an intention on the part of the parties to contract marriage.
A party to a mutual declaration of marriage will not be allowed to plead that he did not truly consent to the marriage if he induced the other party to believe that he did consent.
Circumstances in which *held* that marriage had been proved by written declaration signed by the parties before witnesses. Duran v. Duran, Nov. 18, 1904, p. 87.

*Divorce—Proof and Oath de calumnia taken on commission before case called.*
2. A naval artificer-engineer, who was the pursuer in an action of divorce, presented a petition in which he stated that the summons in the action had been signeted and served edictally, but could not be called in Court until after the date when the ship upon which he and another material witness were serving was under orders to proceed to sea, and moved the Court to appoint a commissioner to take his oath *de calumnia* and the evidence of himself and the other material witness, the depositions to lie *in retentis* subject to the orders of the Court. The Court *granted* the prayer of the petition, reserving to the defender all objections competent to her to the competency of the petition. Pringle, Feb. 21, 1905, p. 525.

INCOME-TAX. See *Revenue*, 4 *to* 9.

INHABITED HOUSE DUTY. See *Revenue*, 10.

INSANITY. See *Poor*, 3.

INSURANCE. *Construction of contract—Accident Insurance by Newspaper—Payment to person adjudged by editor to be next of kin.*
1. A weekly periodical named *Answers* contained a statement that in the event of any person being killed by an accident to any train in which he was travelling as a passenger with a copy of the current number in his possession, £1000 would be paid to "the person adjudged by the editor to be the next of kin of the deceased." It was added that "The person or persons who shall be adjudged by the editor to be the next of kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." H was killed in an accident to a train in which he was travelling, having in his possession a copy of the current number of *Answers*. He was survived by three brothers and a sister. After inquiry, the editor adjudged the sister to be his next of kin, and paid £1000 to her. In an action by the brothers against her, *held* that they had no right to share in the sum so paid. Hunter v. Hunter, Nov. 24, 1904, p. 136.

*Construction of Contract—Widows' Fund limited to members of a Society—Contributor expelled from the Society—Right to remain a contributor—Glasgow Faculty of Procurators Act*, 1875, *sec.* 3.
2. By the Act 3 Will. IV. c. lxiv., the contributors to the Glasgow Pro-

INSURANCE—*Continued.*

curators' Widows' Fund were incorporated into a Society, and persons under fifty years of age becoming members of the Faculty of Procurators of Glasgow were required to become contributors. By the Glasgow Faculty of Procurators Act, 1875, it was enacted that after the passing of the Act [April 1875], "No person shall be obliged or be entitled to become a member of the Society or a contributor to the fund," and that "no person other than the widows and children of then deceased contributors . . . and the persons who shall then be contributors . . . shall have any interest in the fund." In 1901 C., a Glasgow procurator, who had become a contributor to the Widows' Fund in 1870, was struck off the roll of the Faculty in respect of his having been convicted of a crime, and subsequently the Widows' Fund Society declined to receive his contributions. In an action brought by C. and his wife and children against the Widows' Fund Society, *held* that as C. was no longer a member of the Faculty of Procurators he was not entitled to contribute to the Widows' Fund, and that at his death his widow and children would have no right to the benefit of the fund. Colquhoun v. Society of Contributors to Widows' Fund of Faculty of Procurators in Glasgow, Dec. 22, 1904, p. 345.

INTERDICT. *Interim Interdict—Publication of Trade Circular.*

1. M., who had formerly been one of the managing directors of H. & Co., artesian well engineers and mineral boring prospectors, having commenced business in the same line on his own account, issued an advertising trade circular, headed "Artesian Tube Wells," under his firm name of M. & Co., in which it was stated that "our Mr M. has had extensive experience as managing director for many years with the largest artesian well engineers in Scotland, and is an expert in this class of work," and lists were given (1) of persons for whom artesian wells had been successfully put down, "a special visit having been made by him (M.) in each case," (2) of boring work which he had "under his personal supervision," and (3) of contracts completed "under his directorship." The circular did not state (as was the fact) that the work referred to had been done by H. & Co. while M. was one of their managing directors. *Held* that the circular was likely to mislead an ordinary reader into the belief that the work specified had been done by M. & Co. and not by H. & Co., and that H. & Co. were entitled to interim interdict against M. & Co. publishing, issuing, or circulating it. John Henderson & Son v. Alexander Munro & Co., May 12, 1905, p. 636.

*Interim Interdict—Prima facie title—Dissenting Church.*

2. In 1900 a majority of the General Assembly of the Free Church of Scotland passed an Act uniting that Church with the United Presbyterian Church of Scotland, the united Church to be called the United Free Church of Scotland. In 1904 the Free Church of Scotland, composed of the minority of the original Free Church who had not entered into the union, obtained a judgment of the House of Lords to the effect that all the general property belonging to the original Free Church and held by trustees for behoof of that Church fell to be made over to trustees for behoof of the Free Church as it existed after the union. At the same time, in an action raised by the United Free Church against trustees holding church buildings in trust for behoof of the Buccleuch-Greyfriars congregation in Edinburgh for declarator that the said church buildings were held for behoof of the United Free Church congregation, the House of Lords held that the congregation of the United Free Church had no right to the buildings. Thereafter the Free Church and the congregation of the Free Church at Strathpeffer, founding on these judgments, presented a note of sus-

INTERDICT—*Continued.*

pension and interdict against the United Free Church and the congregation of the United Free Church at Strathpeffer, praying for interdict against the United Free Church congregation using the church at Strathpeffer, which was held on a trust title *prima facie* identical with the title of the Buccleuch-Greyfriars Church in Edinburgh. The complainers having moved for interim interdict, the United Free Church congregation maintained that interim interdict ought not to be granted, in respect (1) that the judgments of the House of Lords were not *res judicatæ* against the present respondents, and were pronounced upon incomplete information as to the facts; (2) that the church at Strathpeffer had been built by subscription in 1886 after the original Free Church had (in 1873) resolved that there was no bar in principle to union with the United Presbyterian Church, while the Buccleuch-Greyfriars Church was built at a much earlier date, and that the subscribers to the building of the church at Strathpeffer as a body were in favour of the competency and the expediency of the union; and (3) that the Government intended to take immediate legislative action with a view to a settlement of the differences between the two Churches. *Held* that the church at Strathpeffer being held on a title *prima facie* identical, *mutatis mutandis*, with that of the Buccleuch-Greyfriars Church, interim interdict fell to be granted. General Assembly of the Free Church of Scotland v. Johnston, Feb. 21, 1905, p. 517.

*Wrong done by English Company in Scotland—Jurisdiction.*

3. *Held* (*aff.* judgment of Lord Stormonth-Darling) (1) that the Court of Session has jurisdiction to interdict, at the instance of an English Company, the infringement in Scotland of a patent belonging to them by another English Company, although no arrestments have been used to found jurisdiction and personal service has not been made on the respondents; and (2) (repelling plea of *forum non conveniens*) that the Court of Session was the appropriate *forum* in which to seek interdict against a continuance of the alleged wrong. Toni Tyres, Limited, v. The Palmer Tyre, Limited, Jan. 31, 1905, p. 477.

*Competency—Company—Winding-up.*

4. *Question, per* Lord Kyllachy, whether a note of suspension and interdict to have the respondent interdicted from acting as liquidator of a company under an *ex facie* valid special resolution of the Company for voluntary liquidation, and the appointment of the respondent as liquidator, was competent. Howling's Trustees v. Smith, Jan. 14, 1905, p. 390.

INTEREST. See *Ship*, 4.

ISSUES. *Slander—Slander by Servant.*

1. Where the pursuer in an action of slander alleged that a letter containing defamatory expressions had been written by the defenders' secretary in the course of their business, the Court *approved* of an issue "whether the defenders by their general secretary and manager wrote and dispatched" the letter complained of. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

*Seduction.*

2. In an action of damages for seduction the method of seduction alleged to have been employed must be set forth in the issue. Cathcart v. Brown, July 12, 1905, p. 951.

JOINT AND SEVERAL. See *Master and Servant*, 6—*Process*, 3.

JUDICIAL FACTOR. *Curator Bonis—Enforcement of Decree to deliver document—Warrant to open lockfast places.*

1. The curator bonis of an incapax obtained a decree in absence against the wife of his ward, ordaining her to deliver to the curator a certain policy of insurance on his ward's life. A charge upon this decree having expired without result, the curator, being in a difficulty, presented a note to the Junior Lord Ordinary, in which, on the narrative that he believed that the execution of a warrant to imprison would not be effectual to enforce production, he craved for a warrant to messengers-at-arms to search for and recover the document, and if necessary, to open all shut and lockfast places. The Junior Lord Ordinary having reported the matter to the Inner-House, the Court *granted* the warrant asked for. Ferguson's Curator Bonis, July 4, 1905, p. 898.

*Curator Bonis—Heritable and Moveable—Conversion.*

2. The curator bonis of a lunatic expended the whole moveable estate of the ward on her maintenance, and thereafter, on the advice of the Accountant of Court, and by the authority of the Sheriff, sold the ward's heritable property, the income of which was not sufficient to maintain her. *Held* that the balance of the ward's estate remaining at her death was moveable *quoad* succession, on the ground that in order to maintain the ward it was necessary for the curator to sell her heritable estate. M'Adam's Executor v. Souters, Dec. 2, 1904, p. 179.

*Special Powers—Permission to retain shares involving liability for calls—Distinction between position of a Judicial Factor on a trust-estate and a Curator Bonis.*

3. A judicial factor presented a petition for authority to retain for two years shares in a limited company which were subject to a liability for possible calls of £8, 10s. per share, and which could only be disposed of by payment of £3 per share. The petitioner stated that the prospects of the company were improving. On the report of the Junior Lord Ordinary the Court, in the circumstances, *authorised* the factor to retain the shares, but only *hoc statu* and for no definite time, and *directed* the factor, should any change occur in the circumstances of the company, to communicate with the Accountant of Court.

*Observations* (*per* the Lord Ordinary, Johnston) as to the distinction between the position of a judicial factor appointed on a trust-estate and a curator bonis or factor *loco tutoris*, with regard to his powers, and responsibilities and his right to apply to the Court for instructions. Browning's Factor, July 20, 1905, p. 1037.

JURISDICTION. *Ownership of heritage in Scotland—Sale of the heritage.*

1. A foreigner, the proprietor of a house in Scotland, conveyed it to his daughter by an absolute disposition, which was recorded a few days before a Court of Session summons in a petitory action was served upon him. *Held* that the Court had not jurisdiction over him by reason of the ownership of Scots heritage. Buchan v. Grimaldi, July 6, 1905, p. 917.

*Forty days' residence in Scotland.*

2. Jurisdiction constituted over a foreigner by his residence in Scotland for over forty days ceases when he leaves Scotland; it does not continue for forty days after he has left. Buchan v. Grimaldi, July 6, 1905, p. 917.

*Arrestment jurisdictionis fundandæ causa—Amendments made in the course of the action.*

3. Arrestments *jurisdictionis fundandæ causa* found jurisdiction not only in the action as originally laid, but as competently amended. Hope v. Derwent Rolling Mills Co., Limited, June 27, 1905, p. 837.

INTERDICT—*Continued.*

pension and interdict against the United Free Church and the congregation of the United Free Church at Strathpeffer, praying for interdict against the United Free Church congregation using the church at Strathpeffer, which was held on a trust title *prima facie* identical with the title of the Buccleuch-Greyfriars Church in Edinburgh. The complainers having moved for interim interdict, the United Free Church congregation maintained that interim interdict ought not to be granted, in respect (1) that the judgments of the House of Lords were not *res judicatæ* against the present respondents, and were pronounced upon incomplete information as to the facts; (2) that the church at Strathpeffer had been built by subscription in 1886 after the original Free Church had (in 1873) resolved that there was no bar in principle to union with the United Presbyterian Church, while the Buccleuch-Greyfriars Church was built at a much earlier date, and that the subscribers to the building of the church at Strathpeffer as a body were in favour of the competency and the expediency of the union; and (3) that the Government intended to take immediate legislative action with a view to a settlement of the differences between the two Churches. *Held* that the church at Strathpeffer being held on a title *prima facie* identical, *mutatis mutandis*, with that of the Buccleuch-Greyfriars Church, interim interdict fell to be granted. General Assembly of the Free Church of Scotland v. Johnston, Feb. 21, 1905, p. 517.

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JOINT AND SEVERAL. See *Master and Servant*, 6—*Process*, 3.

JUDICIAL FACTOR. *Curator Bonis—Enforcement of Decree to deliver document—Warrant to open lockfast places.*

1. The curator bonis of an incapax obtained a decree in absence against the wife of his ward, ordaining her to deliver to the curator a certain policy of insurance on his ward's life. A charge upon this decree having expired without result, the curator, being in a difficulty, presented a note to the Junior Lord Ordinary, in which, on the narrative that he believed that the execution of a warrant to imprison would not be effectual to enforce production, he craved for a warrant to messengers-at-arms to search for and recover the document, and if necessary, to open all shut and lockfast places. The Junior Lord Ordinary having reported the matter to the Inner-House, the Court *granted* the warrant asked for. Ferguson's Curator Bonis, July 4, 1905, p. 898.

*Curator Bonis—Heritable and Moveable—Conversion.*

2. The curator bonis of a lunatic expended the whole moveable estate of the ward on her maintenance, and thereafter, on the advice of the Accountant of Court, and by the authority of the Sheriff, sold the ward's heritable property, the income of which was not sufficient to maintain her. *Held* that the balance of the ward's estate remaining at her death was moveable *quoad* succession, on the ground that in order to maintain the ward it was necessary for the curator to sell her heritable estate. M'Adam's Executor v. Souters, Dec. 2, 1904, p. 179.

*Special Powers—Permission to retain shares involving liability for calls—Distinction between position of a Judicial Factor on a trust-estate and a Curator Bonis.*

3. A judicial factor presented a petition for authority to retain for two years shares in a limited company which were subject to a liability for possible calls of £8, 10s. per share, and which could only be disposed of by payment of £3 per share. The petitioner stated that the prospects of the company were improving. On the report of the Junior Lord Ordinary the Court, in the circumstances, *authorised* the factor to retain the shares, but only *hoc statu* and for no definite time, and *directed* the factor, should any change occur in the circumstances of the company, to communicate with the Accountant of Court.

*Observations* (*per* the Lord Ordinary, Johnston) as to the distinction between the position of a judicial factor appointed on a trust-estate and a curator bonis or factor *loco tutoris*, with regard to his powers, and responsibilities and his right to apply to the Court for instructions. Browning's Factor, July 20, 1905, p. 1037.

JURISDICTION. *Ownership of heritage in Scotland—Sale of the heritage.*

1. A foreigner, the proprietor of a house in Scotland, conveyed it to his daughter by an absolute disposition, which was recorded a few days before a Court of Session summons in a petitory action was served upon him. *Held* that the Court had not jurisdiction over him by reason of the ownership of Scots heritage. Buchan v. Grimaldi, July 6, 1905, p. 917.

*Forty days' residence in Scotland.*

2. Jurisdiction constituted over a foreigner by his residence in Scotland for over forty days ceases when he leaves Scotland; it does not continue for forty days after he has left. Buchan v. Grimaldi, July 6, 1905, p. 917.

*Arrestment jurisdictionis fundandæ causa—Amendments made in the course of the action.*

3. Arrestments *jurisdictionis fundandæ causa* found jurisdiction not only in the action as originally laid, but as competently amended. Hope v. Derwent Rolling Mills Co., Limited, June 27, 1905, p. 837.

JURISDICTION—*Continued.*

*Forum non conveniens—Sist of action to preserve arrestment on dependence.*

4. In an action by one Englishman against another who had estate in Scotland, a plea of *forum non conveniens* was sustained. The pursuer moved the Court to sist the action to enable him to preserve arrestments on the dependence till he should raise and follow forth an action in England. The Court *refused* the motion and *dismissed* the action. Atkinson & Wood v. Mackintosh, March 17, 1905, p. 598.

*Preventive Jurisdiction—Interdict—Wrong done by English Company in Scotland—Forum non conveniens.*

5. *Held* (*aff.* judgment of Lord Stormouth-Darling) (1) that the Court of Session has jurisdiction to interdict, at the instance of an English Company, the infringement in Scotland of a patent belonging to them by another English Company, although no arrestments have been used to found jurisdiction and personal service has not been made on the respondents; and (2) (repelling plea of *forum non conveniens*) that the Court of Session was the appropriate *forum* in which to seek interdict against a continuance of the alleged wrong. Toni Tyres, Limited, v. The Palmer Tyre, Limited, Jan. 31, 1905, p. 477.

See *Justiciary Cases*, 1 *to* 4—*Sheriff*, 1.

JUS QUÆSITUM TERTIO. See *Mines and Minerals*, 2.

JUSTICE OF THE PEACE. *Jurisdiction—Police Burgh—Licensing Offences—Licensing (Scotland) Act*, 1903, *sec.* 91.

*Held* that the Justices of the Peace of a county have concurrent jurisdiction along with the Magistrates of a police burgh situated within the county to try offences under the Licensing (Scotland) Act, 1903, where such offences are committed within burgh by persons residing therein. Tasker v. Simpson, Dec. 21, 1904 (J. C.), p. 33.

JUSTICIARY CASES. *Jurisdiction—Territorial Waters—Three-mile limit—Fishing—Trawling—Herring Fishery (Scotland) Act*, 1889, *sec.* 6, *and Schedule.*

1. *Held* that sec. 6 of the Herring Fishery (Scotland) Act, 1889, prohibiting otter-trawling in, *inter alia*, the Dornoch Firth as defined by the Act, applied to foreign trawlers. Peters v. Olsen, July 13, 1905 (J. C.), p. 86.

*Jurisdiction—Civil or Criminal—Suspension—Competency—Summary Procedure Act*, 1864, *sec.* 28.

2. In a complaint for recovery of a penalty under an Act by which the Court was not authorised to pronounce sentence of imprisonment, or in default of payment of the penalty to grant a warrant of imprisonment for a specified time, the Court granted a warrant to imprison the respondent for one month unless the penalty should be sooner paid. *Held* that the complaint was civil, and that a suspension in the High Court of Justiciary was incompetent. Todd v. Magowan, June 27, 1905 (J. C.), p. 50.

*Jurisdiction — Civil or Criminal—Summary Procedure Act*, 1864, *sec.* 28—*Summary Prosecutions Appeals (Scotland) Act*, 1875, *sec.* 7—*Summary Jurisdiction (Scotland) Act*, 1881, *sec.* 9—*Statute Law Revision Act*, 1894, *sec.* 1.

3. In a summary complaint against an incorporated company the jurisdiction is civil within the meaning of sec. 28 of the Summary Procedure (Scotland) Act, 1864, and an appeal under the Summary Prosecutions Appeals (Scotland) Act, 1875, in such a complaint lies to the Court of Session—not to the Court of Justiciary. Lauder v. Hurst, Nelson, & Co., Limited, July 12, 1905 (J. C.), p. 65.

JUSTICIARY CASES—*Continued.*

*Jurisdiction—Justice of Peace—Jurisdiction in Police Burgh—Licensing Offences—Licensing (Scotland) Act*, 1903, *sec.* 91.

4. *Held* that the Justices of the Peace of a county have concurrent jurisdiction along with the Magistrates of a police burgh situated within the county to try offences under the Licensing (Scotland) Act, 1903, where such offences are committed within burgh by persons residing therein. Tasker v. Simpson, Dec. 21, 1904 (J. C.), p. 33.

*Statutory Offences—Betting and Gaming—Burgh Police (Scotland) Act*, 1892, *sec.* 407—*House, room, or place used as betting-house.*

5. *Held* that a space of ground enclosed by walls, but not roofed in, which was entered by a door with a lock, and which was fitted up as a quoiting ground, but was used primarily as a place for conducting betting transactions, was a "place" used as a betting-house within the meaning of section 407 of the Burgh Police (Scotland) Act, 1892, and that a person who was not the tenant of the ground, or employed by him, but was the person who had conducted the betting there, was rightly convicted of a contravention of that section. Flannagan v. Hill, Dec. 20, 1904 (J. C.), p. 26.

*Statutory Offences—Betting and Gaming—Burgh Police (Scotland) Act*, 1892, *sec.* 407—*Forfeiture of money found in place where betting conducted.*

6. *Held* that it was not a valid objection to a conviction and sentence for using a place as a betting-house contrary to section 407 of the Burgh Police (Scotland) Act, 1892, that the magistrate had not, as part of the sentence, forfeited the money found on the accused when he was apprehended. Flannagan v. Hill, Dec. 20, 1904 (J. C.), p. 26.

*Statutory Offences — Betting and Gaming — Implement for practising game of hazard—Burgh Police (Scotland) Act*, 1892, *sec.* 406.

7. In a prosecution under sec. 406 of the Burgh Police (Scotland) Act, 1892, against a confectioner, for exhibiting in his shop a machine or implement for playing a game of hazard in order to induce persons to play thereat, it was proved that the machine was put in motion by placing a penny in a slot, that this enabled a spring to be worked which propelled a ball into the upper part of the machine, whence it descended past pins (which caused irregularity in its course) to the bottom of the machine, unless it was intercepted by a sliding cup manipulated by the player, who, if he succeeded in intercepting the ball, received a metal disc entitling him to twopenceworth of goods in the shop, and, if he failed, forfeited his penny. There was no part of the machine where the ball could descend that the manipulator could not reach with the sliding cup. It was found by the magistrate that, although a certain amount of success in working the machine could be acquired by practice, yet that to an ordinary member of the public having no special opportunity of acquiring skill at it, its working depended on chance. *Held* that the machine or implement was an implement for playing a game of hazard within the meaning of the section. Forte v. Dewar—Ogilvie v. Benigno, July 12, 1905 (J. C.), p. 82.

8. *Held* in a prosecution under sec. 406 of the Burgh Police (Scotland) Act, 1892, for exhibiting an implement for playing a game of hazard in order to induce persons to play thereat, that it was not sufficient to prevent a conviction under section 406 that the player, irrespective of success or failure, received an article of some value, but of less value than the sum paid for playing. Forte v. Dewar—Ogilvie v. Benigno, July 12, 1905 (J. C.), p. 82.

*Statutory Offences—Coal Mines Regulation Act*, 1887, *sec.* 49, *General Rule* 24, *and sec.* 51 *and Special Rules—Winding-Engineman—Re-*

JUSTICIARY CASES—*Continued.*

*sponsibility of Manager—Person not qualified allowed to work engine for raising material only.*

9. *Held* that section 49, General Rule 24, of the Coal Mines Regulation Act, 1887, with regard to the qualifications and duties of winding-enginemen, and a special rule in force at a particular mine under section 51 of that Act, forbidding the winding-engineman to allow any person to interfere with the engine while being wrought, applied when the engine was being used for raising and lowering material as well as when it was being used for raising and lowering persons; and that a colliery manager, who had permitted a person not qualified in respect of age to raise material but not persons by means of the winding-engine when it was under the charge of a qualified winding-engineman, had failed to the best of his power to enforce the special rule, and was consequently guilty of a contravention of section 51 of the Act. Soutar v. Clark, Dec. 15, 1904 (J. C.), p. 1.

*Statutory Offences—Poaching—Game (Scotland) Act*, 1832, *sec.* 1.

10. In a summary prosecution against five persons for trespassing in pursuit of game or conies in the daytime, contrary to the Game (Scotland) Act, 1832, sec. 1, the prosecutor concluded for the forfeiture and payment by each person of a sum not exceeding £2, being the maximum penalty attached to the offence when committed by fewer than five persons. *Held* that although five persons were alleged to have participated in the trespass the prosecutor was entitled to restrict himself to the minor offence and the minor penalty. Saunders v. Paterson, July 12, 1905 (J. C.), p. 58.

*Statutory Offences—Poaching—Proof of title to prosecute—Game Tenant.*

11. *Held* that in a prosecution for day poaching, where it was alleged in the complaint that the prosecutor was the game tenant, and no objection had been taken to the prosecutor's title to prosecute at the outset, it was not necessary for the prosecutor to prove his title. Saunders v. Paterson, July 12, 1905 (J. C.), p. 58.

*Statutory Offences—Salmon Fisheries—Act* 24 *and* 25 *Vict. cap.* 109, *sec.* 11—*Salmon Fisheries (Scotland) Act*, 1862, *sec.* 33.

12. In a prosecution for using a fixed engine to catch salmon in the Solway Firth, contrary to the English Act 24 and 25 Vict. cap. 109, sec. 11, and the Salmon Fisheries (Scotland) Act, 1862, sec. 33, which made the provisions of the English Act with regard to the use of fixed engines applicable to the waters of the Solway Firth in Scotland as the same should be fixed by the Commissioners, *opinion per cur.* that the complaint was irrelevant because it failed to state that the Commissioners under the Act of 1862 had made sec. 11 of the English Act applicable to the *locus* of the alleged illegal fishing. Phyn v. Kenyon, Feb. 21, 1905 (J. C.), p. 47.

13. In a prosecution for using a fixed engine to catch salmon in the Solway Firth, contrary to 24 and 25 Vict. cap. 109, sec. 11, and the Salmon Fisheries (Scotland) Act, 1862, sec. 33, it was found by the Sheriff that the accused were fishermen in the employment of the tenant of the salmon-fishings in question, and that they used the alleged fixed engine complained of in accordance with their master's instructions. *Held* that the accused were not "owners" of the fixed engine in the sense of sec. 11 of the Act 24 and 25 Vict. cap. 109, and were therefore not liable for penalties under that section. Phyn v. Kenyon, Feb. 21, 1905 (J. C.), p. 47.

*Procedure—Indictment—Instance—Private Prosecutor—Competency—Criminal Procedure (Scotland) Act*, 1887, *sec.* 2—*Merchandise Marks Act*, 1887, *sec.* 2 (6).

14. *Held* that apart from the Merchandise Marks Act, 1887, an indictment in the Sheriff Court at the instance of a private prosecutor for his pri-

JUSTICIARY CASES—*Continued.*

vate interest with concurrence of the Lord Advocate was not competent, and that the proviso in sec. 2 (6) of that Act, assuming it to apply to Scotland, does not by implication make such an indictment competent. *Question*, whether indictment is competent in any Court at the instance of a private prosecutor with concurrence of the Lord Advocate. Dunbar v. Johnston, Dec. 22, 1904, p. 40.

*Procedure—Proof—Witness—Commission to examine witness abroad—Act* 1587, *cap.* 91.

15. The Court of Justiciary will not grant a commission to examine a witness abroad with a view to his deposition being read to the jury at the trial, such evidence being contrary to the Act 1587, cap. 91, and to the practice of the Court of Justiciary since its institution. H. M. Advocate v. Hunter, July 12, 1905 (J. C.), p. 73.

*Procedure—Proof—Witness—Evidence of youth released under First Offenders Act*, 1887—*Competency.*

16. A, B, and C having been charged with theft the charge was not proceeded with against A and B. C pleaded guilty, and was conditionally released under the First Offenders Act. The prosecutor having brought a new complaint against A and B tendered C as a witness. *Held* that C's evidence was admissible. Todd v. Priestly, July 14, 1905 (J. C.), p. 94.

*Summary Procedure—Complaint—Relevancy—Specification—Statutory Offence—Motor Car Act*, 1903, *sec.* 1, *subsec.* (1).

17. A complaint under the Summary Jurisdiction Acts set forth that the accused, time and place libelled, "did drive a motor car on" a highway libelled, "negligently, whereby said car came into collision with a horse and van which was then on said highway, contrary to the Motor Car Act, 1903, section 1." The Sheriff-substitute dismissed the complaint as irrelevant in respect that there was no specification of the *modus* of negligence. On appeal *held* that no further specification of *modus* was necessary, and that the complaint was relevant. Todrick v. Dennelar, Dec. 15, 1904 (J. C.), p. 8.

*Summary Procedure—Complaint—Relevancy—Act* 24 *and* 25 *Vict. cap.* 109, *sec.* 11—*Salmon Fisheries (Scotland) Act*, 1862, *sec.* 33.

18. In a prosecution for using a fixed engine to catch salmon in the Solway Firth, contrary to the English Act 24 and 25 Vict. cap. 109, sec. 11, and the Salmon Fisheries (Scotland) Act, 1862, sec. 33, which made the provisions of the English Act with regard to the use of fixed engines applicable to the waters of the Solway Firth in Scotland as the same should be fixed by the Commissioners, *opinion per cur.* that the complaint was irrelevant because it failed to state that the Commissioners under the Act of 1862 had made sec. 11 of the English Act applicable to the *locus* of the alleged illegal fishing. Phyn v. Kenyon, Feb. 21, 1905 (J. C.), p. 47.

*Summary Procedure—Complaint—Penalty—Poaching—Game (Scotland) Act*, 1832, *sec.* 1.

19. In a summary prosecution against five persons for trespassing in pursuit of game or conies in the daytime, contrary to the Game (Scotland) Act, 1832, sec. 1, the prosecutor concluded for the forfeiture and payment by each person of a sum not exceeding £2, being the maximum penalty attached to the offence when committed by fewer than five persons. *Held* that although five persons were alleged to have participated in the trespass the prosecutor was entitled to restrict himself to the minor offence and the minor penalty. Saunders v. Paterson, July 12, 1905 (J. C.), p. 58.

*Summary Procedure—Merchandise Marks Act*, 1887, *sec.* 2 (6).

20. *Question*, whether the proviso in sec. 2 (6) of the Merchandise Marks Act, 1887, that a person charged before a Court of summary jurisdic-

JUSTICIARY CASES—*Continued.*

tion shall be informed of his right to be tried on indictment, applies to Scotland. Dunbar v. Johnston, Dec. 22, 1904 (J. C.), p. 40.

*Summary Procedure—Conduct of Trial—Recall of witness—Evidence (Scotland) Act*, 1852, *sec.* 4.

21. *Opinion*, that in a summary prosecution for day poaching at the instance of a person alleged in the complaint to be the game tenant it was competent for the Sheriff-substitute, *ex proprio motu*, after both the prosecutor and the accused had closed their proof, and been heard in argument, to recall a witness for the prosecution to prove the prosecutor's title to prosecute. Saunders v. Paterson, July 12, 1905 (J. C.), p. 58.

*Summary Procedure—Conviction in Absence—Record of Proceedings—Citation—Omission to state that accused duly summoned—Execution of Citation not produced as evidence—Summary Procedure (Scotland) Act*, 1864, *secs.* 6, 7, *and* 16, *and Schedule I.*

22. To entitle a Sheriff or Magistrate to dispose of a summary complaint in the absence of the respondent in terms of sec. 7 of the Summary Procedure Act, 1864, it is necessary that he should have proof that the respondent has been duly cited. The execution of citation lodged with the Sheriff-clerk will not be regarded as satisfying the condition when it is not noted on the record of the proceedings as having been produced in evidence. Powdrell v. Galloway, Dec. 15, 1904 (J. C.), p. 9.

*Summary Procedure—Conviction and Sentence—Signature by one magistrate when three alleged to be present.*

23. In a suspension of a conviction and sentence under a summary complaint the complainer averred that, while the conviction and sentence was signed by one magistrate only, there were three magistrates present on the bench at the trial, who all took part in the deliberations on the case. The record of procedure bore that the trial was in presence of the only magistrate who had signed. *Held* that, the procedure being *ex facie* of the record quite regular, there was nothing in the averments of the complainer to entitle him to suspension of the conviction, and motion for inquiry as to whether the magistrates who did not sign in fact acted at the trial, *refused.* Wright v. Thomson, Dec. 16, 1904 (J. C.), p. 18.

*Summary Procedure—Conviction and Sentence—Betting and Gaming Offences—Burgh Police (Scotland) Act*, 1892, *sec.* 407—*Forfeiture of money found in place where betting conducted.*

24. *Held* that it was not a valid objection to a conviction and sentence for using a place as a betting-house contrary to section 407 of the Burgh Police (Scotland) Act, 1892, that the magistrate had not, as part of the sentence, forfeited the money found on the accused when he was apprehended. Flannagan v. Hill, Dec. 20, 1904 (J. C.), p. 26.

*Summary Procedure—Sentence—Imprisonment—Summary Procedure Act*, 1864, *sec.* 18 (6).

25. *Opinion per cur.* that in the case of complaints for contravention of an Act of Parliament which imposes a penalty for contravention but contains no special provision for the recovery thereof or for the substitution of a term of imprisonment in default of payment, section 18 (6) of the Summary Procedure Act, 1864, does not authorise the granting of a warrant for the detention of a respondent "for" a specified term "unless the penalty shall be sooner paid." Todd v. Magowan, June 27, 1905 (J. C.), p. 50.

*Summary Procedure—Sentence—Imprisonment—Summary Procedure Act*, 1864, *sec.* 18 (6), *Schedule K* (6).

26. Schedule K (6) of the Summary Procedure Act, 1864, supplies (in cases where it is inexpedient to issue a warrant of arrestment, poinding and sale) a form of warrant for imprisonment, in default of payment of

JUSTICIARY CASES—*Continued.*

a penalty, for a specified period, unless the penalty be paid before its termination, but provides that this form is only to be used "where the Acts founded on authorise imprisonment for a specified period." *Opinion per cur.* that the words "authorise imprisonment" could not be read as "do not exclude imprisonment," and that consequently it was not competent to use this form of warrant in a case where the Act imposing the penalty did not authorise imprisonment for a specified period in default of payment. Todd v. Magowan, June 27, 1905 (J. C.), p. 50.

*Review—Suspension—Mora—Acquiescence—Sentence implemented.*

27. A suspension of a conviction and sentence upon a summary complaint was presented fourteen months after the conviction had been pronounced and the sentence implemented. The complainer explained that he had objected to the relevancy of the charge, and that the first six months of the delay was due to his having waited for the result of an appeal to the High Court in another case, raising the same question, which was not decided until five months after his conviction, and that the subsequent delay was due to the fault of the Police Court officials. The Court *refused* the bill. Kelly v. Smith, Dec. 16, 1904 (J. C.), p. 14.

*Review—Suspension—Oppression—Order for detention of child in industrial school—Notice to father—Industrial Schools Act*, 1866, *sec.* 15.

28. On 11th August 1904 a boy of eleven was summoned to appear on 15th August in a Burgh Police Court to answer to a charge of theft. The summons was handed to the boy's mother in her shop, and a copy of the complaint was served at the same time. The boy's father was not present. On 15th August the boy appeared in Court, but neither his father nor his mother attended the Court. The boy pleaded guilty. The prosecutor then withdrew the charge of theft, and the magistrate granted an order for the detention of the boy in an industrial school until he attained the age of sixteen. In a suspension at the instance of the boy and his father on the ground that the order for the detention of the boy in the industrial school was oppressive, in respect that it had been pronounced without notice to the father, *held* that the order was not in the circumstances oppressive, and suspension *refused*. Hunter v. Waddell, July 12, 1905 (J. C.), p. 61.

See *Public Health*, 2—*Public-House*, 3, 4—*Sheriff*, 5.

LAWFUL DAY. See *Burgh*, 2.

LEASE. *Management and Occupation—Shop—Affixing show-cases outside shop—Reasonable use of premises.*

1. The tenant of a draper's shop in Ayr, without the consent of the landlord, put up show-cases attached by stanchions to the outside walls of the shop. *Held* that, in the absence of proof of general custom of trade in Ayr, this was not impliedly authorised by the lease. British Linen Co. v. Purdie, July 7, 1905, p. 923.

*Sequestration for Rent—Hired Furniture—Right of owner of hired furniture to have tenant's own effects sold first.*

2. When an article of furniture, hired by a tenant, is sequestrated for the tenant's rent along with the tenant's own effects, and the owner of the hired article desires that it should not be sold unless the tenant's own effects prove insufficient to meet the landlord's claims, the owner of the hired article ought to apply to the Sheriff or to the judge of the roup, to have the sale of the article reserved; if the owner of the hired article does not so apply, and the article is sold while effects belonging to the tenant remain unsold, the owner has no remedy against the landlord, even although he has intimated to the landlord that the article is his property. M'Intosh v. Potts, June 8, 1905, p. 765.

LEASE—*Continued.*

*Improvements — Compensation — Arbitration — Statutory Arbitration — Agreement in Writing — Agricultural Holdings Act*, 1900, *Second Schedule, Part II., secs.* 1 *and* 4.

3. *Held* that a clause in an agricultural lease referring to two arbiters certain questions of compensation under the lease was not an agreement in writing in the sense of sec. 1 of the Second Schedule, Part II., of the Agricultural Holdings Act, 1900. Hamilton Ogilvy v. Elliot, July 20, 1905, p. 1115.

*Improvements—Compensation—Arbitration—Statutory Arbitration—Provision for arbitration in lease—Agricultural Holdings Act*, 1900, *sec.* 2.

4. An agricultural lease gave the tenant right on the termination of the lease to compensation for manure and feeding stuffs purchased by the tenant and applied to the lands, the amount of compensation to be determined by arbitration in the manner and according to the rules set forth in the lease. On the termination of the lease the tenant lodged a claim in an arbitration under the Agricultural Holdings Act, 1900, in which he claimed, *inter alia*, compensation for manure and feeding stuffs. *Held* that the claim, in so far as it was for compensation for manure and feeding stuffs, was incompetent, in respect that such compensation fell to be determined by arbitration under the lease. Hamilton Ogilvy v. Elliot, July 20, 1905, p. 1115.

*Improvements—Compensation—Statute — Retrospective Effect — Agricultural Holdings Act*, 1900, *First Schedule, Part III.*

5. The Agricultural Holdings Act, 1900, gives tenants right to compensation, *inter alia*, for "laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy." *Held* that a tenant, whose tenancy terminated less than two years from the date of the Act, was entitled to compensation under this enactment. Hamilton Ogilvy v. Elliot, July 20, 1905, p. 1115.

*Improvements—Compensation—Notice—Dispensation with notice of consent—Agricultural Holdings Act*, 1883, *sec.* 4.

6. *Held* that an agreement under sec. 4 of the Agricultural Holdings (Scotland) Act, 1883, to dispense with written notice need not be in writing. Hamilton Ogilvy v. Elliot, July 20, 1905, p. 1115.

*Lease of Extraordinary Duration—Ruinous Buildings—Burgh Police (Scotland) Act*, 1892, *secs.* 196, 197, 200—*Sale by order of Sheriff—Title of Purchaser—Liability for Rent—Rights of Lessor.*

7. The Burgh Police Act, 1892, provides for the sale by auction of ruinous buildings and waste ground which have become a nuisance and the owners of which cannot be found, for the consignment of the price, and for the completion of a purchaser's title, by recording in the Register of Sasines a decree of the Sheriff declaring the purchase duly completed, and authorising immediate possession of the tenements sold. Ruinous buildings sold under the above enactment were situate on ground let on a building lease for 999 years. After the purchaser had completed his title by recording the Sheriff's decree and had disponed the subjects, an action was raised against the disponee for payment of rent due under the long lease, the pursuer contending that the purchaser had acquired the property *tantum et tale* as it stood in the lessee. The defender founded on the recorded decree as giving him an unqualified statutory title to the land. The Court *sustained* the defence. *Opinions per* Lord M'Laren and Lord Kinnear that the lessor's remedy was to claim against the deposited purchase price. Young's Trustees v. Grainger, Dec. 8, 1904, p. 232.

LEGACY. See *Succession.*

LEGITIM. See *Succession*, 2.

LICENCE. See *Burgh*, 2—*Public Health*, 1—*Public-House*.

LIFERENT. See *Fee and Liferent—Right in Security*, 3—*Succession*, 13, 14—*Trust*, 5, 7.

LIMITATION OF ACTION. *Public Authorities—Colonel Commanding Volunteer Regiment—Public Authorities Protection Act*, 1893, *sec.* 1.

1. In an action for damages against a regiment of volunteers and against the officer commanding the regiment, as representing the regiment, and as an individual, by the father of a child, who was killed on the public street by an ammunition waggon, the horses of which had bolted, the pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The action was not raised within six months after the date of the accident. *Held* that the action against the commanding officer, as an individual, was excluded by the Public Authorities Protection Act, 1893, sec. 1, on the ground that the fault averred against him was neglect of duty in his public capacity as commanding officer. Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers, Nov. 30, 1904, p. 168.

*Public Authorities—Breach of Contract—Public Authorities Protection Act*, 1893, *sec.* 1.

2. The Magistrates of a burgh let the town hall, which belonged to the common good of the burgh, to A, a public entertainments manager, for the purpose of giving a public entertainment therein on 7th September 1903. On that day the Magistrates refused to allow A the use of the town hall unless he agreed to omit a wrestling competition from the entertainment, and A having refused to do this, the entertainment did not take place. On 8th April 1904 A brought an action of damages for breach of contract against the Magistrates, who pleaded sec. 1 of the Public Authorities Protection Act, 1893. *Held* that the Act did not apply. M'Phie v. Magistrates of Greenock, Dec. 10, 1904, p. 246.

LOAN. *Proof—Writ sufficient to prove Loan.*

*Held* that, the passing of money from A to B having been proved by means of a cheque, post entries in pencil in B's ledger and an entry by B in a statement of account between himself and A were sufficient to establish that the money passed from A to B under a contract of loan. Hope v. Derwent Rolling Mills Co., Limited, June 27, 1905, p. 837.

LOCAL GOVERNMENT. *Audit of County Council Accounts—Illegal Payments—Surcharge by Secretary for Scotland on persons "making" the payments—Finality of Secretary's determination—Local Government (Scotland) Act*, 1889, *secs.* 70 *and* 75.

The Secretary for Scotland, on a report by a county auditor, under sec. 70, subsec. (5), of the Local Government (Scotland) Act, 1889, disallowed certain payments made out of county funds, and surcharged them upon the individuals who signed and countersigned the cheques in terms of sec. 75, subsec. (1). The county auditor having brought an action in the Sheriff Court against the persons surcharged by the Secretary for Scotland for decree for the amounts of the cheques, the defenders maintained that they were not liable on the grounds (1) that the Secretary's determination was not final as regarded the legality of the payments in question, and that the payments were legal, and (2) that, in any view, the Secretary's determination was *ultra vires* in so far as it surcharged the defenders, in respect that they were not the persons "making" the payments

LOCAL GOVERNMENT—*Continued.*
within the meaning of the Act, since they had acted merely ministerially in signing and countersigning the cheques. *Held* (1) that as regarded the legality of the payments in question the determination of the Secretary for Scotland was final and not open to review; and (2) that the defenders had rightly been surcharged, in respect that, being the persons who had signed or countersigned the cheques, they were the persons "making" the payments in the sense of the Act. County Auditor of Lanark v. Lambie, July 20, 1905, p. 1049.

LOCUS PŒNITENTIÆ. See *Contract*, 2.

LUNACY. See *Poor*, 3.

MANDATARY. See *Process*, 8.

MARRIAGE. See *Husband and Wife.*

MARRIAGE-CONTRACT. *Antenuptial—Alimentary Provision—Power to trustees to advance trust funds to spouses—Spouses a majority of trustees.*
1. An antenuptial marriage-contract appointed the spouses and the wife's father the sole trustees, and the trustees were empowered at the joint request of the spouses to advance such portion of the trust-estate to the husband as the trustees might think right. Under the marriage-contract the wife had a liferent allenarly, which was declared not to be affectable by her own or her husband's debts or deeds or the diligence of their creditors. *Held* that as the spouses were a majority of the trustees, and might consequently lend any part of the trust funds to the husband, the marriage-contract was not effectual to protect the wife's liferent. M'Callum v. M'Culloch's Trustees, Dec. 22, 1904, p. 337.

*Antenuptial—Assignation of Acquirenda—Estate acquired by Wife after Dissolution of Marriage.*
2. By antenuptial contract of marriage a wife conveyed to trustees "her whole means and estate which she might acquire or succeed to." *Held* that estate to which the wife succeeded after the dissolution of the marriage did not fall under the clause of assignation of *acquirenda*. Boyd's Trustees v. Boyd, March 14, 1905, p. 576.

*Antenuptial—Assignation of Acquirenda—Conquest—Accumulations of income.*
3. *By an antenuptial marriage-contract executed in* 1848, *the wife bound herself to convey to the trustees the whole funds and estate, real and personal, which she might thereafter "conquest and acquire by purchase, succession, or otherwise." The trustees were directed to pay the income of the trust-estate to the wife during her life, for her own separate benefit and use, exclusive of the* jus mariti. Held (aff. *judgment of First Division*) *that the clause of conquest did not extend to estate which, as ascertained at the dissolution of the marriage, consisted of, or was purchased with, accumulations of the wife's income.* Dunbar Dunbar v. Dunbar Dunbar, April 11, 1905 (H. L.), p. 92.

*Vesting.*
4. By antenuptial contract of marriage the husband conveyed to trustees £5000 as an alimentary fund for behoof of the family establishment, with power to the trustees to pay over the free income to either of the spouses, and to continue such payments until the death or re-marriage of the survivor; "and upon the death or re-marriage of the said survivor the principal sum or the investments on which it stands shall belong and be made over in equal sums to and among the children equally of the marriage," declaring that the shares of any children who might be minors at the time should be held and administered by the trustees for their behoof until their majority, and that, in the event of the predecease of any of them before majority, their shares

MARRIAGE-CONTRACT—*Continued.*

should belong to their lawful issue, and, failing issue, should accresce to their surviving brothers and sisters; "in the event of failure of issue of the present intended marriage," the said sum to be at the disposal of the spouses; which provisions in favour of children were declared to be in full satisfaction of their legal rights on the death of their father. *Held* that a proportionate share of the estate vested in a son who survived the dissolution of the marriage and attained majority but predeceased the survivor of the spouses. Boyd's Trustees v. Boyd, March 14, 1905, p. 576.

See *Revenue*, 1—*Succession*, 2.

MASTER AND SERVANT. *Nature and Constitution—Engagement "for one year certain"—Shipping Agent—Tacit Relocation—Termination of contract.*

1. By letter, dated 29th December 1891, the manager of the North British Railway Company appointed Stevenson, a coal exporter, to be "agent for this Company as from 1st ulto. (for the purpose of attending to the Company's interests in connection with their shipping trade to Hamburg at Bo'ness, Burntisland, and Methil), at a salary of £450 per annum, for one year certain." Stevenson's duty as agent was to endeavour to get coal taken by the Railway Company's lines to the ports named and shipped thence to Hamburg. On 7th December 1892 the contract was renewed "for another year." Thereafter Stevenson continued to discharge the duties of agent until 1900 without formal reappointment. He always received his salary in one sum for each year ending 31st October. On 2d January 1901 the Railway Company gave Stevenson notice that his services would not be required after three months from that date. In an action by Stevenson against the Railway Company for payment of the balance of his salary to 31st October 1901, *held* after a proof that the contract between the pursuer and the defenders was a yearly contract, and, therefore, that the defenders were not entitled to terminate it, after a year had begun, on three months' notice. Stevenson v. North British Railway Co., July 20, 1905, p. 1106.

*Liability of Master for Servant—Slander by Servant.*

2. A master is liable for a slander uttered by his servant while acting within the scope of his employment, although without special instructions. So *held* where the master was a voluntary association.

Where the pursuer in an action of slander alleged that a letter containing defamatory expressions had been written by the defenders' secretary in the course of their business, the Court *approved* of an issue "whether the defenders by their general secretary and manager wrote and dispatched" the letter complained of. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

*Workmen's Compensation Acts—Act* 1897, *sec.* 1, *subsec.* (1)—*Accident arising out of and in the course of the employment—"Accident"—Voluntary attempt to rescue fellow-workman.*

3. A steamship was moored to a quay in a dock discharging her cargo under a stevedore, who had contracted with her owners to unload her. The labourers in the employment of the stevedore were each appointed to work in connection with a particular hold of the vessel, either on board her or on the quay. A, who was employed on the quay to discharge cargo from the afterhold, and who did not require in the performance of his duty to go on board the vessel, on being informed that one of his fellow-workmen employed in the forehold was lying there in an unconscious condition owing to inhaling noxious gas, offered to attempt a rescue, and after a handkerchief had been tied round his mouth, was lowered into the forehold, where both he and the man he had attempted to rescue were suffocated by carbonic acid gas. A acted without instructions from his employer—the stevedore—who had gone

MASTER AND SERVANT—*Continued.*

for rescue appliances. A's mother brought a claim for compensation under the Workmen's Compensation Act, 1897, against the steamship owners as the undertakers in the sense of the Act. *Held* that A met his death by an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1897, sec. 1, subsec. (1), and that the respondents were liable in compensation to A's mother. London and Edinburgh Shipping Co. v. Brown, Feb. 16, 1905, p. 488.

*Workmen's Compensation Acts—Act* 1897, *sec.* 1, *subsec.* (2) (*b*)—*Action for reparation by person found not entitled to compensation.*

4. *Held* that a claimant who had been refused compensation under the Workmen's Compensation Act, 1897, on the ground that she was not a dependant of the deceased workman, was not thereby barred under sec. 1, subsec. (2) (*b*), of the Act from raising an action of reparation at common law, or under the Employers Liability Act, 1880, against the deceased's employer. M'Donald v. James Dunlop & Co. (1900), Limited, Feb. 25, 1905, p. 533.

*Workmen's Compensation Acts—Act* 1897, *sec.* 1, *subsec.* (2)—*Injury "attributable" to serious and wilful misconduct.*

5. A miner while riding on the top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, was killed by the fall of a stone from the roof of the tunnel in which the hutch was running. *Held* that although the miner was guilty of serious and wilful misconduct his death was not "attributable" thereto in the sense of section 1, subsection 2, of the Workmen's Compensation Act, 1897, and that his widow was not barred from claiming compensation. Glasgow Coal Co., Limited, v. Sneddon, Feb. 14, 1905, p. 485.

*Workmen's Compensation Acts—Act* 1897, *sec.* 4—*Claim against undertakers and employers jointly and severally—Competency.*

6. A workman, while engaged in the employment of a glass-merchant in repairing the glass on the roof of a factory occupied by a firm of wool manufacturers, fell from a scaffold on the roof and was killed. In an arbitration under the Workmen's Compensation Act, 1897, his widow and children claimed compensation from the glass-merchant and the firm of wool manufacturers, "jointly and severally, or severally, or in such proportions between them as to the Court should seem just." *Held* that as the Act imposed no joint liability, the application, as directed against the two defenders jointly and severally, was incompetent, and application *dismissed.* Herd v. Summers, June 28, 1905, p. 870.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7—*Factory—Dock—Ship in dry dock undergoing repair—Factory and Workshop Act*, 1895, *sec.* 23.

7. Shipowners took a ship into a dry dock, which they had hired for the purpose of repairing the ship. A workman, who had served as ship's carpenter on board the ship during one voyage, and was engaged for her next voyage, in the interval between the voyages was employed by the shipowners in the work of repairing the ship. While engaged in unshackling the ship's cable, in order to turn it end for end, he fell into the dock, and sustained injuries from which he died. *Held* that when the accident happened he was employed as a workman in the repair of a ship in or about a "factory," in the sense of the Workmen's Compensation Act, 1897, and that the shipowners were liable to pay compensation. Cayzer, Irvine, & Co. v. Dickson, June 3, 1905, p. 723.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7 (1) *and* (2)—"*Undertaker*"—"*Factory*"—"*Warehouse*"—"*Occupier*"—*Purchaser of Goods stored in warehouse—Factory and Workshop Act*, 1901, *sec.* 104.

8. The owner of 600 bolls of peas lying in bulk in a grain store belonging to a warehouseman sold 200 bolls thereof to a firm, who received a

MASTER AND SERVANT—*Continued.*

delivery-order therefor. The grain store was a "warehouse" within the meaning of the Factory and Workshop Act, 1901. *Held* that the purchasers were not "occupiers" of the store in the sense of the Factory and Workshop Act, 1901, sec. 104, and that the dependants of a carter in their employment, who was killed by the fall of a bag while taking delivery of part of the peas at the store, were not entitled to compensation from his employers under the Workmen's Compensation Act, 1897. Ramsay v. Mackie, Nov. 19, 1904, p. 106.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7 (1) *and* (2)—*Factory—Warehouse—Uncovered yard used for storage of material—Factory and Workshop Act*, 1901, *sec.* 104 (1).

9. A workman was injured while breaking stones in the employment of the Corporation of Perth by an accident which occurred in a yard in Perth belonging to the Corporation. The yard was uncovered, but at the side of it was a large shed in which implements were kept and work was done in wet weather. The yard was principally used to store materials for the repair of roads and drains and for other works executed by the Corporation either on its own account or to a small extent for private individuals, and it contained bings of stone which the workman was employed in breaking at the time of the accident. No mechanical power was used in the yard. *Held* that the yard was not a warehouse in the ordinary sense of the word, and therefore not a factory within the meaning of the Workmen's Compensation Act, 1897.

*Opinions* that the reference to warehouses in sec. 104 (1) of the Factory and Workshop Act, 1901, was not to warehouses in general, but merely to warehouses used in connection with docks. M'Ewan v. Magistrates of Perth, June 2, 1905, p. 714.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7 (1) *and* (2)—*Mine—Siding—Private Railway from mine to main line—Coal Mines Regulation Act*, 1887, *sec.* 75.

10. A mine was connected with a main line of railway by a private line, about a mile and a quarter in length. At a point in this private line, about 800 yards from the mine, there was a drum-house and sidings connected therewith. At this point an engine-driver in the employment of the mineowners was accidentally killed in the course of his employment. In an application by his mother for compensation under the Workmen's Compensation Act, 1897, *held* that the place where the accident occurred was on, or in, or about a "mine," within the meaning of the Workmen's Compensation Act, 1897. Anderson v. Lochgelly Iron and Coal Co., Limited, Dec. 6, 1904, p. 187.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7 (1) *and* (2)—*Mine—"About" mine—Railway Company's Siding—Private Road to mine—Coal Mines Regulation Act*, 1887, *sec.* 75.

11. A workman employed as a carter at a coal mine sustained fatal injuries while transferring timber to a colliery cart from a railway waggon at a railway siding belonging to and in the occupation of a railway company. The place where the accident occurred was about 400 yards from the pit, the distance being made up of (1) railway siding (123 yards), (2) the breadth of a public road, and (3) a private cart road leading to the pit (259 yards). *Held* that the workman was not injured in the course of employment "on, or in, or about" "a mine" within the meaning of the Workmen's Compensation Act, 1897, sec. 7. Coylton Coal Co. v. Davidson, June 6, 1905, p. 727.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7—"*Undertakers*"—"*Engineering Work.*"

12. A workman in the employment of a firm of boilermakers was injured in the course of repairing a boiler in a spinning-mill belonging to a third

MASTER AND SERVANT—*Continued.*

person. The work in which he was engaged at the time of the accident was all done by hand, and no mechanical power was being used, although there was on the premises steam power available for use. *Held* (1) that, as the spinning-mill was not a factory occupied by the workman's employers, it was not a factory of which they were the undertakers in the sense of the Workmen's Compensation Act, 1897, sec. 7; (2) that the work in which the workman was engaged was not an engineering work in the sense of the Act; and therefore (3) that the workman was not entitled to compensation under the Act. Cooper & Greig v. Adam, May 30, 1905, p. 681.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7, *subsec.* (2)—"*Workman*"—*Contractor*—"*Undertaker.*"

13. An estate owner, through his factor, engaged a man to quarry from a quarry on the estate stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct. He was to be paid 5s. a day, though in fact he was not paid daily, and might employ assistants to be paid through him at the same rate. The estate forester visited the quarry, and kept a note of the days on which the quarryman worked. The tools were supplied partly by the quarryman and partly by the estate. He was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made. The quarryman having been injured by an explosion while engaged in his work, claimed compensation under the Workmen's Compensation Act, 1897, from the estate owner. The Sheriff disallowed the claim on the ground that the claimant was a contractor and not a workman. The claimant appealed upon a stated case, in which the only question put was whether the claimant was a servant or a workman in the sense of the Act. *Held* that the claimant was a servant or workman in the sense of the Act.

*Opinions reserved* (*per* the Lord President and Lord M'Laren) whether a workman could at the same time be a contractor and a workman in the sense of the Act.

*Question* (*per* Lord M'Laren) whether a landed proprietor who works a quarry on his estate for estate purposes is an "undertaker" in the sense of the Act. Paterson v. Lockhart, July 13, 1905, p. 954.

*Workmen's Compensation Acts—Act* 1897, *sec.* 7 (2) (*b*), *and First Schedule* 1 (*a*)—*Dependants—Dependence in law or in fact.*

14. In a claim by a widow for compensation for the death of her son it was proved that the applicant was, at the date of the death, undergoing a sentence of confinement in a State Reformatory for Inebriates, that during the four years preceding she had been in prison with the exception of ten months, and that during that period she had occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son, who had contributed 5s. or 6s. a week towards her support. *Held* that the applicant was not wholly or partially dependent on her son's earnings at the time of his death within the meaning of the Workmen's Compensation Act, 1897, sec. 7, and compensation refused. Robert Addie & Sons' Collieries, Limited, v. Trainer, Nov. 22, 1904, p. 115.

*Workmen's Compensation Acts—Act* 1897, *section* 7, *subsection* (2)—*Dependants.*

15. A workman's daughter, who had previously been earning wages, after her mother's death remained at home to keep her father's house, getting from him board, lodging, and clothing, but no wages. The workman was killed by accident in the course of his employment. *Held* that the daughter was a dependant of the workman in the sense of the Workmen's Compensation Act, 1897, sec. 7. Moyes v. William Dixon, Limited, Jan. 13, 1905, p. 386.

MASTER AND SERVANT—*Continued.*

*Workmen's Compensation Acts—Act* 1897, *sec.* 7 (2)—*Dependants—"In part dependent upon the earnings of the workman."*

16. The father of a workman who died from injuries sustained in the course of his employment claimed compensation under the Workmen's Compensation Act. The son's average weekly earnings from his employment were £1, 4s. 1d. He also practised a systematic course of betting, which brought him a substantial profit. The father, who was a widower, 54 years of age, and without dependants, suffered from bronchitis and rheumatism, and his capacity for work was consequently precarious, but his average weekly earnings during a period of forty weeks were £1, 4s. 11d. The son made payments to his father which averaged 10s. per week. Father and son did not live together. *Held* that the father was not in part dependent upon the earnings of his son within the meaning of section 7 (2) of the Workmen's Compensation Act, 1897. Sir Wm. Arrol & Co., Limited, v. Kelly, July 6, 1905, p. 906.

*Workmen's Compensation Acts—Act* 1897, *First Schedule, section* 1 (*b*)—*Average weekly earnings—Continuity of employment—Miner employed by contractors passing into employment of mine owners.*

17. A miner employed by a contractor in a coal-mine was dismissed from his employment on 7th October. On Friday 9th October he got employment from the coalmaster in the same mine. On Monday 12th October he was injured in the course of his employment. In a claim for compensation under the Workmen's Compensation Act, against his employer, *held* that in estimating his average weekly earnings, his earnings under the contractor could not be taken into account. Hunter v. William Baird & Co., Limited, Dec. 17, 1904, p. 304.

*Workmen's Compensation Acts—Act* 1897, *First Schedule, sec.* (2)—*Wage-earning capacity.*

18. *Opinion*, that while the Workmen's Compensation Act, 1897, First Schedule, sec. (2), requires an arbitrator in fixing the amount of a weekly payment to have regard to the amount of the average weekly earnings of the workman before the accident, and to the average amount he is earning after the accident, the latter is not conclusive as to the workman's wage-earning capacity. Clelland v. Singer Manufacturing Co., July 18, 1905, p. 975.

*Workmen's Compensation Acts—Act* 1897, *First Schedule, sec.* (11)—*Medical examination of workman—Certificate of medical practitioner appointed under the Act—Review of Weekly Payments.*

19. A mason's labourer, sixty-six years of age, whose left eye had been injured in the course of his employment, was awarded under the Workmen's Compensation Act, 1897, the maximum weekly payment for total incapacity. Prior to an application by the employers to have the payment diminished, the workman was examined by one of the medical men appointed by the Secretary of State. The medical certificate bore that the workman's right eye was healthy, and the vision good, but that the left eye was seriously defective. "His disability is, however, at present great enough to unfit him for his usual occupation of a mason's labourer, though I am of opinion he is quite fit for any work where he would not have to exercise for the safety of life or limb that nice discrimination as to distances for which the sight of two eyes is necessary." Neither party moved for proof. The Sheriff held (1) that the certificate was conclusive as to the workman's condition, and that other evidence as to the workman's present earning capacity was incompetent; and (2) that the certificate did not shew that the workman's earning capacity had increased to such an extent as to justify a reduction of the weekly payment. In an appeal, *held* (1) that the certificate of the medical practitioner under section 11 was conclusive evidence of the workman's condition; and (2) that as the certificate bore that the workman was

MASTER AND SERVANT—*Continued.*

unfit for his usual occupation, although fit for work of a particular character, and as his employers did not state or offer to prove that he could get such employment, the Sheriff was entitled to decide the question of compensation without further evidence. Bryce & Co. v. Connor, Dec. 6, 1904, p. 193.

*Workmen's Compensation Acts—Act* 1897, *First Schedule, secs.* (11) *and* (12)*—Medical Examination of Workman—Obstruction—Review of weekly payment.*

20. An injured workman, in receipt of weekly payments under the Workmen's Compensation Act, 1897, went to Australia without intimating to his employers that he was going or leaving his address. In an application by the employers for review of the weekly payments, the Court *suspended in hoc statu* the workman's right to the weekly payments on the ground that he was obstructing medical examination in the sense of sec. (11) of the First Schedule of the Act. Finnie & Son v. Duncan, Dec. 13, 1904, p. 254.

21. A workman who was receiving weekly payments as compensation fixed by agreement under the Workmen's Compensation Act, 1897, and who had twice submitted himself for examination by a medical practitioner provided by the employers, and been certified not to have recovered, immediately after the second examination went to Ireland to reside with his father. About two months thereafter he was again required to submit himself at Glasgow for examination by the employers' medical man. He offered to submit himself to a medical man near the place where he was residing in Ireland, but he refused to come to Glasgow for examination unless his expenses were paid. *Held* that the workman had not refused to submit himself to medical examination or obstructed the same in the sense of the Workmen's Compensation Act, 1897, Schedule I., section 11, and that the employers were not entitled to suspend payment of his compensation. William Baird & Co., Limited, v. Kane, Jan. 28, 1905, p. 461.

*Workmen's Compensation Acts—Act* 1897, *First Schedule, secs.* (12), (13) *—Compensation—Amount—Nominal award of a penny per week—Competency.*

22. In an application by an employer to have a weekly payment to an injured workman reviewed and ended, *held* that it is incompetent for the arbitrator under the Workmen's Compensation Act, 1897, if either party objects, to postpone the determination of the question of compensation by making an interim nominal award of one penny per week. Clelland v. Singer Manufacturing Co., July 18, 1905, p. 975.

*Workmen's Compensation Acts—Act* 1897, *First Schedule, sec.* 14*—Compensation—Setting off expenses against weekly payment.*

23. *Held* that an employer, who had been found liable in a weekly payment under the Workmen's Compensation Act, 1897, to a workman, could not set off against that payment a sum awarded to him as expenses against the workman in an application for the diminution of the weekly payment. Rosewell Gas Coal Co. v. M'Vicar, Dec. 16, 1904, p. 290.

*Workmen's Compensation Acts—Act* 1897, *Second Schedule, sec.* (14) (*c*) *—A. S. 3d June* 1898, *sec.* 9 (*a*)*—Stated Case—Non-compliance with regulations for obtaining.*

24. On the last day allowed for taking an appeal against an award by a Sheriff dismissing a claim for compensation under the Workmen's Compensation Act, 1897, the claimant's Edinburgh agent telegraphed to the local agent to apply for a case for appeal. The local agent being out of town, his clerk obtained the services of another agent, who went to the Sheriff Court office and wrote on the interlocutor sheet "The pursuer appeals against the foregoing judgment, and requests a case to be stated." He did not set forth any question of law, and he did not

MASTER AND SERVANT—*Continued.*

deposit £1, as required by the Act of Sederunt 3d June 1698, sec. 9 (*a*). He was informed by the clerk in attendance at the Sheriff Court office that a deposit was not necessary. The Sheriff stated a case. At the hearing on the appeal the deposit of £1 had not been made. The Court, on the objection of the respondents, *dismissed* the appeal in respect of the appellant's failure to comply with the regulations enacted by sec. 9 (*a*) of the Act of Sederunt, 3d June 1898. Murphy v. Blair & White, June 28, 1905, p. 863.

*Workmen's Compensation Acts—Act* 1897—*A. S., 3d June* 1898, *sec.* 9 (*f*)—*Stated Case—Transmission of Process.*

25. In a stated case under the Workmen's Compensation Act, 1897, one of the parties moved for an order on the Sheriff-clerk to transmit the process, on the ground that there was a note appended by the Sheriff-substitute to his interlocutor which it was advisable that the Court should have before them when the stated case came up for decision. The Court *refused* the motion. Singer Manufacturing Co. v. Clelland, May 20, 1905, p. 654.

*Workmen's Compensation Acts—Act* 1897—*Stated Case—Expenses of Stated Case—Adjustment of case—Fee to counsel.*

26. The respondent in an appeal under the Workmen's Compensation Act, 1897, was found entitled to "the expenses of the stated case." The Auditor taxed off all the items charged in the respondent's account of expenses in connection with the adjustment of the stated case, amounting in all to £7, 7s. 2d. The respondent having objected to the Auditor's report, the Court *held* that "the expenses of the stated case" included the legitimate expenses in connection with the adjustment of the case, and *allowed* £2, 2s. of modified expenses under this head. Fee to counsel for revising the case *disallowed*. London and Edinburgh Shipping Co. v. Brown, Feb. 16, 1905, p. 488.

See *Minor and Pupil*, 3—*Process*, 17 *to* 22, 24—*Reparation*, 4, 21, 22.

MEDICAL PRACTITIONER. See *Contract*, 4—*Reparation*, 15.

MINES AND MINERALS. *Right to support—Feu-disposition reserving the minerals—Clause of Exemption from claims for surface damage—Construction—"Persons deriving right from" superior—Right derived from author of superior.*

1. The testamentary trustees of the twelfth Duke of Hamilton granted a feu-disposition of a plot of building ground, reserving the minerals, and stipulating that no claim for surface damage should lie against the trustees "or persons deriving right from them." The minerals belonged to and were worked by a company under deeds granted by the twelfth Duke and by the eleventh Duke. *Held* that the company "derived right from" the trustees within the meaning of the feu-disposition, and consequently were not liable to the feuar for surface damages. Pringle v. Carron Co., June 23, 1905, p. 820.

*Right to support—Liability of mineral tenant for damages to feuars—Large increase of feuing subsequent to date of lease—Jus quæsitum tertio.*

2. By a lease dated in 1877 Wemyss let an extensive coalfield to a company for thirty years, with a break every four years. The mineral tenants were taken bound to work the coal "by the longwall or other method of complete excavation, and so as to insure the greatest output," but were bound to leave solid unworked masses of coal where it might be necessary for the support of existing buildings on the lands. They further obliged themselves during the currency of the lease "to make compensation . . . for all ground" which they might "use or injure by any of their operations under this tack, and to make good and discharge all damages of what kind soever" which they "may in

MINES AND MINERALS—*Continued.*

any way occasion to any lands, crops thereon, houses, or woods, or fences and drains, wells or water-courses, and whether such damage shall be due to the lessors of the colliery or to the landlord, or land tenants, feuars, or others." In 1894 Wemyss feued off a piece of ground, taking the feuar bound to erect thereon a house of a specified value, but reserved to himself and his successors the whole minerals in the ground feued, declaring that the feuar should have no claim for any damage against him and his successors caused by the working of the minerals, but reserving to the feuar all claims which might be competent to him in respect of any such damage against the "tenants or tacksmen of the minerals and others . . . in so far as such tenants or tacksmen may be liable for such damage, without having any right of recourse or relief, or any other remedy" against Wemyss or his successors. At or about the date of this feu-disposition Wemyss gave off about thirty other feus in terms, *mutatis mutandis*, identical with the foregoing, and houses were built on each feu. The houses were all miners' houses or houses of a similar class. In 1903 the feuar under the feu-disposition above set forth brought an action against the mineral tenants for damages on account of injury to the house on his feu admittedly occasioned solely by subsidence due to the complete excavation of the coal in terms of the mineral lease. *Held* (1) that under his feu-disposition the pursuer's common law right to support of the surface was reserved to him intact except as regarded the liability of the superior, Wemyss, directly or by way of relief; (2) that the defenders, being bound by their lease to make good all damage to "feuars," were liable in damages to the feuars directly and without right of relief against Wemyss; (3) that the fact that a large number of feus had been granted and houses erected thereon did not affect the liability of the defenders to the pursuer, as a feuar, whatever might have been the liability of the defenders in a question with Wemyss himself; and therefore (4) that the pursuer was entitled to damages from the defenders. Dryburgh v. Fife Coal Co., Limited, July 20, 1905, p. 1083.

*Statutory Regulation—Mine—Siding—Private line of railway leading from mine to main line—Coal Mines Regulation Act*, 1887, *sec.* 75.

3. *Opinion* (*per* the Lord Justice-Clerk) that the whole of a private line leading from a mine to the main line of railway is not a siding adjacent to the mine within the meaning of sec. 75 of the Coal Mines Regulation Act, 1887. Anderson v. Lochgelly Iron and Coal Co., Limited, Dec. 6, 1904, p. 187.

4. A workman employed as a carter at a coal mine sustained fatal injuries while transferring timber to a colliery cart from a railway waggon at a railway siding belonging to and in the occupation of a railway company. The place where the accident occurred was about 400 yards from the pit, the distance being made up of (1) railway siding (123 yards), (2) the breadth of a public road, and (3) a private cart road leading to the pit (259 yards). *Held* that the workman was not injured in the course of employment "on or in or about" "a mine" within the meaning of the Workmen's Compensation Act, 1897, sec. 7. Coylton Coal Co. v. Davidson, June 6, 1905, p. 727.

*Statutory Regulation—Coal Mines Regulation Act*, 1887, *sec.* 49, *General Rule* 24, *and sec.* 51 *and Special Rules — Winding-Engineman—Responsibility of Manager—Person not qualified allowed to work engine for raising material only.*

5. By section 49, General Rule 24, of the Coal Mines Regulation Act, 1887, it is enacted that a man not under twenty-two years of age shall be appointed for working machinery which is employed in lowering and raising persons, and shall attend for that purpose during the whole time any person is below ground in the mine. By Special Rule in

MINES AND MINERALS—*Continued.*

force under section 51 of the Act it was provided that the engineman should not allow any person to interfere with the engine while being wrought. *Held* that these general and special rules applied when the engine was being used for raising and lowering material as well as when it was being used for raising and lowering persons; and that a colliery manager who had permitted a person under twenty-two years of age to raise material but not persons by means of the winding-engine when it was under the charge of a qualified winding-engineman, had failed to the best of his power to enforce the Special Rule, and was consequently guilty of a contravention of section 51 of the Act. Soutar v. Clark, Dec. 15, 1904 (J. C.), p. 1.

See *Master and Servant*, 5, 13—*Railway—Reparation*, 22.

MINOR AND PUPIL. *Custody—Legitimate Children—Petition for custody—Respondent obstructing execution of service.*

1. In a petition by a father for the custody of his infant child against his father-in-law, in whose possession the child was alleged to be, the latter deliberately obstructed and prevented service of the petition upon him. The Court *granted* the prayer of the petition without service having been effected. Busby v. Clark, Nov. 30, 1904, p. 162.

*Custody—Illegitimate Child—Right of mother or her nominee to custody—Petition for custody refused—Custody of Children Act*, 1891, *sections* 1 *and* 3.

2. *Circumstances* in which a petition by a mother for the custody of her illegitimate child, whom she had entrusted more than seven years before to the care of her cousin, *refused*, on the ground that it was not for the best interests of the child to deliver it to the petitioner or her nominee.

*Observations* by the Lord President upon sections 1 and 3 of the Custody of Children Act, 1891. Mitchell v. Wright, March 14, 1905, p. 568.

*Capacity to Contract—Lesion—Enorm Lesion—Compromise of Claims under Workmen's Compensation Act—Reduction on ground of Minority and Lesion—Inadequate Consideration—Effect of offer to reinstate workman in employment.*

3. A workman, nineteen years of age, who had his right hand permanently disabled by an accident in the course of his employment and would have been entitled to compensation under the Workmen's Compensation Act, entered, with consent of his father, his curator, into an agreement with his employers, H. & Sons, for compensation, under which he received £25 and an assurance that while the employers could not guarantee a permanent situation they would, so far as they could, give him employment. The workman was subsequently retained in the employment of H. & Sons for three years and six months, when he was dismissed. The workman thereupon raised an action of reduction of the agreement and of a discharge following thereon on the ground of minority and lesion. *Held* (1) that the money payment was not the only consideration for the discharge which the Court must take into account in deciding the question of lesion; and (2) that the offer of employment was a determining factor in effecting the compromise, and, looking to the circumstances of the parties at the time, was likely to be of such advantage to the minor as to make the compromise reasonable and not liable to reduction on the ground of lesion. Robertson v. S. Henderson & Sons, Limited, June 16, 1905, p. 776.

See *Parent and Child.*

MORA. *Delay in bringing Bill of Suspension—Sentence implemented.*

1. A suspension of a conviction and sentence upon a summary complaint was presented fourteen months after the conviction had been pro-

MORA—*Continued.*

nounced and the sentence implemented. The complainer explained that he had objected to the relevancy of the charge, and that the first six months of the delay was due to his having waited for the result of an appeal to the High Court in another case, raising the same question, which was not decided until five months after his conviction, and that the subsequent delay was due to the fault of the Police Court officials. The Court *refused* the bill. Kelly v. Smith, Dec. 16, 1904 (J. C.), p. 14.

*Discharge—Discharge on Compromise—Discharge conditional on truth, accuracy, and completeness of statement of assets—Written statement incomplete—Presumption of full disclosure—Fraud—Reduction.*

2. *The City of Glasgow Bank went into liquidation in* 1878, *under the supervision of the Court, and in* 1879, *Bain, one of the contributories, settled with the liquidators and was discharged by them of his liabilities to the bank on payment of a sum of money, being the value of his property as disclosed in a written state, which he solemnly declared to be true and correct to the best of his knowledge and belief. The state was submitted by him to the liquidators in answer to certain printed queries addressed to him by them, one of which was,—"What property do you possess, and what is its nature and value to the best of your knowledge and belief?" The discharge, which followed on a compromise approved by the Court, bore to be "on the basis, and on condition of the truth, accuracy, and completeness" of the said state. In* 1901 *the Assets Company, Limited, who were in right of the whole assets of the bank, raised against Bain's trustees an action of reduction of the interlocutor approving of the compromise and of the discharge by the liquidators, on the ground that two promissory-notes granted in Bain's favour by his sons previous to his discharge were not disclosed in the state of his affairs upon which the discharge proceeded. In an appeal* held (rev. *the judgment of Second Division*) (1) *that it was not a condition of the discharge that the contributory's disclosure of his assets should be in writing,* (2) *that as twenty years had elapsed since the date of the discharge the* onus *lay upon the pursuers of proving that Bain had not made a full disclosure of his assets either in writing or orally,* (3) *that the pursuers had failed to discharge this* onus, *and that the defenders were entitled to absolvitor.* Bain v. Assets Co., June 4, 1905 (H. L.), p. 104.

MOTOR CAR. See *Justiciary Cases*, 17.

MUNUS PUBLICUM. See *Public Officer.*

NEWSPAPER. See *Advertisement—Insurance*, 1—*Reparation*, 11, 12.

NOBILE OFFICIUM. *Public Official—Town-clerk—Burgh Register of Sasines—Authentication of Minutes—Omission of former Town-clerk to authenticate Minutes.*

1. Authority granted to the town-clerk of a royal burgh to authenticate and subscribe minutes in the minute-books of the Burgh Register of Sasines which had not been authenticated by his predecessors, and to record the petition and warrant in the Burgh Register of Sasines. Hepburn, Feb. 3, 1905, p. 484.

*Statutory Proceedings—Bankruptcy—Sequestration—Gazette Notice—Expenses—Bankruptcy (Scotland) Act*, 1856, *secs.* 48 *and* 67.

2. On 8th May 1905, on the petition of John Somerville & Company and others, creditors of Alexander Ross Mackenzie, Resolis, Mackenzie's estates were sequestrated by the Lord Ordinary on the Bills. The deliverance appointed a meeting of the creditors for the election of a trustee to be held on 18th May. The petitioners having failed to insert the statutory notice of this meeting in the *London Gazette* of

NOBILE OFFICIUM—*Continued.*

9th May, it became necessary to have another date fixed for the meeting. The petitioners having presented an application for this purpose the Court appointed the meeting to be held on 27th May, and remitted to the Sheriff to proceed, with a declaration that the expenses of the application and procedure connected therewith were not to be allowed against the estate. Somerville & Co., Limited, May 16, 1905, p. 651.

ONUS. See *Mora*, 2—*Patent*, 3—*Public House*, 4—*Ship*, 1, 2.

PARENT AND CHILD. *Illegitimate Children — Aliment — Twins — Arrangement between the parents.*

By arrangement between the father and the mother of illegitimate twins each parent took the custody of and supported one of the children. After this arrangement had been in force for about six weeks, the mother brought an action against the father for a yearly contribution towards the aliment of the child in her custody. *Held* that no ground being alleged for disturbing the agreement between the parents, the father was not liable *hoc statu* for the contribution claimed. Wilson v. M'Minnin, Feb. 25, 1905, p. 538.

See *Minor and Pupil*, 1, 2—*Poor*, 1, 2, 3.

PATENT. *Infringement—Master or Pioneer Patent—Mechanical Equivalent.*

1. B. patented an invention for the economy of steam in steam steering engines by means of a cut-off valve actuated by the control valve. The object of the invention was to prevent the loss of steam during the intervals in steering when the engine was at rest. Prior patentees had used the same and other similar mechanical devices for the economy of steam in engines of various kinds while at work, but the application of this device to an engine at rest was a novelty, and the result attained—the economy of steam while the engine was at rest—had never been achieved before. In a question with the holder of a patent of later date for a device, also designed to prevent the escape of steam from steam steering engines when the engine was at rest, but using to obtain that result a stop valve worked in unison with the control valve by a steam relay instead of a stop valve worked by the direct mechanical action of the control valve, *held* that B.'s patent was a master or pioneer patent, and that the new patent was an infringement. Brown v. John Hastie & Co., Limited, Nov. 18, 1904, p. 97.

*Infringement — Particulars of breach — Patents, Designs, and Trade-Marks Act*, 1883, *secs.* 29 *and* 107.

2. In an action for damages for infringement of two patents for the manufacture of electrical insulating sheets the pursuers averred that the defenders, in manufacturing micanite and extra flexible micanite cloth, "have used and employed the inventions protected by the said letters-patent, or one or other of them"; and they further averred that the defenders had purchased from other persons "micanite and extra flexible micanite cloth made in contravention and infringement of the said letters-patent, or one or other of them," and in particular had purchased "micanite made in contravention of said letters-patent," and "machines insulated in infringement of said letters-patent." *Held* (1) that sec. 29 of the Patents, Designs, and Trade-Marks Act, 1883, applied to Scotland, and that, as enacted by that section, particulars of the breach must be set forth, but that they fell to be set forth, in accordance with the forms of process of the Courts in Scotland, in the condescendence, and not in a separate statement; and (2) that the particulars of breach set forth were not sufficient, in respect that they did not specify the manner in which the infringement had taken place, nor which of the two protected processes of manufacture had been

PATENT—*Continued.*

infringed. Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited, July 11, 1905, p. 944.

*Infringement—Amended Patent—Damages for Infringement before and after Amendment—Patents, Designs, and Trade-Marks Act*, 1883, *sec.* 20.

3. In an action of damages in respect of amended patents for infringement both before and after amendment, *held* that, although it was not necessary that separate sums should be claimed as damages in the summons, yet, owing to the heavier *onus* laid upon the pursuer by sec. 20 of the Patents, Designs, and Trade-Marks Act, 1883, in proving actionable infringement for the period prior to the amendment, the amounts claimed for breach prior to and after the amendment must be distinguished in the condescendence. Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited, July 11, 1905, p. 944.

*Patent Agent—Liability—Negligence — Damages for loss of patent—Defence of invalidity of patent.*

4. In an action of damages against patent agents, the pursuer averred that the defenders had charge of two patents held by him, and that they had allowed them to lapse by failing to give him notice that certain payments were necessary to keep them in force. The defenders pleaded that there was no loss, as the patents were invalid by reason of anticipation by prior patents specified. *Held* that the defence was irrelevant. Alexander Turnbull & Co., Limited, v. Cruickshank & Fairweather, June 23, 1905, p. 791.

PAWNBROKER. See *Right in Security*, 4.

PAYMENT. *Bill of Exchange—Approved Acceptance.*

An "approved acceptance" in a mercantile contract means an acceptance to which no reasonable objection can be taken.

A contract of sale provided for payment by "approved acceptance." The seller on 18th September took the buyer's acceptance. On 25th September the seller stopped the goods *in transitu*. The buyer was sequestrated on 1st October. *Held* that the acceptance did not operate as payment so as to deprive the seller of his right to stop the goods *in transitu*. M'Dowall & Neilson's Trustee v. J. B. Snowball Co., Limited, Nov. 8, 1904, p. 35.

See *Local Government*.

PENALTY. See *Contract*, 7—*Justiciary Cases*, 19, 24, 25, 26.

PERSONAL EXCEPTION. *Constitution of Marriage—Consent de præsenti—Mental Reservation.*

1. A party to a mutual declaration of marriage will not be allowed to plead that he did not truly consent to the marriage if he induced the other party to believe that he did consent. Duran v. Duran, Nov. 18, 1904, p. 87.

*Liquidator of Company—Compromise with debtor—Refusal of Liquidator to apply for sanction of Court—Companies Act*, 1862, *sec.* 160.

2. In an action by a company, which was being wound up subject to the supervision of the Court, and its liquidator against an alleged debtor of the company, the defender pleaded that the liquidator having agreed to a compromise of the claim sued for, and having failed to apply to the Court for its sanction, was barred *personali exceptione* from insisting in the action. The Court *repelled* this plea upon the ground that there was *locus pœnitentiæ* until the sanction of the Court had been obtained, and that the liquidator was not bound to apply for the sanction of the Court or to recommend the compromise to it; and *per* Lord Kinnear also upon the ground that the liquidator could not be barred from insisting in an action brought on behalf of the company

PERSONAL EXCEPTION—*Continued.*

and its creditors by an exception personal to himself. Reid & Laidlaw, Limited, v. Reid, Jan. 26, 1905, p. 457.

*Waiver—Breach of Contract—Payment of price without reservation of claim of damages.*

3. Circumstances *in which* held (aff. *judgment of Second Division*) *that payment, without reservation, of the last instalment of the price of a ship, and acceptance of delivery by the purchaser after the date stipulated for delivery, did not import a waiver by the purchaser of his right under a clause in the contract entitling him to a specified sum as damages for late delivery.* Clydebank Engineering and Shipbuilding Co., Limited, v. Don Jose Ramos Yzquierdo y Castaneda, Nov. 17, 1904 (H. L.), p. 77.

PLEDGE. See *Right in Security*, 4, 5.

POLICE. *Building Regulations—Ruinous Buildings—Owner unknown—Sale by order of Sheriff—Burgh Police (Scotland) Act*, 1892, *secs.* 196, 197, 200.

1. Ruinous buildings sold under the Burgh Police Act, 1892, secs. 196, 197, and 200, were situate on ground let on a building lease for 999 years. After the purchaser had completed his title by recording the Sheriff's decree and had disponed the subjects, an action was raised against the disponee for payment of rent due under the long lease, the pursuer contending that the purchaser had acquired the property *tantum et tale* as it stood in the lessee. The defender founded on the recorded decree as giving him an unqualified statutory title to the land. The Court *sustained* the defence.

*Opinions per* Lord M'Laren and Lord Kinnear that the lessor's remedy was to claim against the deposited purchase price. Young's Trustees v. Grainger, Dec. 8, 1904, p. 232.

*Building Regulations—Street—Statutory Remedy—Declarator and reduction pending statutory appeal—Competency—Glasgow Building Regulations Act*, 1900, *sec.* 9 (2).

2. The Glasgow Building Regulations Act, 1900, by sec. 9 (2), directs that a Register of Streets shall be prepared, in which, *inter alia*, the width of streets may be entered, and that any proprietor aggrieved by any entry in the register may appeal to the Sheriff, whose decision shall be final. A proprietor of subjects fronting on various streets in Glasgow brought an action in the Court of Session for declarator that the width of streets entered in the register must be the actual width, and that the width entered in certain cases opposite his properties was not the actual width, with conclusions for deletion of the entries and for interdict, and reduction. On the same date he appealed to the Sheriff against these entries. *Held* that the action, although not incompetent, was premature, and fell to be dismissed. Caledonian Railway Co. v. Glasgow Corporation, July 19, 1905, p. 1020.

*Building Regulations—Street—Width of Street—Glasgow Building Regulations Act*, 1900, *sec.* 20.

3. In an application for a warrant to erect buildings, *held* that in fixing the width of a street under the provisions of sec. 20 of the Glasgow Building Regulations Act, 1900, the Master of Works is entitled and bound to apply his mind to the whole circumstances of the case, and to fix what he considers the proper width, even though the result of his determination is to dedicate to the public for street purposes ground which is the private property of the person proposing to build. M'Dougall v. Nisbet, Nov. 17, 1904, p. 55.

But see 5 and 6 *infra*.

*Building Regulations—Street—Width of Street—Formation of Pavement*

POLICE—*Continued.*

*—Glasgow Police Act*, 1866, *sec.* 366—*Glasgow Building Regulations Act*, 1900, *sec.* 20.

4. The proprietor of ground adjoining a public street in Glasgow obtained a lining in the Dean of Guild Court for certain buildings upon a plan which shewed that they were to be erected at a distance of 30 feet from the centre of the street in compliance with section 366 of the Glasgow Police Act, 1866. At the time the lining was granted the actual width of one-half of the street at the place in question was 20 feet, and no steps had been taken to fix the width of the street in terms of section 20 of the Glasgow Building Regulations Act, 1900. After the buildings had been erected a statutory notice at the instance of the Master of Works was served upon the proprietor, calling upon him to lay a foot-pavement on the space of 10 feet intervening between the buildings and the original boundary of the street, and in the course of the proceedings to enforce the notice in the Dean of Guild Court, the width of one-half of the street was fixed at 30 feet under the provisions of section 20 of the Act of 1900. *Held* (1) that in view of the provisions of section 20 of the Act of 1900 it must be presumed that the lining was granted on condition that one-half of the street, measuring from the centre of the street towards the buildings, should be cleared of all structures and dedicated to the public for street purposes, and (2) that the proprietor was bound to form the foot-pavement in front of the buildings. Neilson v. R. B. Wilson & Co., Nov. 17, 1904, p. 60.

But see 5 and 6 *infra.*

*Building Regulations—Street—Width of Street—Glasgow Building Regulations Act*, 1900, *secs.* 4, 9 (2), *and* 20.

5. *Opinion* (*per cur.*) that in preparing the Register of Streets provided for by sec. 9 (2) of the Glasgow Building Regulations Act, 1900, "the width" of streets when entered therein must be the actual width of the street at the various points in its course, and not an ideal width fixed with a view to a public improvement. Caledonian Railway Co. v. Glasgow Corporation, July 19, 1905, p. 1020.

*Building Regulations—Street—Width of Street—Burgh—Glasgow Building Regulations Act*, 1900, *secs.* 4, 9 (2), 18, 20, *and* 21.

6. *Held* that, under secs. 20 and 21 of the Glasgow Building Regulations Act, 1900, the Master of Works and the Dean of Guild on appeal from him are not entitled in fixing the width of an existing street to fix such width at anything else than the actual existing width of the street. Hamilton v. Nisbet, July 19, 1905, p. 1034.

*Building Regulations—Street—Improving Line of Street—Resolution of Commissioners allowing Buildings to be set forward so as to close up existing Public Street—Effect of General Improvement Scheme—Burgh Police (Scotland) Act*, 1892, *sec.* 157.

7. *Held* that it was competent for Burgh Commissioners under sec. 157 of the Burgh Police Act, 1892, to allow a building to be set forward with the effect of closing one end of a public lane, the alteration being part of an improvement scheme which provided another entrance for the lane. Parish Council of Rutherglen v. Magistrates of Rutherglen, June 23, 1905, p. 829.

See *Burgh,—River, Loch, Sea*, 1, 3, 4.

POOR. *Pauperisation—Maintenance by School Board of child in Blind Asylum—Education of Blind and Deaf-Mute Children (Scotland) Act*, 1890.

1. The maintenance of a child in a blind asylum by a school board, under the Education of Blind and Deaf-Mute Children (Scotland) Act, 1890, has not the effect of pauperising the child. Greenock Parish Council v. Govan Combination Parish Council, June 29, 1905, p. 884.

POOR—*Continued.*

*Settlement—Derivative Settlement—Illegitimate Minor—Mother with Derivative Settlement.*

2. Andrew M., an illegitimate child, was born in the parish of Govan. A year after the child's birth the mother married, and through her husband acquired a settlement in the parish of Greenock. When the child was eight years old the mother died. Down to the date of the mother's death the child had lived in the parish of Greenock with his mother and her husband, but after her death the child ceased to live with the husband. Two years after attaining puberty the child became chargeable. In a question between Greenock and Govan, *held* that the mother having died while the child was still in pupilarity, and the child not having become chargeable until after attaining puberty, the settlement in Greenock possessed by the mother at her death, being a settlement acquired by her through marriage, and not by her own residence, did not enure to the child when he attained puberty; and consequently that the child's settlement was in Govan, the parish of his birth. Greenock Parish Council v. Govan Combination Parish Council, June 29, 1905, p. 884.

*Settlement—Pauper Lunatic not forisfamiliated—Residential Settlement of Father—Relief given to son while living with father—Admission of Liability—Lunacy (Scotland) Act*, 1857, *sec.* 75.

3. In November 1876 a boy, aged fourteen, of weak intellect, and living with his father, received parochial relief from the parish of Montrose, in which his father was then residing. At that date the father had not acquired a residential settlement in Montrose, and, in March 1877, Brechin, the parish of the father's birth, admitted liability for the relief given to the son. In May 1877 the father had acquired a residential settlement in Montrose, unless he was to be regarded as a pauper in respect of the relief given to his son in 1876. The son was never forisfamiliated or able to maintain himself. In September 1891 he was placed in an asylum as a pauper lunatic by order of the Sheriff, and was subsequently supported there by the parish of Brechin. On 6th October 1897 Brechin gave Montrose the statutory notice claiming repayment of the charges incurred on behalf of the pauper. In an action by Brechin against Montrose for repayment of its disbursements since 6th October 1896, one year before the statutory notice, *held* that Montrose was liable, on the grounds (1) that the son followed the settlement of his father; (2) that the father was not made a pauper by the relief given to his son in 1876, and had acquired a residential settlement in Montrose in May 1877; and (3) that the admission of liability properly made by Brechin in March 1877 was not binding after the father had acquired a residential settlement in Montrose. Brechin Parish Council v. Montrose Parish Council, Dec. 6, 1904, p. 207.

*Poor-Rates—Preference—Company—Poor-Law (Scotland) Act*, 1845, *sec.* 88.

4. In a note by the liquidators of a company for authority, *inter alia*, to take credit for their remuneration, as fixed by the Court, and to pay the law expenses, and to pay the preferable claims as set forth in a schedule, among which was included a claim for poor-rates due by the Company, answers were lodged by a collector of poor-rates, who maintained that the liquidators should be ordained to pay the claim for poor-rates preferably to the liquidators' remuneration and their law expenses. The liquidators stated that their accounts shewed a balance in their hands more than sufficient to pay in full all the preferable claims, after payment of the liquidators' remuneration and law expenses, and that the respondent had been informed of this before he lodged answers. *Held* that, in respect the liquidators had admitted the claim

POOR—*Continued.*

for poor-rates to a preferential ranking and tendered payment thereof in full, there was no proper question presented to the Court for adjudication on the answers, and note *remitted* to the Lord Ordinary to proceed. Liquidators of Scottish Drug Depot, Limited, v. Fraser, May 16, 1905, p. 646.

*Poor-Rates—Company—Preferential Payments in Bankruptcy Act*, 1888, *sec.* 1, (1) (3).

5. *Opinion, per* Lord Low, Ordinary, (1) that the provisions of the Preferential Payments in Bankruptcy Act, 1888, are applicable to Scotland, in so far as they deal with the case of companies which are being wound up under the Companies Acts, and (2) that under section 1, subsections (1) and (3), of that Act, poor-rates due by a company at the commencement of the winding-up thereof do not fall to be paid preferably to the liquidator's fees and the law expenses incurred by him in the liquidation. Liquidators of Scottish Drug Depot, Limited, v. Fraser, May 16, 1905, p. 646.

POST OFFICE. See *Reparation*, 7.

POWERS. See *Succession*, 10, 17—*Trust*, 1, 2, 6.

PRESCRIPTION. See *Limitation of Action—Property*, 5.

PRESUMPTION. See *Mora*, 2—*Patent*, 3—*Public-House*, 4—*Ship*, 1, 2.

PROCESS. *Citation—Petition for custody of child—Respondent obstructing execution of service.*

1. In a petition by a father for the custody of his infant child against his father-in-law, in whose possession the child was alleged to be, the latter deliberately obstructed and prevented service of the petition upon him. The Court *granted* the prayer of the petition without service having been effected. Busby v. Clark, Nov. 30, 1904, p. 162.

*Summons—Instance—Several Pursuers—Competency—Community of Interest.*

2. An action was raised at the instance of four pursuers concluding against one defender for separate sums of damages, on the allegation that the pursuers had been induced to purchase shares in a mining syndicate by false and fraudulent statements made to each of them by the defender at different times and different places, the statements in each case being of a similar nature. *Held* that the action was incompetent, on the ground that the pursuers had no real and true community of interest. Killin v. Weir, Feb. 22, 1905, p. 526.

*Summons—Conclusions—Competency—Action against wife and husband concluding for one sum of damages for separate slanders.*

3. In an action of damages for slander at the instance of a female servant against her mistress and the husband of the mistress, the pursuer concluded for decree against the defenders "conjunctly and severally, or otherwise severally or according to their respective liabilities as the same may be determined, to make payment to the pursuer of the sum of £400 sterling." The pursuer averred a slander uttered in January 1904 by the wife when the husband was not present, and further averred that in February 1904 the husband "received a letter from the pursuer's agent specially stating the charges made by his wife. In his reply this defender repeated the slanderous statements" of his wife. "By this and subsequent letters he adopted responsibility for the statements" of his wife. *Held* that the action was incompetent, in respect that it concluded for a lump sum as damages for separate slanders, one uttered by the wife and the other by the husband, without any averment of conspiracy or complicity. Hook v. M'Callum, Feb. 25, 1905, p. 528.

PROCESS—*Continued.*

*Summons—Condescendence—Action for infringement of patent—Particulars of Breach—Patents, Designs, and Trade-Marks Act*, 1883, *secs.* 29 *and* 107.

4. In an action for damages for infringement of two patents for the manufacture of electrical insulating sheets the pursuers averred that the defenders, in manufacturing micanite and extra flexible micanite cloth, "have used and employed the inventions protected by the said letters-patent, or one or other of them"; and they further averred that the defenders had purchased from other persons "micanite and extra flexible micanite cloth made in contravention and infringement of the said letters-patent, or one or other of them," and in particular, had purchased "micanite made in contravention of said letters-patent," and "machines insulated in infringement of said letters-patent." *Held* (1) that sec. 29 of the Patents, Designs, and Trade-Marks Act, 1883, applied to Scotland, and that in accordance with that section particulars of the breach must be set forth, but that they fell to be set forth, in accordance with the forms of process of the Courts in Scotland, in the condescendence, and not in a separate statement; and (2) that the particulars of breach set forth were not sufficient, in respect that they did not specify the manner in which the infringement had taken place, nor which of the two protected processes of manufacture had been infringed. Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited, July 11, 1905, p. 944.

*Summons—Conclusions—Condescendence—Action for Infringement of Patent—Damages for Infringement before and after Amendment—Patents, Designs, and Trade-Marks Act*, 1883, *sec.* 20.

5. In an action of damages in respect of amended patents for infringement both before and after amendment, *held* that, although it was not necessary that separate sums should be claimed as damages in the summons, yet, owing to the heavier *onus* laid upon the pursuer by sec. 20 of the Patents, Designs, and Trade-Marks Act, 1883, in proving actionable infringement for the period prior to the amendment, the amounts claimed for breach prior to and after the amendment must be distinguished in the condescendence. Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited, July 11, 1905, p. 944.

*Summons—Amendment—Competency—Summons laid on Bill of Exchange—Alternative conclusion added by amendment.*

6. *Held* that it was competent to amend a summons concluding for payment of the sum due under a bill of exchange by inserting an alternative conclusion for payment of the sum for which the bill was granted, and adding to the condescendence a statement of the circumstances in which the bill was granted. Hope v. Derwent Rolling Mills Co., Limited, June 27, 1905, p. 837.

*Summons—Amendment—Expenses—Court of Session Act*, 1868, *sec.* 29.

7. In an action for damages raised by the Clippens Oil Company, Limited, against the Edinburgh and District Water Trustees a proof was led and judgment given in favour of the pursuers. Reclaiming notes having been lodged by both parties, the defenders craved leave to amend their record by adding a plea in law, founded on the Public Authorities Protection Act, 1893, which, if sustained, would have rendered the action incompetent. The pursuers objected to the amendment being allowed except on condition of payment of expenses since the closing of the record. The Court *allowed* the amendment, reserving all questions of expenses. Clippens Oil Co., Limited, v. Edinburgh and District Water Trustees, July 6, 1905, p. 914.

*Mandatary—Multiplepoinding.*

8. In a multiplepoinding which had been brought in the Sheriff Court

to determine a question under a codicil to a will, and in which the holder of the fund *in medio* had been exonered and discharged, two claimants residing in Australia, who had been called as defenders, appealed against a judgment of the Sheriff repelling their claim. The respondents (successful claimants) moved that the appellants should be ordained to sist a mandatary. The Court *refused* the motion. Elmslie v. Pauline, March 4, 1905, p. 541.

*Caution for Expenses—Bankruptcy—Petition for Discharge—Appeal.*

9. A bankrupt, whose petition for discharge had been refused by the Sheriff, which refusal was affirmed on appeal, presented a year later another application for discharge. This application having been refused by the Sheriff, the bankrupt lodged an appeal. The respondents moved the Court to ordain the appellant to find caution. The Court *refused* the motion. Melrose-Drover, Limited, v. Heddle, June 28, 1905, p. 852.

*Preliminary Pleas—"All parties not called"—Interdict between crofters on same estate as to taking seaware—Landlord not called—Crofters Holdings (Scotland) Act*, 1886.

10. In 1903 crofters, who were in the occupation of their crofts at the passing of the Crofters Holdings (Scotland) Act, 1886, and whose rents were fixed by the Commissioners under the Act in 1889, brought an action against certain neighbouring crofters who held of the same landlord, for interdict against the defenders infringing rights which the pursuers averred that they possessed, as pertinents of their crofts, of taking seaware from the seashore (belonging to the common landlord) in the neighbourhood of the crofts. The defenders' crofts were not in existence at the passing of the Crofters Holdings Act, 1886, but were formed out of two farms under the powers of the Congested Districts (Scotland) Act, 1897. The pursuers averred that they were entitled to take seaware to the extent to which they had been in use to take it at the date when their rents were fixed; and that the defenders were not entitled to take it to any greater extent than the two tenant farmers had been in use to take it at that date. They averred that the defenders were now taking more than the farmers had been in use to take. The pursuers did not produce any written contract, estate regulation, or finding of the Crofter Commission defining the extent of seaware to which they were entitled. The defenders stated that they had the authority of the landlord for taking seaware as they had taken it, and pleaded "All parties not called," in respect that the landlord had not been called as a defender. The Court *sustained* the plea, and *dismissed* the action. Mackinnon v. Macdonald, March 16, 1905, p. 589.

*Reclaiming—Leave to reclaim where earlier reclaiming note refused as incompetent—Court of Session Act*, 1808, *sec.* 16.

11. Defenders, against whom decree had been pronounced in the Outer-House, presented a reclaiming note, to which was appended a copy of the closed record in a previous action between the same parties, instead of the closed record in the action. Copies of the wrong record were also boxed with the boxing copies of the reclaiming note. The reclaiming note was refused as incompetent, in respect of the failure to box copies of the closed record. The defenders then presented a minute to the Lord Ordinary, craving leave to reclaim under sec. 16 of the Administration of Justice and Appeals Act, 1808. The defenders stated that the failure to box copies of the record had arisen through the mistake or inadvertency of the pursuer's printers in supplying copies of the wrong record. The Lord Ordinary *granted* leave to reclaim. Tough v. Macdonald, Dec. 21, 1904, p. 324.

PROCESS—*Continued.*

*Decree—Decree ad factum præstandum—Enforcement of Decree to deliver document—Warrant to open lockfast places.*

12. The curator bonis of an incapax obtained a decree in absence against the wife of his ward, ordaining her to deliver to the curator a certain policy of insurance on his ward's life. A charge upon this decree having expired without result, the curator, being in a difficulty, presented a note to the Junior Lord Ordinary, in which, on the narrative that he believed that the execution of a warrant to imprison would not be effectual to enforce production, he craved for a warrant to messengers-at-arms to search for and recover the document, and if necessary, to open all shut and lockfast places. The Junior Lord Ordinary having reported the matter to the Inner-House, the Court *granted* the warrant asked for. Ferguson's Curator Bonis, July 4, 1905, p. 898.

*Proof—Diligence and Recovery of Writs—Hereditary Office.*

13. In an action by Lord Lauderdale against Scrymgeour Wedderburn for declarator that the pursuer had the sole right to the office of Hereditary Royal Standard-Bearer for Scotland, the defender stated that he was heir-male of a Scrymgeour to whom the office had been confirmed and of new granted in 1600, and heir-male of the original grantee of the office, to whom it was said to have been granted between 1057 and 1124. Proof having been allowed, the defender, with the view of ascertaining and proving his pedigree, moved for a diligence for recovery of documents under a specification which did not specify any particular document, and in effect embraced all documents relating to the family of Scrymgeour now in the possession of Lord Lauderdale or others on his behalf, provided that they were not titles of any lands now possessed by him. The Court *granted* the diligence. Earl of Lauderdale v. Scrymgeour Wedderburn, July 20, 1905, p. 1045.

*Proof—Proof on Commission—Deposition of Witnesses to lie in retentis—Proof and oath de calumnia taken on commission.*

14. A naval artificer-engineer, who was the pursuer in an action of divorce, presented a petition in which he stated that the summons in the action had been signeted and served edictally, but could not be called in Court until after the date when the ship upon which he and another material witness were serving was under orders to proceed to sea, and moved the Court to appoint a commissioner to take his oath *de calumnia* and the evidence of himself and the other material witness, the depositions to lie *in retentis* subject to the orders of the Court. The Court *granted* the prayer of the petition, reserving to the defender all objections competent to her to the competency of the petition. Pringle, Feb. 21, 1905, p. 525.

*Proof—Proof on Commission—Jury Trial—Examination of Pursuer on Commission—Postponement of Trial.*

15. An issue for the trial by jury of an action of damages for slander was adjusted on 30th October 1903. The trial of the action was postponed in July 1904, owing to the inability of the pursuer from ill-health to attend at the trial for examination as a witness. The case was again set down for trial at the Spring Sittings in 1905. The pursuer moved for a commission to take the pursuer's evidence, and produced a medical certificate which stated that the pursuer was not in a fit state of health to attend the trial, that it was impossible to state when he would be able to do so, but that there was little prospect of his being able to do so within the next twelve months. The defender asked that the trial should be again postponed. The Court *refused* to postpone the trial again, and *granted* the pursuer's motion. Anderson v. Morrison, March 11, 1905, p. 561.

*Proof—Proof on Commission—Evidence to be laid before a foreign Court*

PROCESS—*Continued.*

*—Appointment of Commissioner—Foreign Tribunals Evidence Act*, 1856, *sec.* 1.

16. *Held* that the Foreign Tribunals Evidence Act, 1856, in authorising a Court to pronounce an order for the examination of witnesses on oath at the request of a foreign tribunal does not authorise an order for their examination before a Court, but only before a Commissioner. Baron de Bildt, July 4, 1905, p. 899.

*Proof—Jury Trial—Proof or Jury Trial—Discretion of Lord Ordinary —Action of damages for personal injuries—Special Cause—Action transmitted under the Employers Liability Act*, 1880, *sec.* 6 (3)—*Evidence (Scotland) Act*, 1866, *sec.* 4.

17. The Lord Ordinary in an action under the Employers Liability Act, 1880, which had been transmitted to the Court of Session under section 6 (3) of that Act, sent the case to proof instead of to a jury, upon the ground that the averments were of doubtful relevancy, and that there might be difficulty in distinguishing the averments which were relevant from those which were not. *Held* that the Lord Ordinary had a discretion as to what was special cause for not sending a case of this kind to a jury, that the Court ought not readily to interfere with what he had done in the exercise of it, and that there was no ground for doing so in this case.

The Lord Ordinary has the same discretion as regards the mode of proof in an action transmitted under section 6 (3) of the Employers Liability Act, 1880, as in an action originated in the Court of Session. Vallery v. M'Alpine & Sons, May 16, 1905, p. 640.

*Proof—Jury Trial—Proof or Jury Trial—Appeal for Jury Trial—Remit to Sheriff—Judicature Act, sec.* 40—*Court of Session Act*, 1868, *sec.* 73.

18. In an action of damages at common law for £500 for personal injuries in the Sheriff Court, the pursuer appealed for jury trial. The Court *refused* a motion by the defender to remit the case to the Sheriff Court for proof on the ground that there was nothing to shew that the pursuer had not a genuine claim for an amount exceeding £40. Duffy v. Young, Nov. 3, 1904, p. 30.

19. *Per curiam* (after consulting Judges of the Second Division)—The principles to be deduced from the authorities are clear, and may be summarised thus: (1) When a case is appealed for jury trial the Court is not bound to grant a jury trial, but may either (*a*) decide the case on any legal ground which will allow the case to be disposed of without inquiry, or (*b*) order inquiry by some other method than jury trial, if it considers jury trial unsuitable. Such inquiry may be either by proof before a Judge in the Court of Session, or by proof before the Sheriff: and in deciding between the two methods the Court will keep in view, in relation to the nature of the case, that the one course will, and the other will not, allow of ultimate appeal to the House of Lords on the facts. (2) In deciding whether a case is or is not suitable for jury trial it will apply the same criterion as it does in cases raised before itself. That is to say, it will consider whether the action is of the class specially appropriated by statute to jury trial, and if so, whether there is any special cause for not so trying it. And further, as to amount, it will be guided by the standard fixed by the Legislature, viz., £40, so that unless the action on the face of it discloses a claim which, in the opinion of the Court, could not reasonably be entitled to a verdict amounting to more than £40, it will not refuse a jury trial to an otherwise appropriate case. Sharples v. Yuill & Co., May 23, 1905, p. 657.

20. In an action of damages under the Employers Liability Act, 1880, the pursuer averred that while engaged in the employment of the defenders

PROCESS—*Continued.*

—a firm of stevedores—in discharging iron ore from a ship, a piece of ore weighing seven or eight pounds fell and caused injuries to his wrist which necessitated his going to the infirmary, "where the wound was stitched. Pursuer will be unable to resume work for a considerable time to come." He further averred that his average wages were 30s. a week. The action was raised about a week, and the record was closed ten weeks, after the date of the injury. The Sheriff having allowed a proof, the pursuer appealed for jury trial. The Court, being of opinion that the pursuer's averments disclosed a case which could not reasonably entitle him to a verdict for £40 damages, *refused* the appeal, and *remitted* to the Sheriff to proceed with the proof. Dawson v. Stewart & Shaw, June 8, 1905, p. 769.

*Proof—Jury Trial—Proof or Jury Trial—Appeal for Jury Trial—Remit to Sheriff—Judicature Act, sec.* 40—*Court of Session Act*, 1868, *sec.* 73—*Employers Liability Act*, 1880, *secs.* 4 *and* 7—*Notice of Injury.*

21. *Per cur.* (after consultation with the Judges of the Second Division)—When a question of want of notice under the Employers Liability Act is raised, it should be dealt with by the Sheriff as a prejudicial plea, and a proof should be allowed on this prejudicial plea before a proof is allowed on the merits. If, on proof being allowed on the prejudicial plea, one of the parties appeals to the Court of Session for jury trial, the case will be sent back to the Sheriff to have this prejudicial plea disposed of. Duncan v. Fife Coal Co., Limited, July 15, 1905, p. 958.

*Proof—Jury Trial—Appeal for Jury Trial—Action under Employers Liability Act—Competency—Judicature Act, sec.* 40—*Court of Session Act*, 1868, *sec.* 73—*Employers Liability Act*, 1880, *sec.* 6 (1) *and* (3).

22. *Held*, following *Paton* v. *Niddrie and Benhar Coal Company, Limited*, Jan. 14, 1885, 12 R. 538, that it is competent in an action under the Employers Liability Act, 1880, to appeal for jury trial under section 40 of the Judicature Act and section 73 of the Court of Session Act, 1868. Kelly v. James Fraser & Co., March 10, 1905, p. 559.

*Proof—Jury Trial—Slander—Written Slander—Production of Writing.*

23. It is not necessary as a condition of an issue being allowed in an action for written slander that the writing complained of should be produced by the pursuer. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

*Proof—Jury Trial—Motion for new trial—Third Trial allowed.*

24. The pursuer in an action of damages for the death of her husband, who had been killed while checking waggons on railway sidings, obtained a verdict, which was set aside on the ground that contributory negligence on the part of the deceased had been proved. At the new trial the pursuer, upon the same evidence, again obtained a verdict. The Court *set aside* the second verdict, and *granted* a third trial. Watson v. North British Railway Co., Dec. 6, 1904, p. 220.

*Particular Actions—Declarator and reduction pending statutory appeal—Competency—Statutory Remedy—Glasgow Building Regulations Act*, 1900, *sec.* 9 (2).

25. The Glasgow Building Regulations Act, 1900, by sec. 9 (2), directs that a Register of Streets shall be prepared, in which, *inter alia*, the width of streets may be entered, and that any proprietor aggrieved by any entry in the register may appeal to the Sheriff, whose decision shall be final. A proprietor of subjects fronting on various streets in Glasgow brought an action in the Court of Session for declarator that the width of streets entered in the register must be the actual width, and that the width entered in certain cases opposite his properties was not the actual width, with conclusions for deletion of the entries and for interdict, and reduction. On the same date he appealed to the Sheriff against these entries. *Held* that the action, although not in-

PROCESS—*Continued.*

competent, was premature, and fell to be dismissed. Caledonian Railway Co. v. Glasgow Corporation, July 19, 1905, p. 1020.

*Particular Actions—Multiplepoinding—Competency—Double Distress.*

26. Where a testator left legacies to various persons, and a question arose as to the construction of one of these bequests, the trustees, before making payment of certain of the legacies as to which there was no dispute, raised an action of multiplepoinding for distribution of the balance in their hands and for exoneration. *Held* that the action was incompetent in so far as it submitted for adjudication the legacies other than the one in dispute. MacGillivray's Trustees v. Dallas, June 6, 1905, p. 733.

*Particular Actions—Proving the Tenor—Casus amissionis—Adminicle—Mortis Causa Disposition and Settlement.*

27. An action was brought in 1903 to prove the tenor of a *mortis causa* disposition and settlement, dated 13th November 1848. It was proved that the deceased, on 13th November 1848, the day of his death, had executed a settlement, which had been prepared by a law-agent, and was brought by him for signature, and that the deceased's estate had been administered in accordance with the terms of the deed libelled. No witness was adduced who had ever seen the original of the deed. The adminicle produced bore to be a copy of a *mortis causa* disposition and settlement signed by the deceased and his wife before witnesses on 13th November 1848, with testing-clause and signatures. The copy was in the handwriting of a clerk in the employment of the law-agent who had prepared the deed, and it was initialed on the back as compared. It was proved that upon the death of the law-agent in 1872 such of his papers as had not been claimed by clients were removed to the chambers of another law-agent, who had himself thereafter had more than one removal, and that upon search being made in 1903 the original deed could not be found. The action was defended by the deceased's heir-at-law, who had acquiesced in the administration till 1903, when he discovered that no will could be found. He contended that the settlement must be held to have been destroyed by the granter *animo revocandi*. He did not question the *bona fides* of the administrators. *Held* that the pursuers had proved that the testator had left a settlement in the terms libelled, and that a sufficient *casus amissionis* had been proved. Young v. Anderson, Nov. 23, 1904, p. 128.

*Particular Actions—Reduction—Partial Reduction and Declarator—Competency—Sanction of Local Authority subject to conditions—Claim to reduce sanction quoad condition only—Public Health (Scotland) Act, 1897, sec. 32.*

28. A firm of glue manufacturers who proposed to start the business of glue making, in a district where that business had been duly declared to be an offensive business under section 32 of the Public Health (Scotland) Act, 1897, obtained the sanction of the Local Authority under that section, but subject to the condition that the products of the business should be manufactured "from hide clippings *only*." The firm thereupon brought an action, in which they maintained that the insertion of this condition in the sanction was *ultra vires* of the Local Authority, and concluded for reduction of the order granting the sanction in so far as it imposed the condition, and for declarator that the sanction should be valid and effectual to the pursuers as if the condition had not been inserted. *Held* that, whether the insertion of the condition was or was not *ultra vires* of the Local Authority, the action was incompetent, the condition being an inseparable part of the sanction as granted by the authority which alone had power to grant it. John Darney & Son v. Calder District Committee, Dec. 9, 1904, p. 239.

PROCESS—*Continued.*

*Particular Actions—Special Case—Two distinct litigations combined in one special case.*

29. A special case was presented for the determination of questions between the first parties as superiors and two different vassals, the second and third parties, who held separate and distinct estates under different titles. *Observed* that this method of combining two distinct litigations in one special case was irregular, in respect that each of the vassals was made a party to statements of fact affecting the other with which he had no concern, and his concurrence in which was nevertheless made the basis of a judgment *inter alios*. Church of Scotland v. Watson, Jan. 14, 1905, p. 395.

*Particular Actions—Suspension and Interdict—Competency—Company—Liquidation—Interdict of Liquidator from acting.*

30. *Question* whether a note of suspension and interdict to have the respondent interdicted from acting as liquidator of a company, under an *ex facie* valid special resolution of the company for voluntary liquidation, and the appointment of the respondent as liquidator, was competent. Howling's Trustees v. Smith, Jan. 14, 1905, p. 390.

*Particular Actions—Stated Case—Non-compliance with regulations for obtaining—Workmen's Compensation Act*, 1897, *Second Schedule, sec.* 14 (*c*)—*A. S., 3d June* 1898, *sec.* 9 (*a*).

31. On the last day allowed for taking an appeal against an award by a Sheriff dismissing a claim for compensation under the Workmen's Compensation Act, 1897, the claimant's Edinburgh agent telegraphed to the local agent to apply for a case for appeal. The local agent being out of town, his clerk obtained the services of another agent, who went to the Sheriff Court office and wrote on the interlocutor sheet "The pursuer appeals against the foregoing judgment, and requests a case to be stated." He did not set forth any question of law, and he did not make any deposit of £1, as required by sec. 9 (*a*) of the Act of Sederunt, 3d June 1898. He was informed by the clerk in attendance at the Sheriff Court office that a deposit was not necessary. The Sheriff stated a case. At the hearing on the appeal the deposit of £1 had not been made. The Court, on the objection of the respondents, *dismissed* the appeal in respect of the appellant's failure to comply with the regulations enacted by sec. 9 (*a*) of the Act of Sederunt, 3d June 1898. Murphy v. Blair & White, June 28, 1905, p. 863.

*Particular Actions—Stated Case—Transmission of Process—Workmen's Compensation Act*, 1897—*A. S., 3d June* 1898, *sec.* 9 (*f*).

32. In a stated case under the Workmen's Compensation Act, 1897, one of the parties moved for an order on the Sheriff-clerk to transmit the process, on the ground that there was a note appended by the Sheriff-substitute to his interlocutor which it was advisable that the Court should have before them when the stated case came up for decision. The Court *refused* the motion. Singer Manufacturing Co. v. Clelland, May 20, 1905, p. 654.

*Appeal—Printing and Boxing—Bankruptcy—Petition for Discharge.*

33. A bankrupt, whose petition for discharge had been refused by the Sheriff, which refusal was affirmed on appeal, presented a year later another application for discharge. This application having been refused by the Sheriff, the bankrupt lodged an appeal, but for more than two months thereafter did not print or box to the Court the note of appeal and other documents relative thereto. Thereupon the respondents in the appeal presented a note craving the Court to ordain the appellant to print and box the note of appeal and relative documents. The Court *ordained* the appellant to print and box within ten days, under

PROCESS—*Continued.*
certification that, if he failed to do so, the appeal would be dismissed. Melrose-Drover, Limited, v. Heddle, June 28, 1905, p. 852.
See *Appeal—Arrestment—Expenses—Interdict—Sheriff.*

PROOF. *Res ipsa loquitur—Misrepresentation—Sham Antiques.*
1. A wholesale dealer sold certain articles of jewellery, which he had got made to resemble antiques, to a retail dealer. *Opinion per* Lord Kyllachy, in an action of rescission of the sale on the ground of misrepresentation, that the offer of articles appearing to be antiques was in itself a misrepresentation, on the principle of *res ipsa loquitur*, and that the seller was not entitled to leave the articles to speak for themselves, but was bound to displace the inferences which to his knowledge their appearance was calculated to suggest. Patterson v. Landsberg & Son, May 24, 1905, p. 675.

*Reference to oath.*
2. Refusal to hear supplementary statement by deponent on oath. Paterson v. Cowie's Executor, July 12, 1905 (J. C.), p. 68.
See *Bills of Exchange*, 2—*Justiciary Cases*, 11, 15, 16, 21—*Loan—Process*, 13 *to* 24, 27.

PROPERTY. *Common Property—Trees near boundary of adjacent properties.*
1. *Opinion* (*per* Lord Stormonth-Darling, Ordinary) that trees whose stems are wholly on one side of the boundary of two adjacent properties, but which stand so near the boundary as to extend their roots into the other side of it, are not the common property of both proprietors. Hetherington v. Galt, June 2, 1905, p. 706.

*Boundaries—Line of trees planted as boundary under verbal agreement between adjacent feuars—Question with singular successor—Bounding Title — Measurements — "Or thereby" — Measurements inaccurate — Contemporanea Expositio.*
2. Two adjacent plots of ground, belonging to different persons, were described in their titles by a plan and by measurements, qualified in the latter case by the words "or thereby." Neither plan nor measurements were strictly accurate. The mutual boundary was adjusted by verbal agreement between the proprietors, and marked by a line of trees planted at their mutual expense. *Held* that this arrangement, followed by possession in accordance therewith, was binding upon a singular successor without notice. Hetherington v. Galt, June 2, 1905, p. 706.

*Title to Heritage—Statutory Title—Ruinous Buildings—Sale by order of Sheriff—Burgh Police (Scotland) Act*, 1892, *secs.* 196, 197, 200.
3. Ruinous buildings sold under the Burgh Police Act, 1892, were situate on ground let on a building lease for 999 years. After the purchaser had completed his title by recording the Sheriff's decree and had disponed the subjects, an action was raised against the disponee for payment of rent due under the long lease, the pursuer contending that the purchaser had acquired the property *tantum et tale* as it stood in the lessee. The defender founded on the recorded decree as giving him an unqualified statutory title to the land. The Court *sustained* the defence. Young's Trustees v. Grainger, Dec. 8, 1904, p. 233.

*Designation of Glebe—Excambion of Glebe—Effect of Decree of Presbytery sanctioning excambion of Glebe.*
4. Where a glebe is excambed the title to the new glebe flows from the excamber, and the decree of the Presbytery completing the title is not a judicial determination, but merely gives the sanction of the Presbytery to the transaction, and impresses the land given to the minister with the character and status of a glebe. Cadell v. Allan, March 17, 1905, p. 606.

PROPERTY—*Continued.*

*Title to Heritage—Construction—Servitude—Right of Access—Prescriptive Possession.*

5. Before 1830 a self-contained house in Glasgow, bounded on the south by Bath Street, from which it entered, and on the west by Wellington Street, was divided into two houses, one containing the ground floor and the other the upper floor. An annex containing a stair to the upper floor was added to the north end of the house with a door to Wellington Street. In 1830 the proprietor conveyed the upper floor to A, "with access thereto by a street door from Wellington Street," and in 1831 conveyed the remainder of the property to B. After the division of the property the stair was used solely by the proprietors of the upper storey. In 1904 X, who was in right of the property conveyed to B, brought a declarator that the staircase was his property, and that the proprietor of the upper storey, and successor in title to A, had no right to make structural alterations on it. The Court (*rev.* judgment of Lord Kincairney) *granted* decree, holding (1) that by the disposition of 1831 the property in the staircase was conveyed to B; (2) that A only obtained a servitude of access over it; and (3) that the prescriptive possession by him and his successors could not turn a right of access into a right of property. Robertson's Trustees v. Bruce, March 14, 1905, p. 580.

See *Superior and Vassal—River, Loch, Sea,*

PROVING THE TENOR. See *Process,* 27.

PUBLIC AUTHORITY. See *Limitation of action.*

PUBLIC HEALTH. *Offensive Trade—Licence—Sanction of Local Authority subject to conditions—Claim to reduce sanction quoad condition only—Public Health (Scotland) Act,* 1897, *sec.* 32.

1. A firm of glue manufacturers who proposed to start the business of glue making, in a district where that business had been duly declared to be an offensive business under section 32 of the Public Health (Scotland) Act, 1897, obtained the sanction of the Local Authority under that section, but subject to the condition that the products of the business should be manufactured "from hide clippings *only.*" The firm thereupon brought an action, in which they maintained that the insertion of this condition in the sanction was *ultra vires* of the Local Authority, and concluded for reduction of the order granting the sanction in so far as it imposed the condition, and for declarator that the sanction should be valid and effectual to the pursuers as if the condition had not been inserted. *Held* that, whether the insertion of the condition was or was not *ultra vires* of the Local Authority, the action was incompetent, the condition being an inseparable part of the sanction as granted by the authority which alone had power to grant it. John Darney & Son v. Calder District Committee, Dec. 9, 1904, p. 239.

*Sale of Food and Drugs Act,* 1875, *secs.* 18 *and* 21, *and Schedule—Analyst's Certificate—Statement of Weight—Article liable to decomposition—Butter—Margarine—Statement as to change in Constitution.*

2. In the schedule form of analyst's certificate given in the Sale of Food and Drugs Act, 1875, a space is left for the weight of the sample analysed, but it is provided that "when the article cannot be conveniently weighed this passage may be erased or the blank may be left unfilled." It is also provided that "in the case of a certificate regarding . . . butter . . . the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis." In a suspension of a conviction under the Sale of Food and Drugs Act, 1875, sec. 6, for selling butter containing 92 per cent of foreign ingredients, *held* (1) that it was not a valid objection to the analyst's certificate appended to the complaint that the space

PUBLIC HEALTH—*Continued.*

for the weight of the sample was left blank without any statement that the article could not be conveniently weighed; but (2) that the certificate was invalid in respect that the analyst did not report whether any change had taken place in the constitution of the article, the direction in the schedule so to report being imperative in the case of butter, and that, the article having been sent for analysis as butter, the failure to comply with the direction was not excused by the article having proved on analysis to be margarine; and bill of suspension *sustained* and conviction *quashed*. Hunter v. Wintrup, Dec. 17, 1904 (J. C.), p. 22.

PUBLIC-HOUSE. *Licensing Court—Certificate—Refusal to renew certificate—Discretion of Licensing Authority—Grounds on which reduction of the deliverance of a Licensing Court will be granted—Licensing (Scotland) Act*, 1903, *sec.* 11.

1. A licence-holder, who had been refused a renewal of her certificate, raised an action for the reduction of the deliverance of the Licensing Court on the ground that their proceedings had been illegal, unjudicial, and oppressive. She averred that she had received no notice of any objection to the renewal of her certificate, and that no complaint had been made as to the conduct of her business or the sanitary condition of her premises; that at the Licensing Court formal objection having been taken to the renewal on the ground that the premises were insanitary and the district congested, she was heard through her agent, and offered to carry out any recommendations the Court might make in regard to the sanitary arrangements of the premises; that thereupon the Court, without hearing evidence in support of the objections, refused to renew the certificate on the ground that the premises were insanitary and the district congested. She further averred that the Magistrates who formed the Court had prejudged the question by having come to a resolution prior to the sitting of the Court to reduce the number of licensed premises in the district. *Held* (1) that the Court cannot interfere with the discretion of the licensing authority exercised within the limits of its statutory jurisdiction, unless it has failed to give a judicial consideration to the application before it; (2) that the averments set forth disclosed no case of the licensing authority having exceeded their statutory jurisdiction or having failed to give a judicial consideration to the pursuer's application. Walsh v. Magistrates of Pollokshaws, July 19, 1905, p. 1009.

*Justice of Peace—Jurisdiction—Jurisdiction in Police Burgh—Licensing Offences—Licensing (Scotland) Act*, 1903, *sec.* 91.

2. *Held* that the Justices of the Peace of a county have concurrent jurisdiction along with the Magistrates of a police burgh situated within the county to try offences under the Licensing (Scotland) Act, 1903, where such offences are committed within burgh by persons residing therein. Tasker v. Simpson, Dec. 21, 1904 (J. C.), p. 33.

*Breach of Certificate—Licence-holder drunk on premises after hour of closing—Licensing (Scotland) Act*, 1903, *Sixth Schedule.*

3. The form of certificate for public-houses set forth in the Sixth Schedule to the Licensing (Scotland) Act, 1903, provides that the licence-holder shall be empowered to sell exciseable liquor on condition, *inter alia*, that "he do not himself be in a state of intoxication on the premises." *Held* that this condition applied at all hours, and not merely during the hours when the public-house was open to the public, and consequently that a publican who was found drunk in his public-house at 3 A.M. had committed a breach of his certificate. Kessack v. Smith, July 12, 1905 (J. C.), p. 75.

*Breach of Certificate—Knowingly permitting drunkenness within licensed premises—Proof—Onus—Licensing (Scotland) Act*, 1903, *sec.* 98.

4. The holder of a public-house certificate was charged with knowingly

PUBLIC-HOUSE—*Continued.*
permitting drunkenness within the licensed premises in breach of his certificate, by allowing R. S. to remain in the premises when in a state of intoxication. It was proved that the accused and R. S., who were friends, were both found in the licensed premises at 3 A.M., asleep, and intoxicated. *Held* that the accused had failed to discharge the *onus* imposed on him by sec. 98 of the Licensing (Scotland) Act, 1903, and consequently that he had rightly been convicted of the breach of certificate charged. Kessack v. Smith, July 12, 1905 (J. C.), p. 75.
See *Heritable and Moveable—Reparation*, 12.

PUBLIC OFFICER. *Town-clerk—Munus publicum—Salary—Extension of burgh—Discretion of Town-Council as to fixing salary.*
1. A royal burgh having been extended by the inclusion of a neighbouring burgh, the town-council raised the town-clerk's salary from £100 to £120. The town-clerk brought an action against the town-council for declarator that the defenders were bound to pay him a reasonable and suitable salary as fixed by the Court. The pursuer averred that the increased salary as fixed by the town-council after the extension was quite inadequate looking to the increase of the town-clerk's duties. The Court *assoilzied* the defenders, holding that the question of an increase in the amount of the salary of a town-clerk was a matter for the discretion of the town-council, with the *bona fide* exercise of which the Court would not interfere. Sutherland v. Magistrates of Wick, Jan. 11, 1905, p. 374.
*County Assessor—Remuneration.*
2. *Held* that under sec. 67 of the Town-Councils (Scotland) Act, 1900, a burgh was liable only for the actual outlay of the assessor in preparing the municipal register of voters, and not for anything by way of remuneration to the assessor for his personal services. Maxtone v. Magistrates of Dunoon, Dec. 16, 1904, p. 276.
See *Public Records.*

PUBLIC RECORDS. *Burgh Register of Sasines—Authentication of Minutes — Omission of former Town-clerk to authenticate Minutes.*
Authority granted to the town-clerk of a royal burgh to authenticate and subscribe minutes in the minute-books of the Burgh Register of Sasines which had not been authenticated by his predecessors, and to record the petition and warrant in the Burgh Register of Sasines. Hepburn, Feb. 3, 1905, p. 484.

RAGGED SCHOOL. See *Charitable and Educational Bequests and Trusts*, 4.

RAILWAY. *Minerals under Line—Right of Railway Company to minerals on paying compensation—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 71.*
*Held* that a railway company, which has given notice to a landowner under section 71 of the Railways Clauses Consolidation (Scotland) Act, 1845, requiring him to leave unworked certain minerals lying under or near the railway line, is not entitled, on payment to the landowner of the compensation due to him for leaving the minerals unworked, to demand a conveyance of these minerals. Duke of Hamilton's Trustees v. Caledonian Railway Co., June 27, 1905, p. 847.
See *Mines and Minerals*, 3, 4.

REPARATION. *Wrongs and their Remedies—Foreign—Lex loci delicti.*
1. In order to maintain an action *ex delicto* in Scotland, when the wrong is committed in another country, the wrong must be one for which an action can be maintained both by the law of Scotland and by the law of the country in which it is said to have been done. Evans & Sons v. Stein & Co., Nov. 17, 1904, p. 65.

REPARATION—*Continued.*

*Liability of Master for Servant—Slander.*

2. A master is liable for a slander uttered by his servant while acting within the scope of his employment, although without special instructions. So *held* where the master was a voluntary association. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

*Liability of Master for Servant—Slander—Issue.*

3. Where the pursuer in an action of slander alleged that a letter containing defamatory expressions had been written by the defenders' secretary in the course of their business, the Court *approved* of an issue "whether the defenders by their general secretary and manager wrote and dispatched" the letter complained of. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

4. *Liability of Master for Servant—Crown—Volunteer Regiment—Officer Commanding Volunteer Regiment.* Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers, Nov. 30, 1904, p. 168.

*Seduction—Issue.*

5. In an action of damages for seduction the method of seduction alleged to have been employed must be set forth in the issue. Cathcart v. Brown, July 12, 1905, p. 951.

*Malicious Prosecution—Facts and circumstances inferring malice.*

6. In an action of damages against the Corporation of Glasgow, proprietors of the tramways, the pursuer made the following averments:—On 14th April two of the tramway inspectors employed by the defenders charged the pursuer, then a passenger in one of their cars, with having on 10th April contravened one of the statutory bye-laws by spitting on a car. On 21st April the inspectors reported the matter to the police, and on 22d April a complaint was served on the pursuer. The case was called in the Police Court on 26th April, when the pursuer was in attendance with his witnesses. The prosecutor then deserted the diet *pro loco et tempore*. The pursuer further averred that the charge and the report by the inspectors to the police were made falsely, maliciously, and without probable cause. *Held* (1) that, the inspectors having been appointed to carry out the provisions of an Act of Parliament, it was necessary for the pursuer to aver facts and circumstances inferring malice; and (2) that the action was irrelevant in respect that no such facts and circumstances were averred. Buchanan v. Corporation of Glasgow, July 19, 1905, p. 1001.

*Slander—Publication of Slander—Foreign—Lex loci delicti.*

7. In an action of damages for slander brought by a firm in England against a firm in Scotland, the pursuers averred that the slander was contained in two letters and a telegram, sent from Scotland, by the defenders to the pursuers, and that the slander had been published in the sense of English law, in respect that the letters had been dictated to and typewritten by the defenders' clerks, and that the telegram had passed through the hands of post-office clerks. The names of the defenders' clerks and of the post-office clerks were not given. The Court *dismissed* the action, holding (1) that there was no relevant averment of publication of defamatory matter to persons other than the pursuers; (2) that the defamatory statement to the pursuers was made in England; (3) that it was admitted that by the law of England the statement to the pursuers themselves was not an injury to reputation and was not an actionable wrong; and (4) that the action could not be maintained in respect that the statement was not an actionable wrong by the law of England. Evans & Sons v. Stein & Co., Nov. 17, 1904, p. 65.

*Slander—Written Slander—Production of writing complained of.*

8. It is not necessary as a condition of an issue being allowed in an action for written slander that the writing complained of should be produced

REPARATION—*Continued.*
by the pursuer. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

9. *Slander—Slander by Servant—Liability of Master—Association—Issue.* Ellis v. National Free Labour Association, May 12, 1905, p. 629.

*Slander—Innuendo.*

10. In an action for slander the pursuer complained of the circulation of a pamphlet by the defenders (a free labour association), in which it was stated that the pursuer had been dismissed by the defenders for, *inter alia*, "withholding moneys belonging to the" defenders "contrary to the bye-laws" of the association. The pursuer proposed an issue in which he innuendoed this expression as representing "that pursuer had been guilty of dishonestly appropriating money." *Held* that the expression complained of could not reasonably bear the innuendo proposed, and issue *disallowed*. Ellis v. National Free Labour Association, May 12, 1905, p. 629.

*Slander—Innuendo—Newspaper—Criticism of Management of Hospital Funds—Action of damages by Secretary.*

11. A newspaper published in Wick contained an anonymous letter to the editor to the following effect:—"Is there any way by which the public can ascertain how the money is spent in the management of the B. Hospital? So long as Sir A. B. was paying the whole bill himself some people argued that he had a perfect right to squander a lot of it on the retainers who form his Bridge Street bodyguard. . . . The position is now somewhat different. The public are now being appealed to for assistance. . . . Appeals have been made by the secretary to all the churches in town and county. . . . As there has been such a very strong flavour of jobbery about the institution . . . would it not be fair . . . that a statement should be produced shewing how the money is being spent on the hospital? How are the church collections being disposed of?" Sir A. B., mentioned in the letter, was member for the Northern Burghs, of which Wick was one. He had founded the B. Hospital, and had for a time supported it entirely out of his own means. The secretary and treasurer of the hospital was G., a solicitor in Wick, who was also Sir A. B.'s political agent, with an office in Bridge Street, Wick. G. brought an action against the publishers of the newspaper for damages for slander alleged to be contained in the letter. He innuendoed the letter to mean that he was guilty of dishonest conduct in the application of the funds of the hospital, and was a person unfit to be entrusted with the management of public funds. *Held* that the letter would not support the innuendo, and issue *disallowed*. Green v. Reid & Co., July 1, 1905, p. 891.

*Slander—Innuendo—Newspaper—Shebeening.*

12. A newspaper contained a letter to the editor in which the writer, after criticising the action of the licensing authorities of the district in taking away a licence in B., a small town, on account of supplying liquor to an intoxicated person, continued—"Again, I should like to ask, if authorities are determined to be so rigorous, why, after convicting another licence-holder in B. of shebeening and fining him £10, they did not think it necessary to withdraw his licence? Surely shebeening was more heinous in the sight of the law; and I should like to ask if this was the first conviction against the same party." A publican in B. brought an action of damages for slander against the publishers of the newspaper. The pursuer averred that he had once been convicted of shebeening, that he was the only person in B. who had ever been convicted of shebeening, and that the letter falsely represented that he had been more than once convicted of shebeening. *Held* that the pursuer was entitled to an issue whether the letter falsely represented

REPARATION—*Continued.*

that the pursuer had been more than once convicted of shebeening. Lumsden v. West Lothian Printing and Publishing Co., Limited, July 19, 1905, p. 1006.

*Slander—Statement affecting credit of solicitor.*

13. In an action of damages for slander the pursuer, a solicitor in a county town holding several public appointments of trust, averred that the defender had stated that the pursuer had been "cleaned out and lost his all," and that in consequence the pursuer had suffered in his reputation and business. *Held* that the pursuer was entitled to an issue on the ground that it was not unreasonable to suppose that the statement might have injured his reputation and credit. A B v. C D, Nov. 1, 1904, p. 22.

*Slander—Summons—Competency—Joint and Several.*

14. *Held* that an action of damages for slander was incompetent in respect that it concluded for a lump sum as damages for separate slanders, one uttered by a wife and the other by her husband, without any averment of conspiracy or complicity. Hook v. M'Callum, Feb. 25, 1905, p. 528.

*Slander—Privilege—Privilege of witness—Privilege in precognition.*

15. Held (rev. *judgment of Second Division*) *that the privilege of a witness in giving evidence extends to statements made by a person on precognition with a view to his giving evidence.* Watson v. M'Ewan, July 28, 1905 (H. L.), p. 109.

*Negligence—Duty to Public—Colonel Commanding Volunteer Regiment—Volunteer Regiment—Public Authorities Protection Act,* 1893, *sec.* 1.

16. In an action for damages against a regiment of volunteers and against the officer commanding the regiment, as representing the regiment and as an individual, by the father of a child who was killed on the public street by an ammunition waggon, the horses of which had bolted, the pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The action was not raised within six months after the date of the accident. The Lord Ordinary dismissed the action as against the regiment and its commanding officer as representing it, on the ground that the funds of the regiment belonged to the Crown, and that the Crown could not be sued for damages caused by the wrongful acts of its officers, and allowed a proof before answer as against the commanding officer as an individual. *Held* (*rev.* the judgment on the last point) that the action against the commanding officer, as an individual, was excluded by the Public Authorities Protection Act, 1893, sec. 1, on the ground that the fault averred against him was neglect of duty in his public capacity as commanding officer. Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers, Nov. 30, 1904, p. 168.

*Negligence—Lift in Hotel—Contributory Negligence.*

17. In an action of damages by a mother, against hotelkeepers for the death of her son, a commercial traveller, who was killed by stepping into and falling down the well of a lift in the hotel on the night of his arrival, the pursuer averred that the lift was not provided with the usual appliances to prevent persons from entering the well when the lift was not in position, that it was "the universal practice in all lifts to guard the entrance to them by a collapsible lattice door, which can be opened only when the cage is in position to receive passengers. . . . Thus the deceased on the door being opened was entitled to rely on the cage being in position for him to step into with safety"; that the entrance to the lift was not sufficiently lighted; that there was no light

REPARATION—*Continued.*

in the lift itself; that no warning was given by the waiter when he opened the door of the lift that the lift was not in position; that the deceased stepped through the door and fell into the well. *Held* (1) that the action contained relevant averments of negligence on the part of the defenders, and (2) that the pursuers' averments did not necessarily infer negligence on the part of the deceased, and that the pursuer was entitled to an issue. Greenlees v. Royal Hotel, Dundee, Limited, Jan. 12, 1905, p. 382.

*Negligence—Duty to Public—Starting crane without warning and swinging box over horse's head.*

18. In an action of damages for personal injuries brought by a carter employed by a firm of contractors against a company of quarrymasters, the pursuer averred that when at the defenders' quarries in charge of a horse and bogie, and while he was spragging his bogie, the defenders' craneman suddenly and without warning started a crane, making a great noise and swinging a box over the horse's head, causing the said horse to jump and rear and draw the bogie on top of the pursuer, and that the accident was caused through the fault of the defenders' servants in not warning the pursuer of their intention to start the crane, as was usual in such operations, and in swinging the box near the horse's head; and that the system adopted by the defenders was dangerous in that, although the craneman could not see the pursuer from the crane, the defenders failed to provide a man at the face of the quarry to give warning to pursuer and other workmen. *Held* that these averments were irrelevant. Breslin v. Clyde Quarries, Limited, March 10, 1905, p. 557.

*Negligence—Duty to Public—Accident to member of the public caused by horse let out on hire—Liability of owner of the horse to the member of the public.*

19. A child was run over and killed in a public street by an ammunition waggon belonging to a regiment of volunteer artillery. The waggon was drawn by horses which had been hired out by a firm of carting contractors, two of the volunteers being the drivers. The father of the child brought an action against the contractors. He averred that the horses had run off and got beyond the control of the drivers, who were young members of the volunteer regiment; that the horses were unsuited for the purpose for which they were hired, being young and restive and unaccustomed to drawing ammunition waggons; that they had never previously been driven as a pair; and that the defenders were aware of these defects. *Held* that the pursuer had not stated a relevant case of fault against the defenders.

*Opinion per curiam* that it could not be affirmed as an absolute proposition that under no circumstances could a horse-hirer be liable to a member of the public for injuries caused by horses hired out by him. Wilson v. Wordie & Co., July 11, 1905, p. 927.

*Negligence—Agent and Principal—Patent Agent—Damages for loss of patent—Defence of invalidity of patent.*

20. In an action of damages against patent agents, the pursuer averred that the defenders had charge of two patents held by him, and that they had allowed them to lapse by failing to give him notice that certain payments were necessary to keep them in force. The defenders pleaded that there was no loss, as the patents were invalid by reason of anticipation by prior patents specified. *Held* that the defence was irrelevant. Alexander Turnbull & Co., Limited, v. Cruickshank & Fairweather, June 23, 1905, p. 791.

*Negligence—Master and Servant—Common Law—Ship in course of repair—Open and Unlighted Hatch.*

21. A workman, who was accustomed to take chipping and scaling jobs,

REPARATION—*Continued.*

was engaged to execute chipping work on a ship which was undergoing extensive repairs in a shipbuilding yard. In going to the place on board the ship where his work was to be done he fell into an open hatchway on the middle deck and was injured. In an action of damages at common law raised by him against the shipbuilders, on the ground that the accident was due to their negligence in not having the hatchway covered or sufficiently lighted or fenced, it was proved that the pursuer had gone from broad daylight to the middle deck, where the light was dim, but sufficient to enable the pursuer to see the hatchway if he had proceeded cautiously. *Held* that the accident was not due to negligence on the part of the defenders, but was due to want of care on the part of the pursuer. Burns v. Henderson & Co., Limited, June 2, 1905, p. 697.

*Negligence—Master and Servant—Common Law—Statutory Duty—Common Employment—Coal Mines Regulation Act*, 1887, *sec.* 49, *Rule* 21.

22. A miner who had been injured by the fall of shale from the roof of a roadway in a mine raised an action of damages at common law against his employers, the mineowners, who were a limited company, and obtained an issue, "Whether . . . the pursuer was injured through the fault of the defenders?" It was proved that about eight days before the accident there had been an extensive fall of shale from the roof at the place of the accident, and that nothing had been done prior to the accident to support the roof at this place. The jury found for the pursuer, and awarded damages. The defenders sought to set aside the verdict on the ground (1) that there was no fault on the part of the defenders, as they were proved to have appointed a competent manager, and (2) that, if there was fault on the part of the manager it was the fault of a person in common employment with the pursuer. *Held* (1) that there was fault on the part of the Company in not having the roof made secure as required by the Coal Mines Regulation Act, 1887, sec. 49, Rule 21, and (2) that there being a duty imposed by statute on the mineowners to have the roof made secure, the defence of common employment was not available to them. Bett v. Dalmeny Oil Co., Limited, June 17, 1905, p. 787.

*Negligence—Master and Servant—Employers Liability Act*, 1880, *secs.* 4 *and* 7—*Notice of Injury.*

23. In an action of damages under the Employers Liability Act against a limited company at the instance of a workman in its employment, *held* that a notice of injury addressed to the company, enclosed in an envelope directed to A B, who was the company's cashier, and was in charge at one of the offices of the company, and delivered at that office, was duly served on the company in accordance with the provisions of sec. 7 of the Act.

*Per cur.* (after consultation with the Judges of the Second Division) —When a question of want of notice under the Employers Liability Act is raised, it should be dealt with by the Sheriff as a prejudicial plea, and a proof should be allowed on this prejudicial plea before a proof is allowed on the merits. If, on proof being allowed on the prejudicial plea, one of the parties appeals to the Court of Session for jury trial, the case will be sent back to the Sheriff to have this prejudicial plea disposed of. Duncan v. Fife Coal Co., Limited, July 15, 1905, p. 958.

*Negligence—Master and Servant—Workmen's Compensation Act*, 1897, *sec.* 1, *subsec.* 2 (*b*)—*Action for reparation by person found not entitled to compensation.*

24. *Held* that a claimant who had been refused compensation under the Workmen's Compensation Act, 1897, on the ground that she was *not*

REPARATION—*Continued.*

a dependant of the deceased workman, was not thereby barred under sec. 1 (2) (*b*) of that Act from raising an action of reparation at common law, or under the Employers Liability Act, 1880, against the deceased's employer. M'Donald v. James Dunlop & Co. (1900), Limited, Feb. 25, 1905, p. 533.

See *Contract*, 4 *to* 8—*Interdict*, 1—*Limitation of Actions*—*Master and Servant*—*Process*, 2, 4, 5, 17 *to* 24—*River, Loch, Sea*, 1—*Ship*, 1 *to* 5—*Trust*, 4.

RES IPSA LOQUITUR. *Proof*, 1.

REVENUE. *Estate-duty—Deductions allowable as Debts—Marriage-Contract Provisions—Interim Aliment to Widow—Finance Act*, 1894, *sec.* 7.

1. *Held* that an obligation by a husband in a marriage-contract to make certain payments to his marriage-contract trustees for behoof of his wife and children, as the counterpart of similar obligations by his wife, could not be regarded on his death as a debt incurred by him "for full consideration in money or money's worth wholly for the deceased's own use and benefit," in the sense of the Finance Act, 1894, sec. 7 (1) (*a*), and did not form a proper deduction in determining the value of his estate for the purposes of estate-duty.

*Held* also that a similar obligation by a father in his son's marriage-contract, as the counterpart of an obligation by the son's wife and her father, could not be deducted as a debt. Inland Revenue v. Alexander's Trustees, Jan. 10, 1905, p. 367.

*Estate-duty—Property passing on death—Cesser of Annuity—Value of benefit accruing—Finance Act*, 1894, *secs.* 1, 2 (1), *b, and* 7 (7).

2. *Held*, in the case of the cesser of an annuity payable out of heritable property, that the value of the benefit accruing from the cesser of the annuity fell, under sec. 7 (7) of the Finance Act, 1894, to be determined by capitalising the amount of the annuity on the basis of the number of years' purchase applicable to the class of property out of which it was paid, and without taking into consideration the amount of the bonds by which the heritable property might be affected. Lord Advocate v. Henderson's Trustees, July 15, 1905, p. 963.

*Estate-duty—Entail—Property passing on death of heir of entail—"Competent to dispose"—Estate-duty paid by deceased heir of entail and not charged on entailed estates—Finance Act*, 1894, *secs.* 2, 9, *and* 22.

3. *An heir of entail who had paid estate-duty due on the death of his predecessor died without having applied for a certificate or taken any steps to charge the sum so paid on the entailed estate. The Crown having claimed estate-duty on the sum so paid from his trustees*, held (rev. *judgment of First Division*) *that under sec.* 9, *subsec.* 6, *of the Finance Act*, 1894, *the heir of entail, being a person having a limited interest who had paid the estate-duty, had by the statute the same charge on the estate as if he held a mortgage over the estate for the amount of the duty, and that the charge being a vested transmissible interest belonging to the deceased at the time of his death, his trustees were liable for the duty.* Lord Advocate v. Earl of Moray's Trustees, Aug. 4, 1905 (H. L.), p. 116.

*Income-Tax—"Residing in the United Kingdom"—Income-Tax Act*, 1853, *sec.* 2, *Schedule D—Income-Tax Act*, 1842, *sec.* 39.

4. A British merchant carried on business in Madras, and usually resided there, but his wife, with the children, lived for a number of years in the United Kingdom, occupying latterly a house belonging to her and purchased with his and her money, and he resided with them for months at a time when he came to the United Kingdom, as he did nearly every year. In the year of assessment ending 5th April 1903 he was never in the United Kingdom. In a question as to his liability

REVENUE—*Continued.*

to be assessed for income-tax for that year, *held* that he was not a person "residing in the United Kingdom" within the meaning of the Income-Tax Act, 1853, and therefore not liable to assessment. Turnbull v. Inland Revenue, Oct. 25, 1904, p. 1.

5. An American citizen, having his ordinary residence, and practising his profession, in New York, held for some years a lease of a furnished shooting-lodge and shootings in Scotland. He resided at the shooting-lodge for two months in each year, and the lodge was ready for his use at any time. His residence in New York was also kept open for his use at any time. *Held* that he was a person "residing in the United Kingdom" within the meaning of section 2, Schedule D, of the Income-Tax Act, 1853, and was therefore liable to assessment for income-tax, and that he did not fall within the exemption in sec. 39 of the Income-Tax Act, 1842, of a person in Great Britain "for some temporary purpose only, and not with any view or intent of establishing his residence therein." Inland Revenue v. Cadwalader, Nov. 25, 1904, p. 146.

*Income-Tax—Penalties—Modification—Income-Tax Act*, 1842, *sec.* 166—*Exchequer Court (Scotland) Act*, 1707, *sec.* 23 *or sec.* 15—*Public Revenue (Scotland) Act*, 1833, *secs.* 1, 4, *and* 8—*Exchequer Court (Scotland) Act*, 1856, *sec.* 1.

6. *Held* on a construction of the above statutes that the Court of Session as the Court of Exchequer in Scotland has no jurisdiction to modify the penalties exigible under sec. 166 of the Income-Tax Act, 1842. Lord Advocate v. M'Laren, July 18, 1905, p. 984.

*Income-Tax—Abatement—Untruly declaring income—Penalties—Amount—Income-Tax Act*, 1842, *sec.* 166.

7. *Held* (1) that a person found guilty under section 166 of the Income-Tax Act, 1842, of untruly declaring his income was liable in the forfeiture therein provided, although no exemption or abatement had in fact been allowed, and (2) that the amount upon which the treble duty was to be calculated was his whole income, including income upon which duty had been already deducted or paid.

*Observed, per* Lord Kinnear, that, to involve liability for the penalties under the section, the declaration must be not merely inaccurate but false and untruthful. Lord Advocate v. M'Laren, July 18, 1905, p. 984.

*Income-tax — Exemption — Unincorporated Society — Income-Tax Act*, 1842, *secs.* 40, 163, 192.

8. An unincorporated society, whose aggregate annual income is less than £160, is entitled to claim exemption from income-tax under sec. 163 of the Income-Tax Act, 1842, as extended by the Finance Act, 1894. Inland Revenue v. Old Monkland Conservative Association, Nov. 22, 1904, p. 119.

*Income-Tax—Deduction of Income-Tax from interest on loans—Liability for Income-Tax not deducted—Customs and Inland Revenue Act*, 1888, *sec.* 24, *subsec.* (3).

9. *Held* that a municipal corporation, which was bound to deduct Income-tax from interest on loans but had failed to do so, was liable in payment to the Commissioners of Inland Revenue of the amount that should have been deducted. Lord Advocate v. Corporation of Edinburgh, July 15, 1905, p. 972.

*Inhabited House Duty—Two houses belonging to different owners connected so as to form one dwelling-house—Inhabited House Duty Act*, 1808, *Schedule B, Rule* 14.

10. A and B, two adjoining dwelling-houses belonging to different proprietors, were connected by an open doorway on the ground floor. The proprietor of A, and his son, the tenant of B, occupied the two houses thus:—The son, who was a physician, occupied the public rooms in B

REVENUE—*Continued.*

for his practice, one bedroom in B was occupied by himself, and another by a sister. The father and the other members of the family had bedrooms in A. The whole family took their meals in A. The only kitchen used was in A. There was only one servant. *Held* that there was such internal communication between these two houses that they could not be regarded as "different tenements" in the sense of Schedule B, Rule 14, of the Inhabited House Duty Act, 1808; that the two houses formed one dwelling-house in the joint occupation of father and son; and therefore that the father and son were jointly liable to inhabited house duty for the whole premises. Murdochs v. Inland Revenue, Nov. 22, 1904, p. 111.

RIGHT IN SECURITY. *Securities over heritable property—Power to Sell—Sale by heritable creditor—Advertisement—Time—Titles to Land Consolidation (Scotland) Act*, 1868, *sec.* 119.

1. The holder of a bond and disposition in security exposed the subjects under the power of sale on 23d March 1904. The first advertisement had appeared on the morning of 10th February 1904. *Held* that as forty-two days had elapsed between the morning of the first advertisement and the morning of the exposure the provisions of sec. 119 of the Titles to Land Consolidation Act, 1868, in regard to advertisement had been complied with.

*Opinion* that if an advertisement appeared once in each of six consecutive weeks it was not necessary that forty-two days should have elapsed between the day of the first advertisement and the day of the exposure. Roscoe v. Mackersy, June 8, 1905, p. 761.

*Securities over heritable property—Power to sell—Sale by heritable creditor—Consignation of surplus—Bank—Titles to Land Consolidation (Scotland) Act*, 1868, *sec.* 122.

2. The Titles to Land Consolidation (Scotland) Act, 1868, sec. 122, enacts that the creditor shall upon receipt of the price consign the surplus which may remain after deducting the debt secured and expenses in a bank, "and the particular bank in which such consignation is to be made shall be specified in the articles of roup." *Held* that the omission to specify the bank in the articles of roup did not infer the nullity of the sale where there was in fact no surplus. Roscoe v. Mackersy, June 8, 1905, p. 761.

*Securities over heritable property—Right to eject proprietor—Bond and Assignation in Security by liferentrix—Heritable Securities (Scotland) Act*, 1894, *sec.* 5.

3. The creditors in a bond and assignation in security, granted by a liferentrix by constitution over her liferent interest in certain lands and a mansion-house, brought an action in the Sheriff Court under sec. 5 of the Heritable Securities Act, 1894, for the summary ejection of the liferentrix from the mansion-house, of which she was in personal occupation. *Held* that the liferentrix was not a "proprietor" in the sense of sec. 5 of the Act, and that therefore the summary remedy of ejection was incompetent. Scottish Union and National Insurance Co. v. Smeaton, Dec. 1, 1904, p. 174.

*Security over Moveables—Pledge—Sale on Approbation—Goods pawned by retail dealer—Title of pawnbroker—Sale of Goods Act*, 1893, *sec.* 18, *Rule* 4 (*a*).

4. Ehrmann, a wholesale jeweller, was in the habit of sending goods to Anderson, a retail jeweller, with the wholesale prices marked, with power to sell and deliver on his own account and for his own profit any articles he might sell, Anderson being liable only for the wholesale price. At the same time Ehrmann sent a printed notice headed "approbation note," stating that the goods were to remain the property

of the sender till invoiced by him to Anderson. Anderson having retained a diamond necklace for several months, Ehrmann in April 1903 urged Anderson to purchase the necklace himself, and offered to take bills for the price. Anderson agreed to do so, and the necklace was invoiced to him, and the bills were granted by him. Anderson having subsequently become bankrupt, Bryce, a pawnbroker, with whom Anderson had in December 1902, without Ehrmann's knowledge, pledged the necklace, raised an action of multiplepoinding to determine the right thereto. Claims were lodged by Ehrmann, by Bryce, and by Anderson's trustee, but the claim by the last was not insisted in. *Held* (1) that as in December 1902 Anderson had been put by Ehrmann in a position to give a good title to a purchaser, he could validly pledge the necklace, and had validly pledged it to Bryce; (2) that as Anderson's trustee did not insist in his claim Ehrmann was entitled to delivery of the necklace after satisfying Bryce's claim. Bryce v. Ehrmann, Oct. 28, 1904, p. 5.

*Security over Moveables—Pledge—Custody of security subject—Constructive Delivery—Transference of document of title for valuable consideration and in good faith—Illegal Preference—New security granted in substitution for prior invalid security—Act* 1696, *c.* 5—*Sale of Goods Act*, 1893, *sec.* 47.

5. In June 1903, Neilson lent £3000 to M'Dowall & Company, and in security took from M'Dowall & Company delivery-orders for timber belonging to them stored in Connal & Company's timber-yard. The orders were in favour of Neilson, and were addressed to Haggart & Company, licensed timber-measurers, employed by M'Dowall & Company to measure and store the timber. The orders were intimated by Neilson to Haggart & Company, who replied acknowledging that they held the goods to his order. The duties of Haggart & Company in regard to storing timber were to measure it, to stack it in the yard selected by their employers, by whom they were paid, and to arrange for its removal when sold. The yard belonged to Connal & Company, by whose servants it was watched, and by whom books were kept in which were noted the quantities of the timber stored and the names of the owners, who paid rent for storage. According to the practice of the timber trade in Glasgow, the measurers were allowed by the proprietors of the yard to have practically complete control over timber stored by them. They could remove the timber as and when they chose, and delivery-orders for the removal of timber were addressed to them. On 23d September 1903, Neilson at the request of M'Dowall & Company granted delivery-orders signed by him and addressed to Haggart & Company in favour of M'Dowall & Company for the timber in exchange for the bills of lading of a cargo of timber purchased by M'Dowall & Company from Dobell, Beckett, & Company, then on its way to Glasgow. On the arrival of the cargo at Glasgow four days later, it was stopped *in transitu* by Dobell, Beckett, & Company. On 1st October M'Dowall & Company were sequestrated. In a question between Dobell, Beckett, & Company, and Neilson, *held* (1) that the delivery-order addressed to Haggart & Company by M'Dowall & Company, and duly intimated to them by Neilson, did not operate as constructive delivery of the timber to Neilson, Haggart & Company being the servants of the granters of the order and not independent custodiers of the timber; (2) that Neilson therefore had not a valid security at the date when the bills of lading were transferred to him, and that the transfer was struck at by the Act 1696, c. 5.

*Held* further that the undertaking by Haggart & Company to hold to Neilson's order, surrendered by him when he received the bills of

RIGHT IN SECURITY—*Continued.*

lading, not being an obligation granted by Haggart & Company personally, but only as the servants of M'Dowall & Company, was of no value and was not "valuable consideration" in the sense of the Sale of Goods Act, 1893, sec. 47, and that the stoppage *in transitu* was not affected by the transference of the bills of lading to Neilson. Dobell, Beckett, & Co. v. Neilson, Dec. 16, 1904, p. 281.

RIVER, LOCH, SEA. *River—Pollution—Water supply for a town—Compensation water to riparian owners—Quality of compensation water—Reparation—Neglect of statutory duty.*

1. The water supply system of the Edinburgh and District Water Trustees included the Glencorse Reservoir in the Pentland Hills. This reservoir, which was constructed under statutory authority, was both a supply reservoir and a compensation reservoir, the trustees being by statute bound to allow to flow out of the reservoir down the Glencorse Burn 220 cubic feet of water per minute, as full compensation for the right conferred on them to stop, dam up, and store the water of the burn. The summer and autumn of 1902 were exceptionally dry, and in consequence the Glencorse Reservoir became so much depleted of water that the silt or mud which had accumulated at the bottom of the reservoir became exposed to the air in the shallower portions, with the result that in the following winter, owing to the action of frost, rain, and wind on the exposed silt, the water of the reservoir became contaminated with large quantities of very fine sand, which took a long time to settle. In consequence the compensation water passed down the Glencorse Burn in a very discoloured condition, which made it unfit for use in the manufacture of paper. This state of matters lasted for about three months. In April 1903 the owners of paper mills on the Glencorse Burn about three miles below the reservoir, who were almost entirely dependent on the water of the burn for their water supply, brought an action against the Water Trustees for damages on account of loss sustained by the pursuers in the manufacture of their paper owing to the discoloured condition of the water. The defenders, who had throughout the drought continued to supply the city of Edinburgh with water from the reservoir, maintained that they were not responsible for the quality of the compensation water, in respect that their duty was to supply Edinburgh with water from the reservoir subject only to the condition of giving off the specified quantity of compensation water—a condition which (it was not disputed) they had fulfilled. *Held*, after a proof (1) that although the defenders were by the statute entitled to store the water in the reservoir, it was their duty to use the reservoir so that the compensation water should not be unnecessarily polluted; and (2) on the evidence that the defenders had failed to perform this duty, and were liable in damages to the pursuers. Sommerville & Son, Limited, v. Edinburgh and District Water Trustees, July 20, 1905, p. 1060.

*Sea—Territorial Waters—Three-mile limit—Fishing—Trawling—Herring Fishery (Scotland) Act*, 1889, *sec.* 6, *and Schedule.*

2. *Held* that sec. 6 of the Herring Fishery (Scotland) Act, 1889, prohibiting otter-trawling in, *inter alia*, the Dornoch Firth as defined by the Act, applied to foreign trawlers. Peters v. Olsen, July 13, 1905 (J. C.), p. 86.

*Sea—Foreshore—Rights of owners of foreshore included in harbour—Statute—Construction—Musselburgh Harbour Act*, 1840, *secs.* 2, 49, 76.

3. *The Musselburgh Harbour Act*, 1840, *sec.* 2, *enacts that the word "harbour" shall be understood to mean the "Harbour of Fisherrow," and shall include the whole precincts thereof as after specified. Sec.* 76 *enacts that for the purposes of this Act, and for no other purpose whatever, the said harbour shall be deemed to extend "along the shore"*

RIVER, LOCH, SEA—*Continued.*

*from the M. Burn on the west to the R. Burn on the east, and to seaward to the extent of one hundred yards beyond low-water mark opposite the shore between the aforesaid burns. The distance between the two burns was about two miles. Sec.* 49 *makes it unlawful for "any person to dig or take away from the said harbour or its precincts any sand, gravel, shingle, or stones," except with the authority of the Harbour Commissioners. In an action by the Harbour Commissioners against persons claiming to be the proprietors of part of the foreshore between the two burns,* held (aff. *judgment of Second Division*) (1) *that the harbour and its precincts included the whole foreshore between the two burns, rejecting a plea for the defenders that the words "along the shore" in sec.* 76 *of the Act excluded the foreshore; and* (2) *that the defenders, although owners of part of the foreshore, were not entitled to remove sand from their part without the authority of the Harbour Commissioners.* Musselburgh Real Estate Co. v. Magistrates of Musselburgh, July 31, 1905 (H. L.), p. 113.

*Sea—Foreshore—Boundaries—"Sea-beach."*

4. The burgh of Musselburgh, which was a burgh of barony and regality, held the commonty of the burgh under a charter from the lord superior, which gave the burgh right to the foreshore *ex adverso* on the north. In 1826 the burgh feued a portion of the commonty by a feu-contract, which described the subjects feued as bounded "on the north by the sea-beach." In a question between the burgh and the singular successors of the original feuars, raised in 1902, as to the ownership of the foreshore *ex adverso* of the ground feued, *held*, on a construction of the feu-contract and in the circumstances of the case, that the foreshore was not conveyed to the feuars by the feu-contract, but remained the property of the burgh.

*Opinions* (*per* the Lord Justice-Clerk and Lord Trayner) that a boundary by the "sea-beach" is not *per se* equivalent to a boundary by the "sea," and gives no right of property in the foreshore. *Opinions contra, per* Lord Young, Lord Moncreiff, and Lord Low, Ordinary. Magistrates of Musselburgh v. Musselburgh Real Estate Co., Limited, Dec. 21, 1904, p. 308.

SALE. *Sale of Moveables—Constitution of Contract—Sale or Hire—Consensus in idem—Hire-Purchase Agreements.*

1. A, a piano merchant, who was in the practice of disposing of his pianos in one of three ways—1st, in sales for cash; 2, in hire-purchase agreements; 3, in letting them for hire—made an oral offer to B of a piano "at the value of £26, payable 15s. per month." B accepted the offer, and after the lapse of a month paid certain instalments. B having subsequently failed to continue the payments, A raised an action in the Sheriff Court for re-delivery of the piano, alleging that it had been let on hire to B. It appeared from a proof that A in making his offer had intended the transaction to be on the hire-purchase system, while B understood it to be a sale for a price payable by instalments. The Sheriff held that as there had been no *consensus in idem*, there was no valid contract between the parties, and that A was entitled to have the piano restored. In an appeal, *held* that B understood, and was entitled to understand from the terms of A's offer, that the transaction was an immediate sale for a price payable by instalments, and that a contract of sale had been completed by B's acceptance. Muirhead & Turnbull v. Dickson, June 1, 1905, p. 686.

*Sale of Moveables—Misrepresentation—Sham Antiques—Res ipsa loquitur.*

2. A wholesale dealer sold certain articles of jewellery, which he had got made to resemble antiques, to a retail dealer. In an action of rescission of the sale on the ground of misrepresentation the buyer gave evidence

SALE—*Continued.*

to the effect that the seller had stated that the articles were the antiques they appeared to be. The evidence of the seller was that he said nothing about them. The Court, preferring the evidence of the buyer, *held* (*aff.* judgment of Lord Low) that the pursuer was entitled to rescind the sale. *Opinion per* Lord Kyllachy, that the offer of articles appearing to be antiques was in itself a misrepresentation, on the principle of *res ipsa loquitur*, and that the seller was not entitled to leave the articles to speak for themselves, but was bound to displace the inferences which to his knowledge their appearance was calculated to suggest. Patterson v. Landsberg & Son, May 24, 1905, p. 675.

*Sale of Moveables—Warranty—Proof of Warranty—Receipt—Pictures.*

3. The seller of pictures granted receipts for the price in which the pictures were described as "by" certain artists named. *Opinions* that these receipts by themselves did not prove a warranty that the pictures were the works of these artists. *Observations* as to the proof of such a warranty in a sale of pictures. Hyslop v. Shirlaw, June 29, 1905, p. 875.

*Sale of Moveables—Disconformity to contract—Right of Rejection—Timeous Rejection—Warranty.*

4. In November 1900 a firm of printers ordered from a firm of engineers a Marinoni printing machine. By the contract the sellers undertook to fit the machine in the buyers' works, and leave it in thorough good working condition. The machine was fitted in March 1901, and, by instalments in the following April and August, the price, with the exception of £1, was paid. The buyers used the machine until July 1902, when they intimated rejection of it. During the period from March 1901 to July 1902 they had frequently intimated their dissatisfaction with the working of the machine, and requested the sellers to put it into proper working order, which the latter had unsuccessfully attempted to do. The buyers had made some unimportant alterations in the machine before rejecting it. In an action by the buyers against the sellers, concluding for warrant to remove the machine from their premises, and for repayment of the price so far as paid by them, it was proved that the machine had failed to work properly, and that this was due to its inherent defects, and not to any negligence on the part of the buyers or their workmen. *Held* that the sellers had failed to fulfil their contract, and that the buyers had timeously exercised their right of rejection. Aird & Coghill v. Pullan & Adams, Dec. 14, 1904, p. 258.

*Sale of Moveables—Disconformity to Contract—Right of Rejection—Alternative Remedies—Sale of Goods Act*, 1893, *sec.* 11, *subsec.* 2.

5. An engineer contracted to supply and fit up for an ironfounder two mechanical stokers for two boilers at his works. The stokers were fitted up, and in September 1902 the buyer intimated to the seller his rejection of the machines on the ground that they were not conform to contract, but he continued to use them until the end of 1902. In an action for the price *held* (1) that the buyer having retained and used the machines for two months after intimating his rejection, he was barred from pleading rejection; and (2) that the buyer after intimating his election to reject the goods was not entitled to fall back on the alternative remedy provided by the Sale of Goods Act of retaining the machines, and claiming damages for the seller's failure to perform a material part of the contract. Croom & Arthur v. Stewart & Co., March 14, 1905, p. 563.

*Sale of Moveables—Disconformity to Contract—Right of Rejection—Timeous—Warranty—Pictures—Sale of Goods Act*, 1893, *secs.* 11 (2) *and* 35.

6. The purchaser of four pictures sold, delivered, and paid for in January and February 1901, continued to possess them without making any

SALE—*Continued.*

complaint until July 1902. Doubts having then for the first time been suggested to him as to the genuineness of the pictures, he took the advice of experts. In consequence of the opinions received he intimated rejection of the pictures, and in October 1902 brought an action for repayment of the price, alleging a warranty of the pictures as the works of certain artists. For the purposes of the action it was ultimately admitted that they were not the works of these artists. *Held* that, even assuming the pictures to have been warranted as alleged, the buyer's rejection of them was not timeous, and that he was barred from maintaining the action. Hyslop v. Shirlaw, June 29, 1905, p. 875.

*Sale of Moveables—Sale on Approbation—Transference of property—Goods pawned by retail dealer—Title of pawnbroker—Sale of Goods Act*, 1893, *sec.* 18, *Rule* 4 (*a*).

7. Ehrmann, a wholesale jeweller, was in the habit of sending goods to Anderson, a retail jeweller, with the wholesale prices marked, with power to sell and deliver on his own account and for his own profit any articles he might sell, Anderson being liable only for the wholesale price. At the same time Ehrmann sent a printed notice headed "approbation note," stating that the goods were to remain the property of the sender till invoiced by him to Anderson. Anderson having retained a diamond necklace for several months, Ehrmann in April 1903 urged Anderson to purchase the necklace himself, and offered to take bills for the price. Anderson agreed to do so, and the necklace was invoiced to him, and the bills were granted by him. Anderson having subsequently become bankrupt, Bryce, a pawnbroker, with whom Anderson had in December 1902, without Ehrmann's knowledge, pledged the necklace, raised an action of multiplepoinding to determine the right thereto. Claims were lodged by Ehrmann, by Bryce, and by Anderson's trustee, but the claim by the last was not insisted in. *Held* (1) that as in December 1902 Anderson had been put by Ehrmann in a position to give a good title to a purchaser, he could validly pledge the necklace, and had validly pledged it to Bryce; (2) that as Anderson's trustee did not insist in his claim Ehrmann was entitled to delivery of the necklace after satisfying Bryce's claim. Bryce v. Ehrmann, Oct. 28, 1904, p. 5.

*Sale of Moveables—Stoppage in transitu—Duration of transit—Sale of Goods Act*, 1893, *secs.* 44, 45.

8. By c.i.f. contract dated 11th February 1903, J. B. Snowball Company, Limited, Chatham, Miramichi, New Brunswick, sold a quantity of timber to M'Dowall & Neilson, Glasgow, at certain prices "including freight and insurance to Glasgow." The contract bore—"The goods are deliverable in the usual and customary manner at Miramichi with all reasonable despatch, according to the season of the year, and agreeably to the custom of the port during the shipping season 1903." "Should the vessel or vessels fixed for this contract be lost previous to loading, and after the name being declared to the buyer, then sellers to have the option of substituting another vessel or vessels, or cancelling the contract." The timber was shipped at Miramichi by the sellers, and the bill of lading taken in their own name. The bill of lading bore that the cargo was to be delivered in Glasgow to their order or assigns. On the ship's arrival at Glasgow the sellers stopped the goods *in transitu*. In an action of multiplepoinding brought in name of the shipmaster, the trustee of M'Dowall & Neilson, who had been sequestrated, contended that the place of delivery was Miramichi, and that the *transitus* there ended. *Held* on a construction of the contract that the port of delivery was Glasgow, and not Miramichi,

SALE—*Continued.*

and that the goods were *in transitu* when stopped. M'Dowall & Neilson's Trustee v. J. B. Snowball Co., Limited, Nov. 8, 1904, p. 35.

*Sale of Moveables—Stoppage in transitu—Transference of document of title for valuable consideration and in good faith—Sale of Goods Act, 1893, sec. 47.*

9. In June 1903, Neilson lent £3000 to M'Dowall & Company, and in security took from M'Dowall & Company delivery-orders for timber belonging to them stored in Connal & Company's timber-yard. The orders were addressed to Haggart & Company, licensed timber-measurers, employed by M'Dowall & Company, and were intimated by Neilson to Haggart & Company, who replied acknowledging that they held the goods to his order. According to the practice of the timber trade in Glasgow, the measurers were allowed by the proprietors of the yard to have practically complete control over timber stored by them. They could remove the timber as and when they chose, and delivery-orders for the removal of timber were addressed to them. On 23d September 1903, Neilson at the request of M'Dowall & Company granted delivery-orders signed by him and addressed to Haggart & Company in favour of M'Dowall & Company for the timber in exchange for the bills of lading of a cargo of timber purchased by M'Dowall & Company from Dobell, Beckett, & Company then on its way to Glasgow. On the arrival of the cargo at Glasgow four days later, it was stopped *in transitu* by Dobell, Beckett, & Company. On 1st October M'Dowall & Company were sequestrated. In a question between Dobell, Beckett, & Company, and Neilson, *held* that the undertaking by Haggart & Company to hold to Neilson's order, surrendered by him when he received the bills of lading, not being an obligation granted by them personally, but only as the servants of M'Dowall & Company, was of no value, and was not "valuable consideration" in the sense of the Sale of Goods Act, 1893, sec. 47, and that the stoppage *in transitu* was not affected by the transference of the bills of lading to Neilson. Dobell, Beckett, & Co. v. Neilson, Dec. 16, 1904, p. 281.

*Sale of Heritage—Objections to Title—Expenses.*

10. The purchaser of subjects exposed to public roup under the powers of a bond, who had objected to the title, *found liable* in the expenses of an action for implement in respect that none of his objections were substantial. Roscoe v. Mackersy, June 8, 1905, p. 761.

See *Right in Security*, 1, 2.

SCHOOL. See *Charitable and Educational Bequests and Trusts*, 4, 8, 13—*Justiciary Cases*, 28—*Title to Sue*, 3.

SEQUESTRATION. See *Bankruptcy.*

SEQUESTRATION FOR RENT. See *Lease*, 2.

SERVITUDE. See *Property*, 5.

SHERIFF. *Jurisdiction — Burgh Police (Scotland) Act*, 1892, *sec.* 27 — *Declarator of patrimonial right in burgh lands by Freemen.*

1. *Held* that section 27 of the Burgh Police Act, 1892, did not give the Sheriff jurisdiction in an action brought by the freemen of a burgh of barony, which had been formed into a police burgh, for declarator that the freemen had a private and patrimonial right in the property of the burgh of barony. Freemen of Prestwick v. Provost, Magistrates, and Councillors of Prestwick, March 17, 1905, p. 602.

*Indictment—Indictment in Sheriff Court at instance of private prosecutor with concurrence of Lord Advocate—Competency—Criminal Procedure (Scotland) Act*, 1887, *sec.* 2—*Merchandise Marks Act*, 1887, *sec.* 2 (6).

2. *Held* that apart from the Merchandise Marks Act, 1887, an indictment in the Sheriff Court at the instance of a private prosecutor for his

SHERIFF—*Continued.*

private interest with concurrence of the Lord Advocate was not competent, and that the proviso in sec. 2 (6) of that Act, assuming it to apply to Scotland, does not by implication make such an indictment competent. Dunbar v. Johnston, Dec. 22, 1904 (J. C.), p. 40.

*Proof—Proof on Preliminary Plea—Employers Liability Act*, 1880, *secs. 4 and 7—Notice of Injury.*

3. *Per cur.*, after consultation with the Judges of the Second Division,—When a question of want of notice under the Employers Liability Act is raised, it should be dealt with by the Sheriff as a prejudicial plea, and a proof should be allowed on this prejudicial plea before a proof is allowed on the merits. Duncan v. Fife Coal Co., Limited, July 15, 1905, p. 958.

*Summary Ejection—Heritable Securities (Scotland) Act*, 1894, *sec. 5—Bond and Assignation in Security by liferentrix.*

4. The creditors in a bond and assignation in security, granted by a liferentrix by constitution over her liferent interest in certain lands and a mansion-house, brought an action in the Sheriff Court under sec. 5 of the Heritable Securities Act, 1894, for the summary ejection of the liferentrix from the mansion-house, of which she was in personal occupation. *Held* that the liferentrix was not a "proprietor" in the sense of sec. 5 of the Act, and that therefore the summary remedy of ejection was incompetent. Scottish Union and National Insurance Co. v. Smeaton, Dec. 1, 1904, p. 174.

*Small-Debt Court—Proof—Reference to Oath—Refusal to hear statement by deponent on oath—Appeal—Deviation from statutory enactments—Small-Debt (Scotland) Act*, 1837, *sec.* 31.

5. In an action in the Small-Debt Court the pursuer's claim was referred to the defender's oath. After the defender had made his deposition on oath, his agent proposed to cross-examine him, and, in the hearing of the defender, stated what he expected to prove by the cross-examination. The Sheriff-substitute refused to allow the cross-examination. The defender, who was still in the witness-box, then volunteered to make a statement. The Sheriff-substitute refused to allow the defender to make this statement, and after hearing the parties' agents, gave decree against the defender. In an appeal by the defender under sec. 31 of the Small-Debt (Scotland) Act, 1837, *held* that the refusal of the Sheriff-substitute to allow the defender to make a statement in supplement to his deposition on oath constituted a "deviation in point of form from the statutory enactments" such as had or might have "prevented substantial justice from being done" within the meaning of sec. 31 of the Act. Appeal therefore *sustained* and cause *remitted* to the Sheriff-substitute to rehear the defender in the reference to oath. Paterson v. Cowie's Executor, July 12, 1905 (J. C.), p. 68.

*Debts Recovery Court—Citation—Objection to citation by party appearing—"Ordinary Sheriff Court"—Sheriff Courts (Scotland) Act*, 1876, *secs. 2 and 12—Debts Recovery (Scotland) Act*, 1867.

6. *Held* that sec. 12, subsec. (2), of the Sheriff Courts Act, 1876, applied to an action raised by summons under the Debts Recovery (Scotland) Act, 1867, in respect that such an action was "a civil proceeding in the ordinary Sheriff Court." Hamilton v. Kerr, Dec. 3, 1904, p. 182.

*Debts Recovery Court—Interlocutor—Necessity for findings in fact and in law—Debts Recovery (Scotland) Act*, 1867, *secs.* 9 *and* 10.

7. *Held* that in actions under the Debts Recovery (Scotland) Act, 1867, the Sheriff is not bound to pronounce an interlocutor containing findings in fact and findings in law, unless in cases in which he has taken a note of the evidence upon the requisition of one or both of the parties. Hamilton v. Kerr, Dec. 3, 1904, p. 182.

See *Cessio Bonorum—Master and Servant—Process.*

SHIP. *Collision—Moving and stationary vessels—Onus—Compulsory Pilotage—Liability for defective equipment of ship.*

1. When a vessel in motion collides with a vessel at rest the presumption is that the former is in fault, and this presumption will not be over come by proof that the colliding vessel was compulsorily in charge of a pilot, unless it is also proved that the collision was due to the fault of the pilot. Mann, Macneal, & Co. v. Ellerman Lines, Dec. 6, 1904, p. 214.

*Collision—Departure from Collision Regulations—Onus—Regulations for Preventing Collisions at Sea, Articles* 20, 21, 22, 23, *and* 27—*Merchant Shipping Act*, 1894, *secs.* 418 *and* 419 (4).

2. The s.s. "Kyanite," finding herself in dangerous proximity to the "Buccleuch," a ship under sail, whose lights were inadequate, and being unable to tell what the course of the sailing ship was, starboarded her helm in order to turn away from the sailing ship, and continued to go full speed ahead. This brought the "Kyanite" across the course of the "Buccleuch," and, two or three minutes after the "Buccleuch" was first sighted by the "Kyanite," a collision took place, the stem of the "Buccleuch" striking the "Kyanite" on the starboard side, nearly amidships. In cross actions of damages, *held* (1) that although the "Kyanite" did in fact depart from the Regulations for Preventing Collisions at Sea, by crossing the course of the "Buccleuch," she, being wholly unaware of the course of the latter owing to her inadequate lights, was not chargeable with fault in respect of this departure from the regulations; but (2) that the "Kyanite" was to be held at fault in respect that she had infringed article 23 of the regulations by failing to stop and reverse in the short space of time after she sighted the sailing ship, and had failed to discharge the *onus* which lay on her of shewing that her failure to comply with this article of the regulations was excusable, by proving either that her departure from the regulations was the only chance of escaping a collision, or that the risk of collision would have been increased by obeying the regulations. Windram v. Robertson, May 23, 1905, p. 665.

*Collision—Damages—Limitation of Liability—Cross actions of damages between the two Shipowners—Decree in favour of one of the Shipowners—Petition for limitation of liability at the instance of the other Shipowner—Competency of reopening the question of damages at the instance of cargo owners—Merchant Shipping Act*, 1894, *secs.* 503 *and* 504.

3. A collision between the s.s. "Anglia" and the s.s. "Olga" resulted in the sinking of the "Anglia" and in the "Olga" being slightly damaged. In cross actions of damages between the owners of the "Anglia" and the owners of the "Olga," both vessels were found to be in fault, and the owners of the "Anglia" obtained decree against the owners of the "Olga" for £7149, 14s. 7d., being one-half of the value of the "Anglia" under deduction of one-half of the damage to the "Olga." The owners of the "Olga" then presented a petition under sections 503 and 504 of the Merchant Shipping Act, 1894, for limitation of their liability to £6215, 4s., being £8 per ton on a tonnage of 776·90, the tonnage of the "Olga." The owners of the "Anglia" lodged a claim in the petition claiming to be ranked on the sum of £6215, 4s. for £7149, 4s. 7d., the sum in the decree obtained by them in the cross actions of damages. The owners of the cargo of the "Anglia" also lodged a claim in which besides claiming to be ranked in respect of the value of the cargo, they maintained that the decree for £7149, 4s. 7d. was not binding on them; that the value of the "Anglia," on the basis of which that decree was reached, was a gross over-estimate of her true value; that the owners of the "Olga" had no interest to contest, and had not in fact contested, the question of the value of the "Anglia," in respect that, once it was decided that both vessels were to blame, the question of exact values became immaterial to the owners of the "Olga," whose limit of £8 per

SHIP—*Continued.*

ton was reached by the finding that both vessels were to blame. The cargo owners of the "Anglia" did not aver that the decree for £7149, 4s. 7d., had been obtained collusively or of consent or by way of compromise. *Held* that the claim of the owners of the "Anglia" having been duly constituted against the debtor by a decree *in foro*, must be taken at the amount fixed in the decree. Owners of the "Olga" v. Owners of the "Anglia," June 6, 1905, p. 739.

*Collision—Damages—Limitation of Liability—Interest—Merchant Shipping Act*, 1894, *sec.* 503.

4. *Held* that in addition to £8 per ton of her tonnage the owners of a ship liable in damages for collision were liable in payment of interest at 4 per cent from the date of the collision until payment or consignation of the damages. Owners of the "Olga" v. Owners of the "Anglia," June 6, 1905, p. 739.

*Collision—Damages—Limitation of Liability—Ascertainment of Tonnage—Deduction for Crew Space—Certificate of Board of Trade Surveyor—Foreign Vessel—Merchant Shipping Act*, 1894, *secs.* 84, 503, *and Schedule VI.* (3)—*Order in Council*, 21*st November* 1895.

5. An Order in Council of 21st November 1895, issued under section 84 of the Merchant Shipping Act, 1894, decrees "that the merchant ships of the kingdom of Denmark, the measurement whereof shall . . . have been ascertained and denoted in the certificates of registry or other national papers of such ships, shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers, in the same manner, to the same extent, and for the same purposes as the tonnage denoted in the certificate of registry of a British ship is deemed to be the tonnage of that ship." *Held* that the owners of a Danish vessel with a Danish certificate setting forth her measurements, including the tonnage taken up by crew space, were not entitled, in ascertaining the tonnage of the vessel for the purposes of section 503 of the Merchant Shipping Act, 1894, to deduct the tonnage set forth in the certificate as taken up by crew space, in respect that the space so set forth had not been certified by one of the surveyors under the Act as required by Schedule VI. Owners of the "Olga" v. Owners of the "Anglia," June 6, 1905, p. 739.

*Charter-Party—Lay-Days—"Working Day of twenty-four consecutive hours."*

6. A charter-party provided that the ship was to be loaded and discharged "at the rate of 500 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays always excepted." *Held* that a "working day of twenty-four consecutive hours" meant a period of twenty-four actually consecutive hours (*i.e.*, including the hours of night, and not an artificial period made up of twenty-four working hours, *i.e.*, excluding the hours of night. Turnbull, Scott, & Co. v. Cruickshank & Co., Dec. 15, 1904, p. 265.

*Charter-Party—Demurrage—Exceptions—"Stoppage of trains or any cause beyond the personal control" of charterers—Delivery of cargo "as customary."*

7. By a charter-party the ship was bound to deliver the cargo consisting of iron ore "as customary" at the port of discharge where and as directed by the consignees. The charterers were exempt from liability for demurrage in case of delay, *inter alia*, through "stoppage of trains or any cause beyond the personal control" of the charterers. The time taken for loading and discharging having exceeded the lay-days, the shipowners brought an action for demurrage against the charterers, who pleaded the exemption clause. It was proved that the customary mode of discharging iron ore at Ardrossan, the port of discharge, when the cargo had been sold (as the cargo in question had been), was direct

into railway waggons, although in special circumstances the harbour authorities might give permission for part of a cargo being discharged on the quay. It was also proved that delay in discharging the cargo had been caused by the railway company failing to supply a sufficient number of waggons per day. The charter-party took the ship bound to work at night if requested, but the charterers did not request the harbour authorities for permission to work at night. *Held* (1) that the customary mode at Ardrossan of discharging a cargo of iron ore which had been sold was into railway waggons direct; (2) that the charterers were not liable for demurrage in respect of ordinary working hours where the delay was caused by want of railway waggons; but (3) that the absence of waggons during the hours of night did not exempt them from demurrage, as the railway company could not be expected to supply waggons at night without notice. Turnbull, Scott, & Co. v. Cruickshank & Co., Dec. 15, 1904, p. 265.

*Charter-party—Damages for detention—Charterers' obligation to have cargo ready—Custom of Port.*

8. *Under a charter-party dated 30th May* 1900, *which did not fix the time within which the ship was to be loaded, the s.s. "Ardandearg" was bound to proceed to Newcastle, New South Wales, and there load a cargo of Australian coals "in the usual and customary manner, as ordered by the charterers, which they bind themselves to ship (except in the event of riot, strikes, &c. . . . or any other accidents or causes beyond the control of the charterers, which may delay her loading)." By the custom of the port of Newcastle, of which both parties were aware, a loading berth could not be procured until a coaling order from a colliery was produced. These coaling orders were issued in regular turn. There were no facilities for storing coal at the harbour. The charterers ordered a cargo of coal from the Lambton Colliery, in the neighbourhood of Newcastle, ten days after the ship was chartered. On 14th July when the "Ardandearg" arrived, two other ships having coaling orders from the same colliery had arrived before her. In consequence of the colliery having only an output of* 350 *tons per day, the loading of these ships was not completed till* 13*th August. The "Ardandearg," having then obtained a colliery order and a berth, completed her loading on* 23*d August and sailed the following day.* Held (rev. *judgment of First Division*) *that the charterers were liable in damages to the shipowners for the detention of the ship, on the ground that there was an absolute obligation on the charterers to have a cargo ready when the "Ardandearg" arrived, and that no facts had been proved to qualify that obligation.* Ardan Steamship Co., Limited, v. Weir & Co., Aug. 4, 1905, (H. L.), p. 126.

*Charter-party—Failure to provide Cargo—Measure of damage.*

9. *Manufacturers of wood pulp at Stocka, Sweden, in January* 1900 *entered into a charter-party with a British shipowner for the carriage of two cargoes of wood pulp from Stocka to Cardiff, the first to be lifted at Stocka "May (f.o.w.), (first open water) and the second in August/September, owners' option." The ordinary length of the voyage was twenty-two days. In an action by the charterers against the shipowner for damages for an admitted breach of the contract by the failure of the shipowner to send a ship to Stocka for the second cargo before the last day of September, it was proved that the shipment was intended by the charterers for delivery at Cardiff in implement of a contract of sale between the charterers and Owen, Cardiff, which set forth as the "mode and place of delivery—c.i.f., Cardiff. Time of delivery—in two cargoes, first open water, and August/September* 1900." *The delivery of the first cargo was duly made, but on* 29*th September Owen having ascertained that the ship for the second cargo could not sail from Stocka*

SHIP—*Continued.*

*before 12th October, bought in against the charterers the remainder of the wood pulp contracted to be delivered. The charterers paid Owen the loss they had thus sustained, and claimed this sum from the shipowner as the damage sustained by them. The First Division, construing the obligation in the contract of sale, to deliver c.i.f. Cardiff August/September, to import an obligation to make actual delivery of the cargo at Cardiff before the end of September, held that as by the charter-party the ship was not bound to load at Stocka before the end of September the charterers' failure to deliver the goods at Cardiff by that date was not due to non-implement of the charter-party. In an appeal by the charterers,* held (rev. *the judgment*) *that when the charterers ascertained that the ship could not leave Stocka before 12th October, they were entitled to buy in, or to allow their purchaser to buy in, other goods to replace those which could not be delivered in terms of the charter-party, and that the measure of damages for the shipowner's breach of contract was the extra cost thus occasioned.*

Opinions *that the words in the contract of sale,—"Mode and place of delivery—c.i.f., Penarth Dock, Cardiff. Time of delivery—in two cargoes, first open water and August/September 1900"—imported an obligation to ship, not to deliver at Cardiff, both at first open water, and in August or September.* Ströms Bruks Aktie Bolag v. Hutchison, Aug. 4, 1905 (H. L.), p. 131.

SLANDER. See *Reparation*, 7 *to* 15.

STATUTE. *Construction—Headings in Statute—Factory and Workshop Act*, 1901, *sec.* 104.

1. *Opinions* (*per* the Lord Justice-Clerk and Lord Kyllachy) that a heading in a statute, as distinguished from a marginal rubric, was part of the statute, and was to be taken into account in construing the section. M'Ewen v. Magistrates of Perth, June 2, 1905, p. 714.

*Retrospective Effect—Agricultural Holdings Act*, 1900, *First Schedule, Part III.*

2. The Agricultural Holdings Act, 1900, gives tenants right to compensation, *inter alia*, for "laying down temporary pasture with clover, grass, lucerne, sainfoin, or other seeds, sown more than two years prior to the determination of the tenancy." *Held* that a tenant, whose tenancy terminated less than two years from the date of the Act, was entitled to compensation under this enactment. Hamilton Ogilvy v. Elliot, July 20, 1905, p. 1115.

*Applicability to Scotland—Patents, Designs, and Trade-Marks Act*, 1883, *secs.* 29 *and* 107.

3. *Held* that sec. 29 of the Patents, Designs, and Trade-Marks Act, 1883, applies to Scotland, and that in an action for infringement of patent particulars of the breach must be set forth, but that in view of the terms of sec. 107, which provides that nothing in the Act shall affect the forms of process of the Courts in Scotland, the particulars fell to be set forth in the condescendence, and not in a separate statement. Mica Insulator Co., Limited, v. Bruce Peebles & Co., Limited, July 11, 1905, p. 944.

*Applicability to Scotland—Preferential Payments in Bankruptcy Act*, 1888, *sec.* 1 (1), (3).

4. *Opinion, per* Lord Ordinary, that the provisions of the Preferential Payments in Bankruptcy Act, 1888, are applicable to Scotland, in so far as they deal with the case of companies which are being wound up under the Companies Acts. Liquidators of Scottish Drug Depot, Limited, v. Fraser, May 16, 1905, p. 646.

*Applicability to Scotland—Merchandise Marks Act*, 1887, *sec.* 2 (6).

5. *Question*, whether the proviso in sec. 2 (6) of the Merchandise Marks Act, 1887, that a person charged before a Court of summary jurisdiction

STATUTE—*Continued.*
shall be informed of his right to be tried on indictment, applies to Scotland. Dunbar v. Johnston, Dec. 22, 1904 (J. C.), p. 40.

STATUTES.
1587, *cap.* 91. See *Justiciary Cases*, 15.
1696, *cap.* 5. See *Bankruptcy*, 1.
6 *Anne, cap.* 53 (*Exchequer Court (Scotland) Act*, 1707). See *Revenue*, 6.
48 *Geo. III. cap.* 55 (*Inhabited House Duty Act*, 1808). See *Revenue*, 10.
48 *Geo. III. cap.* 151 (*Court of Session Act*, 1808). See *Appeal*, 1—*Process*, 11.
1 *and* 2 *Geo. IV. cap.* 38 (*Court of Session Act*, 1821). See *Administration of Justice*, 1.
6 *Geo. IV. cap.* 120 (*Judicature Act*, 1825). See *Process*, 18 *to* 22.
2 *and* 3 *Will. IV. cap.* 65 (*Representation of the People (Scotland) Act*, 1832). See *Election Law*, 1.
2 *and* 3 *Will. IV. cap.* 68 (*Game (Scotland) Act*, 1832). See *Justiciary Cases*, 10.
3 *and* 4 *Will. IV. cap.* 13 (*Public Revenue (Scotland) Act*, 1833). See *Revenue*, 6.
3 *Will. IV. cap. lxiv.* (*Glasgow Faculty of Procurators Widows Fund Act*, 1833). See *Insurance*, 2.
1 *Vict. cap.* 41 (*Small-Debt (Scotland) Act*, 1837). See *Sheriff*, 5.
3 *Vict. cap. xxiii.* (*Musselburgh Harbour Act*, 1840). See *Harbour.*
4 *and* 5 *Vict. cap.* 38 (*School Sites Act*, 1841). See *Charitable and Educational Bequests and Trusts*, 8.
5 *and* 6 *Vict. cap.* 35 (*Income-Tax Act*, 1842). See *Revenue*, 4 *to* 8.
8 *and* 9 *Vict. cap.* 33 (*Railways Clauses Consolidation (Scotland) Act*, 1845). See *Railway.*
8 *and* 9 *Vict. cap.* 83 (*Poor-Law (Scotland) Act*, 1845). See *Poor*, 4.
15 *and* 16 *Vict. cap.* 27 (*Evidence (Scotland) Act*, 1852). See *Justiciary Cases*, 21.
16 *and* 17 *Vict. cap.* 34 (*Income-Tax Act*, 1853). See *Revenue*, 4, 5.
19 *and* 20 *Vict. cap.* 56 (*Exchequer Court (Scotland) Act*, 1856). See *Revenue*, 6.
19 *and* 20 *Vict. cap.* 79 (*Bankruptcy (Scotland) Act*, 1856). See *Bankruptcy.*
19 *and* 20 *Vict. cap.* 113 (*Foreign Tribunals Evidence Act*, 1856). See *Process*, 16.
20 *and* 21 *Vict. cap.* 71 (*Lunacy (Scotland) Act*, 1857). See *Poor*, 3.
24 *and* 25 *Vict. cap.* 109 (*Salmon Fisheries (England) Amendment Act*, 1861). See *Justiciary Cases*, 12.
25 *and* 26 *Vict. cap.* 89 (*Companies Act*, 1862). See *Company.*
25 *and* 26 *Vict. cap.* 97 (*Salmon-Fisheries (Scotland) Act*, 1862). See *Justiciary Cases*, 12, 13.
27 *and* 28 *Vict. cap.* 53 (*Summary Procedure (Scotland) Act*, 1864). See *Justiciary Cases*, 2, 3, 22, 25, 26.
29 *and* 30 *Vict. cap.* 118 (*Industrial Schools Act*, 1866). See *Justiciary Cases*, 28.
29 *and* 30 *Vict. cap. cclxxiii.* (*Glasgow Police Act*, 1866). See *Police*, 4.
31 *and* 32 *Vict. cap.* 48 (*Representation of the People (Scotland) Act*, 1868). See *Election Law*, 1, 2, 3.
31 *and* 32 *Vict. cap.* 96 (*Debts Recovery (Scotland) Act*, 1867). See *Sheriff*, 6, 7.
31 *and* 32 *Vict. cap.* 100 (*Court of Session Act*, 1868). See *Process*, 7, 18, 19, 20, 21, 22.
31 *and* 32 *Vict. cap.* 101 (*Titles to Land Consolidation (Scotland) Act*, 1868). See *Right in Security*, 1.
37 *and* 38 *Vict. cap.* 94 (*Conveyancing (Scotland) Act*, 1874). See *Superior and Vassal*, 3, 4, 5, 6.

STATUTES—*Continued.*
38 *and* 39 *Vict. cap.* 62 (*Summary Prosecutions Appeals* (*Scotland*) *Act*, 1875). See *Justiciary Cases*, 3.
38 *and* 39 *Vict. cap.* 63 (*Sale of Food and Drugs Act*, 1875). See *Public Health*, 2.
38 *Vict. cap. vi.* (*Glasgow Faculty of Procurators Act*, 1875). See *Insurance*, 2.
39 *and* 40 *Vict. cap.* 70 (*Sheriff Courts* (*Scotland*) *Act*, 1876). See *Sheriff*, 6.
43 *and* 44 *Vict. cap.* 42 (*Employers Liability Act*, 1880). See *Proof* 17, 21, 22—*Reparation*, 23.
44 *and* 45 *Vict. cap.* 21 (*Married Women's Property* (*Scotland*) *Act*, 1881). See *Succession*, 2.
44 *and* 45 *Vict. cap.* 33 (*Summary Jurisdiction* (*Scotland*) *Act*, 1881). See *Justiciary Cases*, 3.
45 *and* 46 *Vict. cap.* 61 (*Bills of Exchange Act*, 1882). See *Bills of Exchange*, 2.
46 *and* 47 *Vict. cap.* 57 (*Patents, Designs, and Trade-Marks Act*, 1883). See *Patent*, 2, 3.
46 *and* 47 *Vict. cap.* 62 (*Agricultural Holdings* (*Scotland*) *Act*, 1883). See *Lease*, 6.
48 *and* 49 *Vict. cap.* 3 (*Representation of the People Act*, 1884). See *Election Law*, 2.
48 *and* 49 *Vict. cap.* 16 (*Registration Amendment* (*Scotland*) *Act*, 1885). See *Election Law*, 3.
49 *and* 50 *Vict. cap.* 29 (*Crofters Holdings* (*Scotland*) *Act*, 1886). See *Crofter.*
50 *and* 51 *Vict. cap.* 25 (*First Offenders Act*, 1887). See *Justiciary Cases*, 16.
50 *and* 51 *Vict. cap.* 28 (*Merchandise Marks Act*, 1887). See *Justiciary Cases*, 14, 20.
50 *and* 51 *Vict. cap.* 35 (*Criminal Procedure* (*Scotland*) *Act*, 1887). See *Justiciary Cases*, 14.
50 *and* 51 *Vict. cap.* 58 (*Coal Mines Regulation Act*, 1887). See *Justiciary Cases*, 9—*Master and Servant*, 10, 11—*Reparation*, 22.
51 *and* 52 *Vict. cap.* 8 (*Customs and Inland Revenue Act*, 1888). See *Revenue*, 9.
51 *and* 52 *Vict. cap.* 62 (*Preferential Payments in Bankruptcy Act*, 1888). See *Company*, 8.
52 *and* 53 *Vict. cap.* 23 (*Herring Fishery* (*Scotland*) *Act*, 1889). See *Justiciary Cases*, 1.
52 *and* 53 *Vict. cap.* 50 (*Local Government* (*Scotland*) *Act*, 1889). See *Local Government.*
54 *and* 55 *Vict. cap.* 3 (*Custody of Children Act*, 1891). See *Minor and Pupil*, 2.
55 *and* 56 *Vict. cap.* 55 (*Burgh Police* (*Scotland*) *Act*, 1892). See *Justiciary Cases*, 5, 6, 7, 8—*Police*, 1, 7—*Sheriff*, 1.
56 *and* 57 *Vict. cap.* 61 (*Public Authorities Protection Act*, 1893). See *Limitation of Action.*
56 *and* 57 *Vict. cap.* 71 (*Sale of Goods Act*, 1893). See *Sale*, 5 *to* 9.
57 *and* 58 *Vict. cap.* 30 (*Finance Act*, 1894). See *Revenue*, 1, 2, 3.
57 *and* 58 *Vict. cap.* 44 (*Heritable Securities* (*Scotland*) *Act*, 1894). See *Right in Security*, 3.
57 *and* 58 *Vict. cap.* 56 (*Statute Law Revision Act*, 1894). See *Justiciary Cases*, 3.
57 *and* 58 *Vict. cap.* 60 (*Merchant Shipping Act*, 1894). See *Ship*, 2, 3, 4, 5.
58 *and* 59 *Vict. cap.* 37 (*Factory and Workshop Act*, 1895). See *Master and Servant*, 7.

STATUTES—*Continued.*
60 *and* 61 *Vict. cap.* 37 (*Workmen's Compensation Act*, 1897). See *Master and Servant.*
60 *and* 61 *Vict. cap.* 38 (*Public Health* (*Scotland*) *Act*, 1897). See *Public Health*, 1.
63 *and* 64 *Vict. cap.* 49 (*Town-Councils* (*Scotland*) *Act*, 1900). See *Burgh*, 6.
63 *and* 64 *Vict. cap.* 50 (*Agricultural Holdings Act*, 1900). See *Lease*, 3, 4, 5.
63 *and* 64 *Vict. cap. xxviii.* (*Edinburgh Corporation Act*, 1900). See *Burgh*, 2.
63 *and* 64 *Vict. cap. cl.* (*Glasgow Building Regulations Act*, 1900). See *Police*, 2, 3, 4, 5, 6.
1 *Edw. VII. cap.* 22 (*Factory and Workshop Act*, 1901). See *Master and Servant*, 8, 9.
2 *Edw. VII. cap.* 25 (*Lands Valuation* (*Scotland*) *Amendment Act*, 1902). See *Valuation Acts*, 6.
3 *Edw. VII. cap.* 25 (*Licensing* (*Scotland*) *Act*, 1903). See *Public-House.*
3 *Edw. VII. cap.* 36 (*Motor Car Act*, 1903). See *Justiciary Cases*, 17.

STOPPAGE IN TRANSITU. See *Sale*, 8, 9.

STREET. See *Police.*

SUCCESSION. *Terce—Jus relictæ—Goodwill of Public-House.*
1. Circumstances in which *held*, in a question as to a widow's legal rights, that the value of the goodwill of two public-houses, one of which was occupied by the deceased as tenant, while the other belonged to him as proprietor, was heritable estate. Muirhead's Trustees v. Muirhead, Feb. 17, 1905, p. 496.

*Legitim—Discharge—Married Women's Property* (*Scotland*) *Act*, 1881, *secs. 7 and 8.*
2. *An antenuptial marriage-contract, executed in* 1848, *declared that the provisions therein made for the child or children of the marriage should be in full satisfaction "of all bairns' part of gear, executry, and everything else which they could respectively claim or demand by and through the decease of" their mother. The mother having died in* 1899, *a son, who had taken his provision under the marriage-contract, claimed also, under the Married Women's Property Act*, 1881, *legitim from such part of his mother's moveable estate as did not fall under the marriage-contract, and which she had disposed of by will.* Held (aff. *judgment of First Division*) *that the son's claim to legitim from his mother's estate was excluded by the above clause in the marriage-contract.* Dunbar Dunbar v. Dunbar Dunbar, April 11, 1905 (H. L.), p. 92.

*Conversion—Judicial Factor—Sale of heritage to maintain ward.*
3. The curator bonis of a lunatic expended the whole moveable estate of the ward on her maintenance, and thereafter, on the advice of the Accountant of Court, and by the authority of the Sheriff, sold the ward's heritable property, the income of which was not sufficient to maintain her. *Held* that the balance of the ward's estate remaining at her death was moveable *quoad* succession, on the ground that in order to maintain the ward it was necessary for the curator to sell her heritable estate. M'Adam's Executor v. Souters, Dec. 2, 1904, p. 179.

*Testament—Pencil alterations on holograph will.*
4. *Held* that unauthenticated holograph pencil alterations on a holograph will written in ink had no effect. Currie's Trustees v. Currie, Dec. 24, 1904, p. 364.

*Testament—Revocation—Special Destination of Heritage—Subsequent General Disposition.*
5. In 1898 and 1902 A purchased with moneys belonging to himself certain heritable properties, taking the titles (which were registered), "to

SUCCESSION—*Continued.*

and in favour of the said A and B, wife of and residing with the said A, and to the survivor of them, and to their heirs and assignees whomsoever." A died in July 1904 leaving a trust-disposition and settlement, dated April 1904, by which he conveyed to trustees his whole estate, heritable and moveable, including all means and estate over which he had power of disposal by will or otherwise. The purposes were to pay the liferent of the whole residue to his widow, burdened with an obligation to maintain and educate the children, and the fee to the children on the liferenter's death. Power was given to the trustees (1) to encroach upon capital if the income was insufficient for the maintenance of the widow and children, and (2) to sell and burden heritage. At his death the testator had personal estate of the value of £3337. The heritable properties above mentioned were valued at £4900. The testator had no other heritable property. He was survived by a widow and by eight children, two in pupilarity and four in minority. *Held* that the settlement, read in the light of the circumstances, shewed the testator's intention to evacuate the special destinations of the heritable properties, and that the settlement had this effect. Morrison's Trustees v. Morrison, June 23, 1905, p. 810.

*Construction of Testamentary Writings—Will made in Foreign Country—Words importing gift of heritage—"Effects."*

6. A native of British Guiana who had been resident in Scotland for some years died in 1903 possessed of heritage in Scotland, leaving a will which had been executed in British Guiana in 1891. The will bore that the testator was about to leave the colony, and that in order to prevent disputes arising after his demise "as to the disposition of my effects in or out of the colony. . . . I now order as follows . . . I will and bequeath to . . . all my effects to be divided equally between the three . . ." The will concluded with a nomination of executors. *Held* (1) that the question whether the will carried the Scottish heritage was a question for the Scottish Court; (2) that as the will was expressed in ordinary language, and as there was no relevant averment that it contained any technical term—or that it fell to be construed in accordance with any technical canon of construction—peculiar to the colony, it was not necessary for the Court to resort to any foreign Court for aid in its interpretation; and (3) that the will did not convey the testator's heritable estate in Scotland. Griffith's Judicial Factor v. Griffith's Executors, Jan. 31, 1905, p. 470.

*Construction of Testamentary Writings — Conditions — Restrictions on Vested Right—Bequest to "A for behoof of his family."*

7. A testator by his holograph will bequeathed one-fifth share of residue to his brother A "for behoof of his family." *Held* (1) that this expression was equivalent to "in trust for his children," and that the beneficial right was in the children only; and (2) that the children being of full age were entitled to immediate payment. Michie's Executors v. Michie, Feb. 21, 1905, p. 509.

*Construction of Testamentary Writings—Bequest to Executors—Certain persons or "the successor of each" appointed executors—Right of successors to share in bequest.*

8. A testator directed certain of his books to "be parted among" his executors. He appointed as his executors, *inter alios*, his brothers A and B and his sister C, "or their representatives, namely, the successor of each as representing their respective families." B predeceased the testator. C declined to accept office, and her eldest son was assumed as an executor. *Held* that B's eldest son being an executor as the successor and representative of his father was entitled to share in the bequest, but that C's eldest son was not so entitled. Michie's Executors v. Michie, Feb. 21, 1905, p. 509.

SUCCESSION—*Continued.*

*Construction of Testamentary Writings—"Survivors or survivor" held to mean "others or other."*

9. In a *mortis causa* disposition and settlement the granter disponed certain heritable subjects to A, his youngest son, "and the heirs whomsoever of his body, whom failing to the heirs of the bodies of" B, C, D, and E, his other children, one-fourth to each, "and in case of the death of any of the said B, C, D, and E without issue, or that the children of any of them should fail, then to the heirs of the bodies of the survivors or survivor of the said B, C, D, and E, and their heirs, successors, and assignees whomsoever." *Held* that the words "survivors or survivor" fell to be read as "others or other." Smith's Trustees v. Smith's Trustees, June 23, 1905, p. 815.

*Specific Legacy—Power to sell specific subject held in trust for liferenter and fiars.*

10. A testator, *inter alia*, directed her trustees "to hold in their own name my shares of the G. C. Railway Company, and pay the dividends or annual income thereof to" her nephew George "during his lifetime, and immediately after the decease of the said" George "I direct my said trustees to realise the said shares and to pay the price or value thereof" to George's children, whom failing to his heirs, executors, or successors whomsoever. The truster empowered her trustees "to sell and realise . . . the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion." In 1905, as the shares were yielding no income, George requested the trustees to sell them and to reinvest the proceeds. In a special case presented by the trustees *held* that the trustees had power to sell the shares. Galloway v. Campbell's Trustees, July 11, 1905, p. 931.

*Destination—Substitution or Conditional Institution—Date at which heirs to be sought.*

11. By a marriage-contract certain heritable subjects belonging to the wife were disponed in fee "to the children of said intended marriage equally among them, share and share alike, whom failing to the heirs and assignees" of the wife. The wife died survived by one child, who died in pupilarity. *Held* that the last clause of the destination was a substitution and not a conditional institution merely; and that the heirs of the wife were to be sought as at the date of the child's death. Smith's Trustees v. Smith's Trustees, June 23, 1905, p. 815.

*Legacy to a class—Direction "to hold"—Period of distribution.*

12. A testator directed his trustees "to hold" a fund in trust for all the children of A who, being sons, should attain twenty-one, or being daughters should attain that age or marry. During A's lifetime, certain of his children who had attained majority claimed payment of their shares. *Held* that as the class of beneficiaries could not be ascertained till after the death of A, no child was entitled to payment of a share before that event. Hope Johnstone v. Sinclair's Trustees, Nov. 1, 1904, p. 25.

*Fee or Liferent—Vesting—Repugnancy.*

13. A trust-disposition and settlement contained the following clauses:—"(Sixth) I leave and bequeath the residue of my estate, means, and effects, heritable and moveable, for behoof of all my children equally, and direct my trustees to pay over to each of my sons, as soon as conveniently may be after my death, the share of said residue falling to him: . . . And my trustees shall hold the shares of my daughters during their respective lives, and on the death of each shall pay her share to such person or persons as she may appoint by any revocable deed executed by her after she has attained the age of twenty-one years, and failing such appointment, then to her own nearest heirs";

SUCCESSION—*Continued.*

but with power to the trustees to encroach on the share of which a daughter "may be receiving the income" to an extent not exceeding £200 to provide her with an outfit on marriage. There followed a declaration that "the whole of the said provisions, whether of capital or income, so far as conceived in favour of or devolving upon females, shall be for their own sole and separate use, shall not be assignable by them or attachable for their debts or obligations, and shall be exclusive of the *jus mariti* and right of administration of any husband or husbands they may marry, and shall not be subject to the debts of such husbands or the diligence of their creditors." *Held* that on a sound construction of the above provisions the daughters had not a right of fee, but merely a liferent with a power to test on the capital of their shares. Forrest's Trustees v. Reid, Nov. 25, 1904, p. 142.

14. A testator by the third purpose of his trust-disposition and settlement directed his trustees to divide the residue of his estate into four equal shares, "which several shares shall continue to be held by my said trustees, or paid, applied, or disposed of by them in manner hereinafter directed." In the fifth purpose the testator directed the trustees to hold and invest in their own names one share for behoof of his second son. The trustees were further directed to pay to the son during his survivance the free income of the share, with power to them to make advances, not exceeding £2000, out of capital "in the event of the marriage of my said son to the satisfaction of my said trustees, or if for any other reason they may judge it expedient and prudent to make such advances." Power was also given to the son to provide, with consent of the trustees, an annuity for his widow out of the income of the share, and to apportion "by deed, *inter vivos*, or by testament, to take effect upon his decease," the share among his children. The testator further provided that in the event of the son "dying unmarried" the share should "be divided equally among his surviving nearest of kin *per stirpes*." The son survived the testator, and married and obtained an advance of £2000 from the trustees. In a special case the son maintained that he was entitled to payment of the share. *Held* that the son was not entitled to payment, and that the trustees were bound to hold the share for his behoof during his lifetime. Anderson's Trustees v. Anderson, Dec. 7, 1904, p. 224.

*Vesting—Express provision as to vesting—Vesting on youngest child attaining twenty-five—Claim by sole surviving child at age of twenty-three.*

15. A testator directed his trustees to hold the residue for behoof of his children equally, payable on the youngest attaining the age of twenty-five, the lawful issue of children dying before that period being entitled to the share which their parent would have taken, and the share of children dying without issue being divisible among the survivors jointly with the issue of predeceasers. He also directed that until the period of division the income of each child's share should be applied for its education and to paying their mother for their maintenance between the ages of fifteen and twenty-five. It was declared that the period of vesting should be as at the date when the youngest child should attain twenty-five. The testator was predeceased by his wife, but survived by two children, one of whom died without issue before the period of payment. The surviving child when twenty-three years of age demanded payment of the residue from the trustees. *Held* that on a true construction of the settlement the clause of vesting was still applicable although only one child survived, and that consequently the residue had not yet vested in him. Lawrie's Trustees v. Lawrie, July 6, 1905, p. 910.

SUCCESSION—*Continued.*

*Condition—Conditions impossible of fulfilment.*

16. A testator directed his trustees to expend two sums of £20,000 each upon the erection of two Roman Catholic churches, or "such smaller sum or sums as may be necessary . . . my intention being merely to have such church . . . completed although it may be at a less cost than £20,000 each"; any unexpended balance to revert to the residue of his estate. Except for a provision of £10,000 for the endowment of one of the two churches, the trust-disposition and settlement contained no provision for endowment. Upon the completion of the buildings the trustees were directed to convey them, on certain specified conditions, to trustees to be appointed respectively by the Bishop of the Roman Catholic Diocese in which the churches were to be situated. In a multiplepoinding raised after the death of the testator the Bishops stated they were unable to accept the bequests under the conditions specified, on the ground that owing to want of endowment the conditions could not be implemented. They proposed that the testamentary trustees should either accumulate the funds till they amounted to a sum sufficient to build and endow the churches or that the fund should be applied in accordance with a scheme to be approved by the Court. *Held* that either proposal was contrary to the truster's intention, and that the bequests having lapsed owing to the refusal of the Bishops to accept them on the conditions specified by the testator the sums in question fell into residue. Marquess of Bute's Trustees v. Marquess of Bute, Nov. 16, 1904, p. 49.

*Faculties and Powers—Validity of Exercise of Power—Whether power exercised or not—Partial Invalidity—Exercise by General Settlement—Power to appoint among issue—Appointment to daughter in liferent, with fee to her issue as she should appoint—Power to daughter to give liferent to husband.*

17. In a deed of settlement by way of indenture between A, a married woman, and trustees, it was, *inter alia*, agreed that the trustees should hold the trust funds in trust for A's issue, at such ages or times not earlier than twenty-one or marriage, in such shares, and in such manner, as she should appoint. In a hotchpot clause reference was made to any "child who or any of whose issue shall take under such appointment." By her will A bequeathed to other trustees the whole residue of her estate, "including all property over which I have power of appointment," upon trust, after payment of funeral and testamentary expenses, debts, and legacies, to hold for her two children (a son and daughter), or such one of them as should attain twenty-four, or die under that age leaving lawful issue, the daughter's share to be retained and the income paid to her during life, and the capital after her death to be held for her issue, "whether children or remoter descendants," in such manner as she should appoint, with power to her to appoint to her husband, if he survived her, not more than a moiety of the income during his life. *Held* (1) that A by her will intended to exercise, and had exercised, the power of appointment reserved in the settlement; (2) that the exercise of the power was not invalid in respect of its taking the form of a conveyance to other trustees who held other funds, and, *inter alia*, for purposes which could not be satisfied out of the funds which were the subject of the power; (3) that the expression "issue" in the settlement included remoter descendants than children, and that consequently the daughter's issue were objects of the power; (4) that the testatrix had validly exercised the power by giving a liferent to her daughter with a power of appointment of the fee among her issue, and the fee to her daughter's issue as the daughter should appoint; (5) that the daughter's husband not being an object of the power the will was not a valid exercise of the

SUCCESSION—*Continued.*

power in so far as it gave the daughter right to provide a liferent to her husband, but that this provision was to be held *pro non scripto*, and did not affect the validity of the exercise of the power otherwise.

A had also under her father's will a power to appoint among her issue "born or to be born during" her life, "or within twenty-one years after her death," with such future or other trusts for their benefit as she should appoint. *Held* that A had also validly exercised this power by her will except in so far as she gave right to her daughter to provide a liferent to her husband, and in particular, that the exercise of the power was not necessarily invalidated owing to A having given her daughter power to appoint to issue, whether children or remoter descendants, without any restriction to issue born within twenty-one years of A's death. Dalziel v. Dalziel's Trustees—Dalziel v. Henderson's Trustees, March 9, 1905, p. 545.

See *Charitable and Educational Bequests and Trusts—Fee and Liferent—Marriage-Contract,—Trust.*

SUPERIOR AND VASSAL. *Subject feued—Description—Boundaries.*

1. The burgh of Musselburgh, which was a burgh of barony and regality, held the commonty of the burgh under a charter from the lord superior, which gave the burgh right to the foreshore *ex adverso* on the north. In 1826 the burgh feued a portion of the commonty by a feu-contract, which described the subjects feued as bounded "on the north by the sea-beach." In a question between the burgh and the singular successors of the original feuars, raised in 1902, as to the ownership of the foreshore *ex adverso* of the ground feued, *held*, on a construction of the feu-contract and in the circumstances of the case, that the foreshore was not conveyed to the feuars by the feu-contract, but remained the property of the burgh. Magistrates of Musselburgh v. Musselburgh Real Estate Co., Limited, Dec. 21, 1904, p. 308.

*Charter of Novodamus—Glebe—Minerals—Foreshore.*

2. In exchange for an old glebe, a new glebe bounded by the sea was acquired by excambion in 1817. The new glebe had originally formed part of a portion of the barony of Grange, known as the 24 acres. In 1613 the 24 acres bounded by the sea had been feued by the proprietor of Grange to Bruce, the coal being reserved by the granter. In 1643 the granter obtained a Crown charter of resignation which contained a grant of the coal in the foreshore as a separate estate. In 1673 the proprietor of Grange, in consideration of a money payment, granted a charter of novodamus conveying the 24 acres (without reservation of the coal) to Bruce's successor, who in the same year took infeftment upon a precept contained in the charter. In 1904 the right of the minister to the coal in the foreshore *ex adverso* of the glebe was challenged by the proprietor of Grange in a process of interdict brought by him against the minister's mineral tenants. The complainer founded on the Crown charter of resignation of 1643, which contained a grant of the minerals in the 24 acres as a separate tenement, and contended that the charter of novodamus of 1673 merely gave of new what was given in the feu-contract of 1613. The mineral tenants in answer founded on the novodamus of 1673 as conveying the coal in the 24 acres from the proprietor of Grange to Bruce's successor. *Held* that the charter of novodamus of 1673 included the coal, and contained a valid grant by the proprietor of Grange of the 24 acres, without reservation, and that therefore the proprietor of Grange had no title to challenge the minister's right to the coal in the foreshore *ex adverso* of the glebe. Cadell v. Allan, March 17, 1905, p. 606.

*Casualty—Entry—Implied Entry—Duplicand on entry of each heir and*

SUPERIOR AND VASSAL—*Continued.*

*singular successor—Last vassal entered still alive—Conveyancing (Scotland) Act*, 1874, *sec.* 4.

3. By the *tenendas* clause of a feu-charter, dated in 1825, the vassal and his heirs and assignees whomsoever were taken bound to pay a certain feu-duty, "doubling the said feu-duty at the entry of each heir and singular successor." Subinfeudation and holding otherwise than of the granters and their successors were prohibited, and it was provided that all disponees of the vassals after the grantee taking infeftment should be obliged to enter within six months of the dispositions in their favour, and to pay the duplicand for such entry although their author might be then in life, "and in case of their failing or refusing to enter as aforesaid, then the right of the said purchasers or disponees . . . shall be held and considered still to remain with the former vassals, and the said area . . . shall be subject and liable to his debts and deeds notwithstanding the dispositions . . . granted by him." *Held* that the superiors had a contractual right to recover a duplicand from a singular successor of the vassal holding under and in terms of the feu-charter, and impliedly entered under a disposition recorded in 1903, although the last vassal who had paid a duplicand was still alive. Church of Scotland v. Watson, Jan. 14, 1905, p. 395.

4. A feu-disposition granted in 1831, provided that the lands were to be holden of and under the superior and his heirs and successors for the yearly payment of a certain feu-duty, "paying two years' feu-duty for the entry of each heir and singular successor (or one year's feu-duty in the event of the vassal last entered with the superior being then alive), over and above the duty for the year." It was declared that the vassal and his heirs and assignees should not be entitled to sell, let, or dispose of the subjects "to be held of themselves or of any interjected superior, but only of and under the superior and his foresaids," and that if the vassal or his heirs and assignees should "act contrary to any of the conditions above expressed," an irritancy should be incurred. *Held* that the superiors were entitled to recover a duplicand from a singular successor of the vassal holding under and in terms of the feu-charter, and impliedly entered under a disposition recorded in 1895, although the last vassal who had paid a casualty was still alive. Church of Scotland v. Watson, Jan. 14, 1905, p. 395.

*Casualty—Entry—Statutory Action for Declarator and Payment of Casualty—Competency—Effect of Implied Entry when fee empty—Conveyancing (Scotland) Act*, 1874, *sec.* 4, *subsecs.* 2, 3, 4.

5. A feu-charter granted in 1835 stipulated for payment of a certain feu-duty and for payment the first year of entry of each heir or singular successor of double the feu-duty "in name of entry," and subinfeudation was prohibited. These conditions were fenced with an irritant and a resolutive clause. The original vassal A died infeft in 1842, and the lands remained in non-entry until 1903, when his heirs were impliedly entered by recording in the Register of Sasines an extract of a decree pronounced in their favour by the Sheriff of Chancery, but they did not pay a casualty. In the same year they disponed part of the subjects to B, a purchaser, who was impliedly entered by recording the disposition in his favour. In an action against B by the superior for declarator and payment of the casualty, raised in the statutory form provided by the Conveyancing Act of 1874, the defenders pleaded that the action was incompetent in this form, and that the only action that could be competently raised against him was an ordinary petitory action founded on the contractual obligations in the feu-charter. The Court *held* that, as there was no vassal in life who had paid a casualty on entry, and as by the law prior to

SUPERIOR AND VASSAL—*Continued.*

1874 a declarator of non-entry could, in these circumstances, have been brought, the present action, as the statutory equivalent of a declarator of non-entry, was competent. Christie's Trustees v. M'Dougall, June 8, 1905, p. 756.

*Casualty — Composition — Lands held by trustees — Duplicand payable on each sale or transfer — Obligation of relief — Conveyancing (Scotland) Act, 1874, sec. 5.*

6. The title to certain lands provided that a duplicand of feu-duty should be payable to the superior, "the first year of the entry of every heir and singular successor," and contained clauses binding each heir and singular successor to enter and record his title within six months of his succession or purchase, with an irritancy, in the option of the superior, of all conveyances inconsistent with these provisions. In 1874 these lands were disponed to Gordon's trustees, who in 1885 paid a duplicand. In 1903 Macdonald's trustees, who were singular successors, with a title *ex facie* absolute, but in reality in security, disponed the lands to Tough's trustees, with an obligation to relieve them "of all feu-duties, casualties, and public burdens, due from or on account of the said subjects prior to the term of entry." No duplicand had been demanded since 1885, but in 1903 the superior demanded and received a duplicand from Tough's trustees. In an action of relief by Tough's trustees against Macdonald's trustees founded on the above-quoted clause of relief, *held* that the pursuers were entitled to decree, in respect (1) that the title to the feu made a duplicand payable on the occasion of each sale or transfer as well as on the death of each vassal, within the meaning of section 5 of the Conveyancing Act, 1874; (2) that consequently the duplicand paid in 1903 had become payable in 1900, *i.e.*, fifteen years after the last payment in 1885, and fell within the terms of the obligation of relief; and (3) that as the action was laid on an express obligation of relief, it was immaterial that the duplicand, although due in 1900, had not actually been demanded. Tough v. Macdonald, Jan. 17, 1905, p. 443.

*Building Restriction — Contravention by other feuars — Acquiescence.*

7. The disposition of the upper storey of a tenement, dated in 1830, conveyed a piece of ground at the back, subject to the restriction that no building of any kind in the back-ground should be higher than 12 feet. In 1904 the owner of the said upper storey proposed to build on the piece of ground a building exceeding 12 feet in height, and the owner of the remaining portion of the tenement objected. It was proved that the other back-greens in the street, which were all held from the same superior and subject to the same restriction, had been built over without objection, and that the objector had expressly assented to a similar building on the back-green of the house next door. *Held* that the restriction was no longer binding. Robertson's Trustees v. Bruce, March 14, 1905, p. 580.

See *Mines and Minerals*, 1, 2—*Property.*

SUPPORT, RIGHT OF. See *Mines and Minerals*, 1, 2.

TIME. See *Advertisement—Burgh*, 2.

TITLE TO HERITAGE. See *Expenses*, 6—*Property—Superior and Vassal—Writ*, 1.

TITLE TO SUE AND DEFEND. *Trustees of deceased shareholder in Company —Liquidation—Contributories but not Members of Company—Companies Act, 1862, sec. 76.*

1. Testamentary trustees were, under sec. 76 of the Companies Act, 1862, contributories but not members of a company in which the deceased held shares at the time of his death. *Held* that the trustees had a

TITLE TO SUE AND DEFEND—*Continued.*

good title to challenge the validity, on the ground of non-compliance with the articles of association, of a special resolution of the Company for voluntary liquidation and the appointment of a liquidator. Howling's Trustees v. Smith, Jan. 14, 1905, p. 390.

*Title to defend—Collector of Poor-Rates—Company—Winding-up—Poor-Law (Scotland) Act*, 1845, *sec.* 88.

2. In a note by the liquidators of a company for authority, *inter alia*, to take credit for their remuneration, as fixed by the Court, and to pay the law expenses, and to pay the preferable claims as set forth in a schedule, among which was included a claim for poor-rates due by the Company, answers were lodged by a collector of poor-rates, who maintained that the liquidators should be ordained to pay the claim for poor-rates preferably to the liquidators' remuneration and their law expenses. The liquidators stated that their accounts shewed a balance in their hands more than sufficient to pay in full all the preferable claims, after payment of the liquidators' remuneration and law expenses, and that the respondent had been informed of this before he lodged answers. *Held* that, in respect the liquidators had admitted the claim for poor-rates to a preferential ranking and tendered payment thereof in full, there was no proper question presented to the Court for adjudication on the answers, and note *remitted* to the Lord Ordinary to proceed. Liquidators of Scottish Drug Depot, Limited, v. Fraser, May 16, 1905, p. 646.

*Title to defend—School Board and Inhabitants—Statutory Irritancy—Failure of trust purposes—School Sites Act*, 1841.

3. In 1858, by disposition bearing to be granted under the authority of the School Sites Act, 1841, H., a fee-simple proprietor, conveyed to certain persons as trustees four acres of land "to be applied as a site for a school for the district of . . . for children of the labouring, manufacturing, and other poorer classes . . . and for a residence for the teacher or teachers, and for no other purposes whatever." A school was erected. In 1903 the trustees closed the school, and intimated that they were no longer able to maintain it. The heir of H. brought an action against them, concluding for declarator that the site had reverted to him under the provisions of the School Sites Act. The trustees did not defend the action, but (1) the local School Board, and (2) certain residents in the locality, parents of children of the class for which the school was intended, were allowed to lodge defences, and they maintained that the school should be conveyed to the School Board. *Opinions* that the School Board had no title to intervene in the action. *Opinions* that the individual residents had a title to intervene, but no interest to oppose the decree, in respect that their only interest in the matter was to secure free education for their children, and that such education was provided by statute. *Opinion* (*per* Lord Young) that they had no title to intervene. Houldsworth v. School Board of Cambusnethan, Dec. 16, 1904, p. 291.

TOWN-CLERK. See *Burgh*, 3.

TRADE CIRCULAR. See *Interdict*, 1.

TRUST. *Constitution—Spouses a majority of trustees—Power to trustees to advance trust funds to spouses.*

1. An antenuptial marriage-contract appointed the spouses and the wife's father the sole trustees, and the trustees were empowered at the joint request of the spouses to advance such portion of the trust-estate to the husband as the trustees might think right. Under the marriage-contract the wife had a liferent allenarly, which was declared not to be affectable by her own or her husband's debts or deeds or the diligence

TRUST—*Continued.*

of their creditors. *Held* that as the spouses were a majority of the trustees, and might consequently lend any part of the trust funds to the husband, the marriage-contract was not effectual to protect the wife's liferent. M'Callum v. M'Culloch's Trustees, Dec. 22, 1904, p. 337.

*Termination—Funds held by trustees under an inter vivos settlement, for issue subject to power of appointment—Power exercised by will—Whether settlement or testamentary trustees to hold fund.*

2. Where under an *inter vivos* settlement trustees were directed to stand possessed of trust funds for the issue of the settlor, as she should appoint, and this power of appointment was validly exercised by the settlor in her will, by which she directed the whole residue of her estate to be held by her testamentary trustees for certain purposes, *held* that the settlement trustees were in the circumstances bound to pay over the settlement trust funds to the testamentary trustees. Dalziel v. Dalziel's Trustees—Dalziel v. Henderson's Trustees, March 9, 1905, p. 545.

*Removal of Trustee.*

3. A, one of two trustees, who were law-agents, wrote to B, his co-trustee, who was law-agent in the trust, making a claim for half fees on all business to be done by B for the trust, and added that on this condition being agreed to he would consider the question of investing the trust funds. B refused to agree to this arrangement. A thereafter refused to approve of an investment suggested by B, assigning no reason for his refusal. He also refused to assume new trustees, or to resign. On a petition by the beneficiaries the Court *removed* A from the office of trustee, but continued the petition until B had lodged a minute of assumption of two new trustees. Stewart v. Chalmers, Nov. 30, 1904, p. 163.

*Administration—Personal Liability of Trustees—Rebuilding Heritable Property—No express power to rebuild—Investment of Trust-Funds.*

4. Circumstances in which *held* that trustees who had expended trust funds in rebuilding and improving heritable subjects belonging to the estate, which twenty-one years after the rebuilding realised £100 less than the sum expended upon them, had not acted imprudently or negligently, and that loss had not been caused by their fault. Armstrong v. Wilson's Trustees, Dec. 22, 1904, p. 353.

*Expenses—Expenses of "this trust"—Estate-Duty—Legacy-Duty.*

5. A testator directed the residue after payment of debts to be divided into five shares, and after disposing of three and three-fourths of these shares directed that the remaining one and one-fourth share should be devoted to certain purposes, and *inter alia*, "discharging the necessary expenses connected with this trust." *Held* that the whole expenses of administering the will were chargeable against the one and one-fourth share, but that such expenses did not include estate-duty and legacy-duty. Michie's Executors v. Michie, Feb. 21, 1905, p. 509.

*Administration—Power to sell—Power to sell specific subject held in trust for liferenter and fiars.*

6. A testator, *inter alia*, directed her trustees "to hold in their own name my shares of the G. C. Railway Company, and pay the dividends or annual income thereof to" her nephew George "during his lifetime, and immediately after the decease of the said" George "I direct my said trustees to realise the said shares and to pay the price or value thereof" to George's children, whom failing to his heirs, executors, or successors whomsoever. The truster empowered her trustees "to sell and realise . . . the whole or any part of my estate, heritable or moveable, in so far as may be necessary or proper in their discretion." In 1905, as the shares were yielding no income, George requested the

TRUST—*Continued.*

trustees to sell them and to reinvest the proceeds. In a special case presented by the trustees *held* that the trustees had power to sell the shares. Galloway v. Campbell's Trustees, July 11, 1905, p. 931.

*Actions—Multiplepoinding—Competency—Double Distress.*

7. Where a testator left legacies to various persons, and a question arose as to the construction of one of these bequests, the trustees, before making payment of certain of the legacies as to which there was no dispute, raised an action of multiplepoinding for distribution of the balance in their hands and for exoneration. *Held* that the action was incompetent in so far as it submitted for adjudication the legacies other than the one in dispute. MacGillivray's Trustees v. Dallas, June 6, 1905, p. 733.

*Law-Agent—Expenses—Liability of trust-estate to law-agents for expense of unsuccessfully defending an action.*

8. In an action against the sole trustee under a testamentary trust, the final interlocutor decerned against the trustee for payment of a sum of money, and found "that in all questions with the pursuer in this action the defender is not entitled to deduct the expenses which he has incurred in the action from the trust-estate." The trust-estate having subsequently been sequestrated on the petition of the successful pursuer of the action, the law-agents who had acted for the testamentary trustee claimed to be ranked on the sequestrated estate for their expenses. *Held* that as the law-agents for the trustee were presumably acquainted with the whole circumstances of the trust, they were not entitled to rank for their account. Ferme, Ferme, & Williamson v. Stephenson's Trustee, July 6, 1905, p. 902.

See *Charitable and Educational Bequests and Trusts—Church*, 3—*Mines and Minerals*, 1—*Succession.*

ULTRA VIRES. See *Burgh*, 2—*Police—Public Health*, 1.

UNIVERSITY. See *Charitable and Educational Bequests and Trusts*, 2, 3, 5, 12.

VALUATION ACTS. *Subjects—Salmon-Fishings.*

1. Sum paid by upper proprietors to lower proprietor for abstention from netting. Assessor for Elginshire v. Duke of Richmond and Gordon, Jan. 14, 1905, p. 424.

*Value—Subjects unlet.*

2. Houses in occupation of owner's workmen—Criterion of value—Rent of similar house belonging to same owner let to a tenant—Local knowledge of Valuation Committee. Cadzow Coal Co., Limited, v. Assessor for Hamilton, Jan. 14, 1905, p. 413.

*Value—Subjects unlet—Principle of valuation—Sanatorium.*

3. A sanatorium for the treatment of pulmonary diseases was erected in 1901, and was sold to a company for £53,000. The Assessor entered the sanatorium at the yearly value of £1300, proceeding either on the principle of taking a percentage on the cost of construction, or on the principle of taking the profits earned by the company, as the basis of valuation—the two methods in the particular case bringing out substantially the same result. The company appealed, and maintained that the value should be reached by comparison with other sanatoria and with hydropathics, and should be £500. The Judges *held* that, having regard to all the circumstances, the valuation should be reduced to £800. Nordrach-on-Dee Sanatorium, Limited, v. Assessor for Kincardineshire, Jan. 14, 1905, p. 419.

*Value—Subjects unlet—Gas works belonging to private company—Tenant's capital—Meters—Cooking Stoves—Deductions—Income-tax.*

4. Gas works belonging to and in the occupation of a private company were entered in the Valuation-roll at an annual value brought out on

the principle of taking the income of the company and deducting (1) the annual expenditure; (2) 5 per cent on a sum in name of tenant's capital for carrying on the business; and (3) a sum for tenant's profits, estimated at 20 per cent on the net income after deducting expenditure and the percentage on tenant's capital. *Held* that the value of gas meters, owned by the company and hired out to customers, was to be regarded as tenant's capital, such meters being necessary for carrying on the business; but (2) that the value of cooking stoves, owned by the company and hired out to customers, was not to be regarded as tenant's capital, the hiring out of cooking stoves being a branch of business which a hypothetical tenant might or might not find it expedient to carry on. *Held* further that a deduction from the net income did not fall to be made in respect of income-tax on tenant's profits. Kirkcaldy Gas Light Co., Limited, v. Assessor for Kirkcaldy, Jan. 14, 1905, p. 430.

*Value—Subjects unlet—Railway Hotel.*

5. The North British Railway Company's Hotel in Edinburgh was entered in the Valuation-roll at the yearly rent or value of £11,950. The Assessor reached this sum by taking the floor space and applying thereto varying rates per square foot, and comparing the accommodation with that of other hotels in the city. The Railway Company maintained that the basis of valuation should be the profits of the hotel business, or alternatively the number of lettable bedrooms. *Held* that no single method of valuation was reliable, and in the whole circumstances that the valuation should be reduced to £7000. North British Railway Co. v. Assessor for Edinburgh, Jan. 14, 1905, p. 435.

*Value—Subjects unlet—Oil works in occupation of owners—Former valuation fixed by the Judges—Necessity for revaluation—Depreciation—Additions to plant—Lands Valuation (Scotland) Amendment Act*, 1902, *sec.* 1.

6. Oil works for the distillation of shale oil, belonging to and in the occupation of an oil company, were for the year 1901-2 directed by the Valuation Appeal Judges to be entered at the yearly value of £4264. This sum was reached by taking 10½ per cent on the capital value of the works and adding thereto feu-duty, insurance, and landlord's taxes. The 10½ per cent consisted of 4½ per cent as reasonable interest on the capital value and 6 per cent as being the average sum which the owners, if the works were let, would require to spend annually in order to fulfil the landlord's obligation to keep the works in an efficient state of renewal, such works being subject to rapid deterioration. In 1904 the Company added largely to the number of the retorts in their works, and the Assessor in consequence raised the valuation to £6700. The Assessor reached this sum by taking the value as fixed for 1901-2 by the Judges, and adding thereto a sum to cover the value of the new retorts. The Company appealed, and maintained that the value should be £3000, in respect (*a*) that the original works having depreciated in value they ought to be revalued; (*b*) that the Assessor had much over-estimated the value of the new retorts; and (*c*) that portions of the plant included in the valuation fell to be excluded under the Lands Valuation (Scotland) Amendment Act, 1902. The Valuation Committee adopted the principle on which the Assessor had proceeded, but reduced the valuation to £5800. The Committee found that the works had been kept in a not less efficient state than they were in 1901. In an appeal by the Company the Judges *held* that the Valuation Committee were right, in respect that the original works having been kept in an efficient state of renewal, there was no necessity for a revaluation; that the sum fixed by the Committee as the value of the new retorts was reasonable; and that

VALUATION ACTS—*Continued.*

there was not sufficient evidence to shew what, if any, portions of the works fell to be excluded under the Act of 1902. Pumpherston Oil Co., Limited, v. Assessor for Linlithgowshire, Jan. 14, 1905, p. 438.

*Value—Subjects let—Consideration other than the rent—Obligation by tenant of public-house to carry out at his own expense alterations required by licensing authority.*

7. The lease of a public-house took the tenant bound "to carry out any alterations or improvements which the licensing authority may from time to time require to be made upon the premises" at his own expense. *Held* that this obligation constituted a consideration other than the rent incapable of being estimated in money value; and consequently that the Valuation Committee were justified in disregarding the rent stipulated in the lease altogether, and in fixing the annual value according to their personal knowledge of the lettable value of such property in the locality. Angus v. Assessor for Lanarkshire, Jan. 14, 1905, p. 411.

*Value—Subjects let.*

8. Consideration other than the rent—Alterations by tenant. Liverpool, China, and India Tea Co., Limited, v. Assessor for Edinburgh, Jan. 14, 1905, p. 415.

*Value—Subjects let.*

9. Consideration other than the rent—Agreement by tenant of farm to erect farmhouse. Davidson v. Assessor for Peeblesshire, Jan. 14, 1905, p. 422.

See *Burgh*, 6.

VESTING. See *Marriage-Contract*, 4—*Succession*, 13, 14, 15.

VOLUNTEER FORCE. *Colonel Commanding Volunteer Regiment—Volunteer Regiment—Funds—Liability for Negligence—Public Authorities Protection Act*, 1893, *sec.* 1.

In an action for damages against a regiment of volunteers and against the officer commanding the regiment, as representing the regiment, and as an individual, by the father of a child, who was killed on the public street by an ammunition waggon, the horses of which had bolted, the pursuer averred that the accident had been caused by the fault of the commanding officer in not seeing that quiet horses were used, that competent drivers were employed, that the waggons were driven according to military regulations, and that a competent commissioned officer was present to superintend the parade. The action was not raised within six months after the date of the accident. The Lord Ordinary (Kyllachy) dismissed the action as against the regiment and its commanding officer as representing it, on the ground that the funds of the regiment belonged to the Crown, and that the Crown could not be sued for damages caused by the wrongful acts of its officers, and allowed a proof before answer as against the commanding officer as an individual. *Held* (*rev.* judgment of Lord Kyllachy on the last point) that the action against the commanding officer, as an individual, was excluded by the Public Authorities Protection Act, 1893, sec. 1, on the ground that the fault averred against him was neglect of duty in his public capacity as commanding officer. Wilson v. 1st Edinburgh City Royal Garrison Artillery Volunteers, Nov. 30, 1904, p. 168.

WAIVER. See *Personal Exception*, 3.

WAREHOUSE. See *Master and Servant*, 8, 9.

WARRANT TO OPEN LOCKFAST PLACES. See *Diligence.*

WATER SUPPLY. See *River, Loch, Sea*, 1.

WIDOWS' FUND. See *Insurance*, 2.

WITNESS. See *Justiciary Cases*, 15, 16—*Process*, 14, 15, 16—*Proof*, 2—*Reparation*, 15.

WORKMEN'S COMPENSATION ACTS. See *Master and Servant*.

WRIT. *Blank in feu-charter.*

1. *Question* as to the competency of filling in by inference from the context a blank in the description of the subjects disponed under a feu-charter. Magistrates of Musselburgh v. Musselburgh Real Estate Co., Limited Dec. 21, 1904, p. 308.

*Pencil alterations on holograph will.*

2. *Held* that unauthenticated holograph pencil alterations on a holograph will written in ink had no effect. Currie's Trustees v. Currie, Dec. 24, 1904, p. 364.

See *Loan*.

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